

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

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

vs) No. 11-0636 (Gilmer County 09-F-12)

**Dustin Chad Reed,
Defendant Below, Petitioner**

FILED

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

MEMORANDUM DECISION

Petitioner Dustin Reed appeals the circuit court's order denying his motion to reconsider sentence pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed a summary response and a supplemental appendix. Petitioner has filed a reply brief.

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.

On July 7, 2009, petitioner was indicted by a Gilmer County Grand Jury on seven counts of forgery and uttering, one count of forgery, and one count of grand larceny. Petitioner thereafter entered a plea agreement with the State, and pled guilty to one count of forgery and one count of grand larceny. Pursuant to the agreement, the remaining charges were dropped. Following entry of the guilty plea, petitioner was sentenced to a term of one to ten years of incarceration for forgery, and a term of one to ten years of incarceration for grand larceny. These sentences were ordered to run consecutively to one another, and also consecutively to a prior criminal sentence from Braxton County, West Virginia. After sentencing, petitioner filed two separate Rule 35(b) motions seeking reconsideration of his sentence, both of which were ultimately denied.

On appeal, petitioner argues that the circuit court erred in denying the Rule 35(b) motion given the evidence presented and the nature of the offense, and also that the circuit

court erred by improperly focusing on the petitioner's previous convictions in Braxton County. Petitioner states that he is not a violent criminal, and has several children who have been adversely affected by his incarceration. Further, petitioner suffered from severe drug addiction at the time of his crimes, and has potential for rehabilitation. The societal benefit of putting petitioner on home confinement, he argues, is great because of the support his children are now lacking. As to his second assignment of error, petitioner alleges that there was no evidence presented to the circuit court regarding the status of his Braxton County conviction, and the circuit court erred by placing emphasis on the prior criminal acts in determining his sentence.

In response, the State argues that the circuit court's denial of petitioner's motion was well within its discretion and also supported by the record. Further, the State argues that the circuit court's consideration of petitioner's criminal record from Braxton County was permissible and within its discretion in determining an appropriate sentence. The State does note that while many factors petitioner sets forth in his petition may, and should, be considered in a sentencing decision, "nothing in this Court's jurisprudence mandates that they should control in a case where, as here, the [p]etitioner has an exceptionally lengthy criminal history at such a young age." Citing petitioner's pre-sentence investigation report, the State notes that he has been charged with no less than thirty-three prior felonies and misdemeanors, and also that he had previously violated the terms of a conditional release stemming from charges in Braxton County.

"In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review.' Syllabus Point 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996)." Syl. Pt. 1, *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010). Additionally, this Court has held that "[s]entences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.' Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syl. Pt. 1, *State v. Eilola*, 226 W.Va. 698, 704 S.E.2d 698 (2010). West Virginia Code §§ 61-3-13(a) and 61-4-5(a) set out the crimes of grand larceny and forgery, respectively. Both code sections set the punishment for each crime at a term of one to ten years of incarceration in the penitentiary. As such, the petitioner was appropriately sentenced for the crimes as set forth in the statutes and the circuit court did not abuse its discretion in denying petitioner's Rule 35(b) motion. Further, Rule 32 of the Rules of Criminal Procedure provides for the consideration of a criminal defendant's full criminal history in rendering a sentence, as the same is to be included in a pre-sentence investigation report. As such, it was not impermissible for the

circuit court to consider petitioner's prior criminal charges in Braxton County during sentencing.

For the foregoing reasons, we find no error in the decision of the circuit court and the circuit court's order denying petitioner's Rule 35(b) motion is hereby affirmed.

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