STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0677 (Ohio County 10-F-62)

Ronald B. Givens,
Defendant Below, Petitioner

FILED
June 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Ronald B. Givens appeals from the Ohio County Circuit Court's "Sentencing Order" entered on March 16, 2011, sentencing petitioner to one to fifteen years in prison for his burglary conviction, one to five years in prison on each of his two sexual abuse convictions, and one to three years in prison for his attempted second degree sexual assault conviction. The trial court ordered the sentences to run consecutively for an effective sentence of four to twenty-eight years in prison followed by fifty years of extended supervision upon his release and lifetime registration as a sexual offender. Petitioner is presented on appeal by his counsel, Lori M. Peters. Respondent State of West Virginia is represented by its counsel, Laura Young.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record 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 of Appellate Procedure.

Petitioner and his wife lived next door to the victim, S.S., in a trailer park. On the afternoon of September 11, 2009, S.S. reported that petitioner entered her trailer through a back door that was locked, came into her bedroom where she was taking a nap, and proceeded to "feel her up," make lewd statements to her, place his hand down her jeans and underwear, and rub her vaginal area. The victim's two-year-old child was present in the home at the time. There was no additional violence in the attack. It appears that the victim was able to eventually shove petitioner out her back door and, that shortly thereafter, her boyfriend telephoned her from work and she told him what had just happened. The boyfriend called Matthew Adams, who also lived in the trailer park, and asked him to go to the victim's trailer to help her. Adams called the police and went to the victim's trailer on foot. The victim's boyfriend also called the police.

Shortly after Adams arrived at the victim's trailer, several deputy sheriffs arrived. Adams and one or more of the deputies observed petitioner leaving the victim's backyard going into his neighboring backyard. Petitioner resisted arrest and the deputies used pepper spray and physical force to subdue petitioner, who had been consuming alcohol that day. The deputies handcuffed petitioner and took him into custody. During booking, which was almost two hours after the alleged attack, petitioner had a blood alcohol content of .243.

Petitioner was indicted on one count of burglary, two counts of first degree sexual abuse, and one count of attempted second degree sexual assault. Petitioner moved pretrial to suppress the statements that he made to law enforcement. At the hearing held on his motion, Deputy Costello testified that he advised petitioner of his *Miranda* rights, that he believed that petitioner understood those rights, and that petitioner volunteered during the booking process: "all this for a strange piece of ass." After the booking procedure was completed, Deputy Costello and Deputy Lewis transported petitioner to jail. Deputy Costello testified that during the transport, petitioner made the statement, "all this for a blow job," a statement that was also heard by Deputy Lewis.[1]

The trial court ruled that petitioner's statements were admissible and the deputies testified at petitioner's trial concerning these statements, including Deputy Weisal, who assisted in the booking process. Deputy Weisal testified at trial that petitioner voluntarily made a statement to the effect that "all I was trying to do was get a piece of strange off my neighbor."[2] Deputy Weisal denied that petitioner was questioned during the booking process. Petitioner testified at trial that he did not remember making any statements at either the Sheriff's Office or while being transported to jail, although he indicated on cross-examination that he was certain that the deputies heard him say something.

The victim testified at trial concerning petitioner's sexual assault upon her. The victim testified on cross-examination that she had a friendly and neighborly relationship with petitioner and his family; that petitioner had repaired the front door on her trailer at one time; and that petitioner and his wife had sold her a van, which she stopped paying for after it "blew up." The victim denied any confrontation with petitioner.

Petitioner testified at trial and denied the charges against him. He testified that he went to the victim's trailer during the morning on the date in question to complain about the victim's garbage, but that he did not actually see her at that time, although he heard her. Petitioner testified that this was the only time he was at the victim's trailer that day.

---

[1] Petitioner states that he was transported to the regional jail seated next to a police dog and that the officers warned that the dog bites. Petitioner asserts that perhaps this was done by law enforcement in an attempt to intimidate him into making incriminating statements.

[2] Deputy Weisal also testified at trial that the phrase "piece of strange" is vernacular for a person with a wife or a girlfriend having sex with someone else.

The jury returned its verdict finding petitioner guilty on all counts.

Exclusion of Evidence

Petitioner asserts that the trial court abused its discretion when it sustained the State's objection and refused to allow petitioner to elicit testimony from non-party witnesses at trial that would have established motive, bias, and/or prejudice in the victim's testimony. The trial court sustained the State's objection and prohibited petitioner from asking Mr. Adams (the neighbor who ran to assist the victim) about his suspected illegal drug activity on the basis that it was irrelevant. Petitioner states that the trial court also erred in preventing him from questioning his wife, Carrie Givens, about the victim still owing $550 for the van and about the fact that the victim appeared to be avoiding her. The trial court sustained the State's relevancy objection and struck this testimony,[3] which petitioner asserts went directly to the victim's credibility. Petitioner adds that the State was allowed to ask the victim whether she had fabricated the allegations against petitioner because of a dispute over a van, and that the victim replied, "no."

Under Rule 608 of the West Virginia Rules of Evidence, specific instances of conduct may not be proven by extrinsic evidence for the purpose of attacking credibility. While specific instances of conduct may in the discretion of the trial court be inquired into on cross-examination, under Rule 608, if probative of truthfulness or untruthfulness, an arrest for a drug offense without a conviction is not probative in this regard.[4] "'A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.' Syllabus Point 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998)." Syl. Pt. 5, *State v. McCartney*, 228 W.Va. 315, 719 S.E.2d 785 (2011). Under this standard and based upon our review of the trial transcript, we find neither error nor an abuse of discretion in the trial court's evidentiary rulings in relation to the trial testimony of the Mr. Adams and petitioner's wife.

[3] Although the trial court granted the State's motion to strike Mrs. Givens's testimony regarding the van, the trial transcript does not show that the court ever instructed the jury to disregard that testimony. The transcript does reflect that petitioner cross-examined the victim about the van transaction and the fact that the victim still owed money to petitioner and his wife for the van. Thus, information about the van transaction was before the jury.

[4] Mr. Adams testified to receiving the phone call from the victim's boyfriend and to observing petitioner running from the back of the victim's trailer when he got to the victim's trailer at the time in question. Inasmuch as deputies testified without objection to observing petitioner leaving the back of the victim's trailer when they arrived on the scene, any error in the limitation of the cross-examination of Mr. Adams would appear to be harmless.

Suppression

Petitioner asserts that the trial court abused its discretion when it denied his motion to suppress the statements that he made to deputies following his arrest. Petitioner contends that his statements lacked reliability and credibility given his intoxicated state and because he was recovering from being physically struck and pepper sprayed by the deputies when he resisted arrest. Petitioner contends that he was unable to voluntarily and intelligently waive his rights against self-incrimination for these same reasons. Petitioner states that although Deputy Costello testified that he advised petitioner of his *Miranda* rights and that petitioner waived those rights, petitioner was not asked to sign a waiver of rights form, nor was his booking video recorded although it was standard protocol to do so at the Sheriff's Office.

The State responds and asserts that petitioner's statements were spontaneous and not in response to interrogation or its functional equivalent. The State cites the deputies' trial testimony to the effect that after they subdued petitioner, he was coherent and responsive to commands. The State notes that the trial court held a hearing on petitioner's motion to suppress before ruling that the statements were admissible at trial.

"'When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.' Syl. Pt. 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996)." Syl. Pt. 3, *State v. Jones*, 220 W.Va. 214, 640 S.E.2d 564 (2006). Further, "'[w]hether an extrajudicial inculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the totality of the circumstances.' Syl. Pt. 2, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995)." Syl. Pt. 4, *Id.* Also, "'[a] trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.' Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978)." Syl. Pt. 1, *Id.* With these standards in mind and based upon our review of the appendix record, we find no error in the admission of petitioner's statements.

Sentencing

Petitioner asserts that the trial court abused its discretion when it refused to consider alternative sentencing which resulted in the imposition of a disproportionate sentence. Petitioner contends that his sentence was based upon an impermissible factor, *i.e.*, the trial judge's disdain for petitioner as reflected in statements made by the trial judge at petitioner's sentencing hearing. Petitioner asserts that this was his first conviction, that he successfully maintained himself on home confinement from pre-trial until sentencing, and that both the psychologist who evaluated him and his trial counsel advocated for continued home confinement. Petitioner asserts that his evaluating

psychologist found that he has a relatively low risk of re-offending, thus, home confinement would provide society with appropriate protection.

Sentencing orders are reviewed under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands. Syl. Pt 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). "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." Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). The trial court imposed the sentences specified by statute. Upon a review of the record and the parties' arguments, we find that the trial court did not abuse its discretion in sentencing petitioner. We further find that the trial judge's comments at the sentencing hearing do not constitute an impermissible factor that would cause the Court to overturn petitioner's sentencing. The hearing transcript reflects that the trial judge considered all available information and determined that a penitentiary sentence was appropriate, and we agree.

Sufficiency of the Evidence

Petitioner asserts that the evidence introduced at trial was insufficient to support the jury's verdict. Petitioner argues that the State's main witnesses against him–the victim and Mr. Adams–each lacked the necessary credibility to permit their testimony to have any weight. Petitioner asserts that the victim had a motive to lie, *i.e.*, the dispute regarding the van and the victim's garbage drifting into petitioner's yard. Petitioner adds that there was no forensic evidence connecting him to the crime. Petitioner admitted that he consumed too much alcohol on the day in question in celebrating the fact that he had gotten a new job, but contends that a person who is going to start a new job the next day does not go out and commit a crime.

The State argues that the victim's testimony, alone, was sufficient to prove each of the elements of the offenses for which petitioner was convicted and that while petitioner testified that the assault did not happen, credibility determinations are left to the jury.

In reviewing a defendant's challenge to the sufficiency of the evidence to convict, we have stated, as follows:

> "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 1, *State v. Juntilla*, 227 W.Va. 492, 711 S.E.2d 562 (2011). We have also stated that

> "[a] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syl. pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 2, *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62 (2011). Having applied these standards to our review of the evidence adduced at trial, as set forth in the appendix record, we find that there was sufficient evidence to support petitioner's convictions.

Sex Offender Extended Supervision

Petitioner asserts that the West Virginia Extended Supervision of Sex Offenders Act (West Virginia Code §62-12-26 (2010)) is unconstitutional under both the West Virginia and United States Constitutions. Petitioner acknowledges our recent opinion in *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011), wherein we upheld the constitutionality of this Act, but states that he respectfully disagrees with the Court's analysis and asks us to reexamine our opinion. We decline to do so. Based upon our review of the appendix record, we find that there was a sufficient basis for the trial court's imposition of an extended period of supervised release in sentencing petitioner.

Conclusion

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 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