

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

FILED

February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**State of West Virginia,
Plaintiff Below, Respondent**

vs) **No. 11-0619** (Cabell County 08-F-310, 09-F-74, & 09-F-267)

**Michelle Bryant, Defendant Below,
Petitioner**

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Cabell County, wherein the petitioner's request for probation or home confinement was denied. This appeal of the order sentencing the petitioner to serve in the state penitentiary and regional jail was timely perfected by counsel, with Petitioner Bryant's appendix accompanying the petition. The State filed a response in support of the circuit court's decision.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner entered pleas of guilty to fraud against the elderly, false pretenses, failure to appear, uttering, and forgery. The basis for these pleas arose from instances including: the petitioner entering an elderly woman's home and taking seventy dollars out of her purse; the petitioner forging stolen checks with the intent to defraud; and the petitioner's failure to appear before the circuit court for a plea hearing in 2008. At sentencing, the petitioner requested the circuit court to place her on probation or allow her to serve her sentences on home confinement. The circuit court, however, denied these requests and sentenced the petitioner to imprisonment. The circuit court sentenced the petitioner to five to fifteen years in the state penitentiary for her offense of fraud against the elderly; 300 days in the Western Regional Jail, with credit for time served, for false pretenses, to run consecutively with her sentence for fraud against the elderly; one to five years in the state penitentiary for failure to appear, to run consecutively with her sentence for fraud against the elderly; one to ten years in the state penitentiary for uttering and one to ten years in the state penitentiary for forgery, with both of these sentences to run concurrent with her sentence for fraud against the elderly.

In imposing these sentences, the circuit court considered the petitioner's extensive criminal history, her pre-sentence report, and letters from the community.

On appeal, the petitioner argues that the circuit court abused its discretion when it denied her probation or home confinement.¹ The petitioner argues that although the petitioner's sentences do not "shock the conscience of the court and society" as outlined in the subjective test in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), the sentences "shock our feelings of humanity . . . and mercy," as discussed in *State v. Houston*, 166 W.Va. 202, 206, 273 S.E.2d 375, 377 (1980) (quoting *Franklin v. Brown*, 73 W.Va. 727, 730, 81 S.E.2d 405, 406 (1914)). The petitioner highlights that she comes from an impoverished background with a serious substance abuse problem that led her to her crimes. She stresses that she is remorseful for her actions, which are non-violent offenses, and asserts that she would better serve her sentences through probation or home confinement so that she may benefit from enrolling in an in-patient drug rehabilitation program. Consequently, the petitioner requests that this Court reverse the circuit court's sentencing order and remand this case for re-sentencing.

The State contends that the circuit court did not abuse its discretion in sentencing the petitioner to serve her sentences in imprisonment. The circuit court adhered to the guidelines provided in the West Virginia Code for each of the petitioner's convictions: West Virginia Code § 61-2-29(e) sets forth that the sentence for fraud against the elderly shall be not less than three years nor more than fifteen years; West Virginia Code § 61-3-24 sets forth that the sentence for false pretenses shall be not more than one year; West Virginia Code § 62-1C-17b(b) sets forth that the sentence for failure to appear shall be not less than one year nor more than five years; West Virginia Code § 61-4-5(a) sets forth that the sentence for uttering shall be not less than one year nor more than ten years; West Virginia Code § 61-4-5(a) sets forth that the sentence for forgery shall be not less than one year nor more than ten years. The petitioner did not provide a basis for alternative sentencing through probation or home confinement.

"Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.' Syllabus Point 4, *State v.*

¹ The petitioner also argues another assignment of error, asserting that an indigent criminal defendant who desires to appeal his or her conviction has a right, under Article III, Sections 10 and 17 of the West Virginia Constitution, to the effective assistance of court appointed counsel on his or her appeal. The Court declines to discuss this assignment of error as the petitioner has counsel for this appeal and has not been denied access to transcripts of the proceedings in circuit court. This issue needs no further resolution on this appeal.

Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).” Syl. Pt. 4, *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007). If a sentence is subject to appellate review, however, the Court must review it under the standards set forth in *State v. Cooper*, 172 W.Va. 266, 305 S.E.2d 851 (1983), and Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 275 S.E.2d 205 (1981):

There are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution. *Accord, Stockton v. Leeke*, 269 S.C. 459, 237 S.E.2d 896, 897 (1977). The first is subjective and asks whether the sentence for the particular crimes shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test we spelled out in Syllabus Point Five of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 275 S.E.2d 205 (1981): In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

State v. Cooper, 172 W.Va. 266, 272, 304 S.E.2d 851, 857 (1983).

Here, the record reflects that the circuit court adhered to the statutory limits of the West Virginia Code and did not base its sentences on any impermissible factor. Accordingly, the petitioner’s sentences are not subject to appellate review. Even if her sentences were subject to appellate review, however, the requirements under the subjective test from *Cooper* and the objective test from *Wanstreet* are not satisfied here to warrant reversal for re-sentencing. The petitioner’s sentences neither shock the conscience of society nor are they disproportionate to her crimes. The circuit court did not commit error or abuse its discretion.

For the foregoing reasons, we affirm the circuit court’s decision.

Affirmed.

ISSUED: February 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh