STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0690 (Raleigh County 07-IF-342-H)

Brian Keith Hubbard,
Defendant Below, Petitioner

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

MEMORANDUM DECISION

Petitioner Brian Keith Hubbard appeals the circuit court's order resentencing him to the penitentiary and imposing extended supervision upon release. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed a response brief, to which petitioner has filed a reply.

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 November 6, 2007, petitioner entered a guilty plea to one count of possession of child pornography. He was then sentenced to a two year term of incarceration, which was suspended in lieu of three years of supervised probation. Petitioner failed to successfully complete the same, violating with only a few months remaining in his three year term. On November 23, 2010, a motion to revoke petitioner's probation was filed, and petitioner admitted to the allegations as contained in the petition. The circuit court granted the revocation, and, at petitioner's counsel's request, the circuit court ordered that petitioner undergo psychological and psychiatric evaluations. On March 25, 2011, a final hearing was held, during which the circuit court upheld its original revocation and sentenced petitioner to two years of incarceration. The circuit court also ordered petitioner to be re-sentenced based on newly discovered evidence, and placed him on extended supervision for a period of fifty years pursuant to West Virginia Code § 62-12-26. This newly discovered evidence consisted of petitioner's detailed admissions of engaging in sexual acts with both his

daughter and his niece on multiple occasions when the girls were both between the ages of two and three.

On appeal, petitioner argues that the circuit court abused its discretion when it added a period of fifty years of extended supervision to his sentence three years after his original sentencing date. He argues that this violates both due process and double jeopardy principles of finality, and constitutes cruel and unusual punishment. While he admits that West Virginia Code § 62-12-26 was in effect at the time of his original sentence, petitioner argues that his original sentence was not illegal pursuant to West Virginia Rule of Criminal Procedure 35(a) because it did not exceed the bounds of the statute for which he was convicted. Petitioner argues that per Rule 35, the original sentence was either incomplete or imposed in an illegal manner, which means the circuit court retained the ability to correct the oversight for only 120 days after sentencing. Once that period elapsed, the circuit court did not retain jurisdiction and any changes to the sentence would be void. Further, petitioner argues that the period of fifty years under West Virginia Code § 62-12-26 is the statutory maximum, and substantially longer than the original two year sentence imposed in 2008. Not only was the extended supervision period disproportionate to the prison term, but its imposition three years after the original sentencing date constitutes cruel and unusual punishment, and violates both his due process and double jeopardy rights of finality in sentence.

In response, the State argues that the original sentence issued in 2008 was, in fact, an illegal sentence. As such, pursuant to the language of Rule 35(a), the circuit court was entitled to correct the sentence at any time. Petitioner was sentenced under West Virginia Code § 61-8D-6 governing possession of child pornography. In effect at the time of sentencing, West Virginia Code § 62-12-26(a) required as follows:

> Notwithstanding any other provision of this code to the contrary, any defendant convicted after the effective date of this section of a violation of section twelve, article eight, chapter sixty-one of this code or a felony violation of the provisions of article eight-b, eight-c or eight-d of said chapter shall, as part of the sentence imposed at final disposition, be required to serve, in addition to any other penalty or condition imposed by the court, a period of supervised release of up to fifty years . . .

According to the State, the circuit court's failure to include any period of supervised release at the time of the original sentencing clearly violated the mandatory language of this code section, and rendered petitioner's sentence illegal. As such, Rule 35 permits correction of this illegal sentence at any time. The State also argues that this Court has previously held that West Virginia Code § 62-12-26 is not facially unconstitutional on cruel and unusual punishment grounds in *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). Lastly, while

petitioner undoubtedly had an expectation of finality in his sentence, the imposition of the extended period of supervised release does not violate petitioner's due process or double jeopardy rights. Upon review, we find petitioner's arguments unpersuasive.

"'The Supreme Court of Appeals reviews sentencing orders . . . 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)." Syl. Pt. 1, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). This Court has also held that

> [a]s a general rule, the sentence imposed by a trial court is not subject to appellate review. However, in cases as the one before us in which it is alleged that a sentencing court has imposed a penalty beyond the statutory limits or for impermissible reasons, appellate review is warranted. Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). Once an appropriate basis for review is established, this Court applies a three-prong standard of review to issues involving motions made pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure: '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.' Syl. Pt. 1, in part, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

State v. McClain, 211 W.Va. 61, 64, 561 S.E.2d 783, 786 (2002).

To begin, petitioner's argument is premised on the idea that his original sentence was not illegal "as it did not exceed the bounds of the statute." Petitioner cites to United States Supreme Court precedent and argues that "a sentence is legal so far as it is within the provisions of the law and the jurisdiction of the court over the person and offense, and only void as to excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence." *U.S. v. Pridgeon*, 153 U.S. 48, 62 (1894). Petitioner argues, instead, that his original sentence was partially defective or incomplete, and therefore constitutes a sentence imposed in an illegal manner for purposes of Rule 35(a) analysis. In support, petitioner argues that he was sentenced to a valid term of incarceration for possession of child pornography under West Virginia Code § 61-8D-6, but that the circuit court neglected to also sentence him to a term of supervised release under West Virginia Code § 62-12-26. However, petitioner's arguments on this issue are unfounded, as the illegality of the sentence at issue is not based on excess, but rather insufficiency because the original sentence lacked any mandatory term of supervision. Additionally, his characterization of the sentence as imposed in an illegal manner due to incompleteness is incongruent with this Court's prior holdings.

In discussing illegal sentences and their effect on the validity of plea agreements, this Court cited the Eighth Circuit Court of Appeals decision of *U.S. v. Greatwater*, 285 F.3d 727 (8th Cir. 2002), which concerned a plea agreement that failed to sentence petitioner to the statutory minimum punishment for the crime with which he was charged. *State ex rel. Gessler v. Mazzone*, 212 W.Va. 368, 572 S.E.2d 891 (2002). In *Greatwater*, the defendant was charged with premeditated murder in violation of 18 U.S.C. §§ 1111(a) and 1153. *U.S. v. Greatwater*, 285 F.3d 727, 728 (8th Cir. 2002). Although the statutory mandate for that crime is either death or life imprisonment, the prosecution offered to recommend a thirty-five year sentence in exchange for defendant entering a guilty plea. *Id*. After the trial court imposed the agreed upon sentence, the Eighth Circuit vacated the same because the sentence was illegal, defining an illegal sentence as one that "is greater or less than the permissible statutory penalty for the crime." *Id*. at 729. In citing this case favorably, this Court noted that the sentence at issue was illegal because "the plea agreement contained an unfulfillable promise that the defendant would receive a sentence below the statutory minimum." *State ex rel. Gessler v. Mazzone*, 212 W.Va. 368, 373, 572 S.E.2d 891, 896 (2002). Clear from this favorable discussion is that, while most illegal sentences are struck down for excess, so too can a sentence be illegal for failing to meet the statutory minimum punishment.

Additionally, we find no merit in petitioner's argument that a sentence which contains a valid punishment under one code section but wholly ignores mandatory sentencing under another code section constitutes a sentence imposed in an illegal manner. This Court previously addressed a case in which a defendant was sentenced within the statutory guidelines for the specific crime, but the sentence was found to be illegal because the sentencing court failed to impose a longer sentence mandated by another applicable code section. *State ex rel. Daye v. McBride*, 222 W.Va. 17, 658 S.E.2d 547 (2007). In that matter, the defendant was "sentenced to not less than two nor more than thirty years in a state correctional facility pursuant to the enhancement provisions of *W.Va. Code* [§] 60A-4-408 (1971)," though the sentencing judge "specifically declined to sentence the [defendant] under the provisions of *W.Va. Code* [§] 61-11-18 (2000)." 222 W.Va. at 20, 658 S.E.2d at 550. Thereafter, the State filed a Rule 35(a) motion to correct the sentence, and an order correcting the initial sentence and ordering petitioner confined for life pursuant to § 61-11-18 was entered. In upholding the circuit court's denial of the defendant's petition for habeas corpus relief on this issue, this Court held as follows:

> When any person is convicted of an offense under the Uniform Controlled Substances Act (*W.Va. Code*, Chapter 60A) and is subject to confinement in the state correctional facility therefor and it is further determined, as provided in *W.Va. Code* [§] 61-11-19 (1943), that such person has been before convicted in the United States of a crime or crimes, including crimes under the Uniform Controlled Substances Act (*W.Va. Code*, Chapter 60A), punishable by confinement in a penitentiary, the court shall sentence the person to

> confinement in the state correctional facility pursuant to the provisions of *W.Va. Code* [§] 61-11-18 (2000), notwithstanding the second or subsequent offense provisions of *W.Va. Code* [§] 60A-4-408 (1971).

Syl. Pt. 5, *Id*. Clearly, the matter presently before the Court is analogous, as it deals with a sentencing court's failure to apply multiple statutes in determining the appropriate sentence for a crime.

As such, the Court finds that petitioner's original sentence was illegal, because it did not conform with the requirements of West Virginia Code § 62-12-26(a). As noted above, that code section mandates that any person convicted of a crime under § 61-8D-6 of the Code shall be required to serve a period of supervised release of up to fifty years. Because the sentence was illegal, Rule 35(a) of the West Virginia Rules of Criminal Procedure allows for the same to be corrected at any time. This Court has held that, "'[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.' Syllabus Point 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384, (1970)." Syl. Pt. 2, *State ex rel. Daye v. McBride*, 222 W.Va. 17, 658 S.E.2d 547 (2007). The code section cited above is clear and not open to interpretation concerning the requirement that petitioner's sentence was to include a term of supervised release. Because it did not, the circuit court was required to correct the original illegal sentence.

Petitioner next argues that even if the original sentence was found to be illegal and subject to correction, fifty years of supervised release added three years after his original sentence violates his right to finality of sentence as guaranteed by his substantive due process rights. Additionally, when compared to the two year sentence for the underlying offense, the fifty year term of supervision is so disproportional as to violate due process. Taken together, he argues that these facts also constitute cruel and unusual punishment. And while it is true that this Court has held that West Virginia Code § 62-12-26 is not facially unconstitutional on cruel and unusual punishment grounds, petitioner argues that it is the manner in which it was applied in this matter that renders it unconstitutional. However, we do not find petitioner's arguments persuasive.

To begin, we find no merit in petitioner's proportionality argument, which is simply a manner of determining if a sentence constitutes cruel and unusual punishment. This Court has previously held that "West Virginia Code § 62–12–26 (2009) is not facially unconstitutional on cruel and unusual punishment grounds in contravention of the Eighth Amendment to the United States Constitution or Article III, § 5 of the West Virginia Constitution." Syl. Pt. 6, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). As for his argument concerning finality of sentencing, the Court finds the same to be without merit. While it is true that due process affords criminal defendants a due process right to finality of sentence, Rule 35(a) of the West Virginia Rules of Criminal Procedure allows an illegal

sentence to be corrected at any time. Petitioner cites to the Fourth Circuit Court of Appeals case of *United States v. Lundien*, which states that "[e]ven casual observation suggests that there must be some limitation on the power of the trial court to enhance punishment by resentencing after the defendant's commencement of service." 769 F.2d 981, 986 (1985). In discussing how possible due process considerations may prevent the correction of a sentence after it has been served, this Court quoted *Lundien* and the Fourth Circuit's explanation that "' . . . due process may also be denied when a sentence is enhanced after the defendant has served so much of his sentence that his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them.'" *State ex rel. Hill v. Parsons*, 194 W.Va. 688, 691-92, 461 S.E.2d 194, 198, fn. 10 (1995).

In this matter, however, we decline to find that petitioner meets such considerations. Specifically, petitioner was sentenced to the fifty years of supervised release at the same time he was sentenced to two years of incarceration upon revocation of his probation. As such, he had not yet served so much of his sentence as to have expected its finality to have crystallized. While it is true that petitioner had served almost three years of probation prior to the revocation, we decline to find that the circuit court's correction of the original illegal sentence during revocation violated petitioner's due process rights, especially in light of the extraordinary facts of this particular case.

For the foregoing reasons, we find no error in the decision of the circuit court and the circuit court's order resentencing the petitioner is hereby affirmed. The Court also finds that petitioner's motion for stay of execution of sentence pending appeal is denied as moot.

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