

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

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

vs) No. 11-0714 (Marion County 10-F-10)

**Thomas Eugene Gardner, Jr.
Defendant Below, Petitioner**

FILED

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

MEMORANDUM DECISION

Petitioner Thomas Eugene Gardner Jr. appeals the circuit court's order sentencing him to serve a life sentence pursuant to the recidivist statute, following his conviction by jury of distribution and display to minor of obscene matter. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response.

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.

This case arises from a telephone call made by the petitioner to a minor, then age thirteen, wherein he engaged her in a sexually explicit conversation and then played a tape or a television program over the telephone that was sexually explicit, after determining that the child was in fact a minor. Petitioner's discussion with the minor centered around Catholic school girls, spanking and rape. Petitioner asserts that he then "turned up" the volume on the television, which was tuned to an adult movie channel, but the State alleges that he actually played a tape depicting a rape over the telephone to the child. Petitioner was indicted on one count of distribution and display to minor of obscene matter. Defense counsel moved to dismiss the indictment, arguing that the telephone call was not did not fall under the definition of "distribute" as defined by West Virginia Code § 61-8A-1. The circuit court denied the motion, and petitioner later pled guilty to the charge, reserving the right to appeal the issue. A recidivist information was then filed, based on petitioner's prior felony

charges of statutory rape, involuntary deviate sexual intercourse, kidnaping, and failure to register as a sex offender, as well as the misdemeanor of indecent assault. Petitioner admitted to these prior convictions, but his counsel argued at sentencing that the prior felony convictions were too remote in time to be used as the basis for a life sentence, and argued that the conduct in the instant felony was not violent nor did it contain the threat of violence. Thus, petitioner's counsel argued that it was unconstitutional to sentence petitioner to a life sentence under the recidivist statute. The circuit court rejected these arguments, and sentenced petitioner to a life sentence pursuant to the recidivist statute.

On appeal, petitioner first argues that the circuit court erred in ruling that an obscene telephone call is a "distribution" as defined by West Virginia Code § 61-8A-1(d). Pursuant to West Virginia Code § 61-8A-1(d), "[d]istribute' means to transfer possession, transport, transmit, sell or rent, whether with or without consideration." The State argued that the audio portion of the tape played for the minor over the telephone constituted "distribution" under the relevant statute, West Virginia Code § 61-8A-2(a):

Any adult, with knowledge of the character of the matter, who knowingly and intentionally distributes, offers to distribute, or displays to a minor any obscene matter, is guilty of a felony and, upon conviction thereof, shall be fined not more than twenty-five thousand dollars, or confined in a state correctional facility for not more than five years, or both.

Further, the State argued that the playing of the sexually explicit audio during the telephone call was "transmission" under the relevant definition. Petitioner now argues that a telephone call, even if a recording or an adult television program is playing in the background, does not fit in the statutory definition of "distribute," and that obscene telephone calls are punishable under another statute, West Virginia Code § 61-8-16. The State argues on appeal that the provision it used to prosecute the petitioner was designed specifically to protect minors from the distribution or exhibition of obscene matter.

Under the facts of this case, this Court finds no error in the circuit court's denial of the petitioner's motion to dismiss the indictment, as the conduct fits within the relevant statutes. West Virginia Code § 61-8A-1 defines what matter that, when distributed to a minor, is a felony. This definition encompasses either a recorded sexual act, as the State claims was played to the minor, or the playing of an adult television program depicting an explicit sexual act, as petitioner claims. The term "distribute" as used in the statute includes "transmit" and this telephone call falls within that definition, as petitioner used the telephone to "transmit" obscene materials to a minor.

Petitioner next argues that his life recidivist sentence under West Virginia Code § 61-11-18 imposed by the circuit court is unconstitutional, as it violates the proportionality principle of the West Virginia Constitution. Petitioner argues that the felony which triggered the recidivist statute was not a violent crime, and it has been at least nineteen years since he was convicted of a violent crime, showing that petitioner does not have the propensity for violence that he once had. The State responds, arguing that the propensity for violence is there, that the child on the receiving end of the telephone call was emotionally harmed by the explicit discussions of rape, and that petitioner committed the instant crime only two weeks after being released from parole supervision. Moreover, the State argues that the main factor in why petitioner's other convictions are so remote in time is because petitioner was incarcerated for long periods, making it impossible for him to commit further crimes.

In regards to recidivist sentencing, this Court has stated that:

“ ‘The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5 [of the West Virginia Constitution], will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute.’ Syl.Pt. 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).” Syllabus Point 2, *State v. Housden*, 184 W.Va. 171, 399 S.E.2d 882 (1990).

Syl. Pt. 4, *State v. Wyne*, 194 W.Va. 315, 460 S.E.2d 450 (1995). Petitioner has a long criminal history, interrupted only by the periods of time he was actually incarcerated. Given petitioner's history of sex-based crimes, and the fact that the telephone conversation in question dealt with explicit discussions of rape, this Court finds no error in the use of the recidivist statute in this matter.

For the foregoing reasons, we affirm.

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