

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

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

vs) No. 11-0758 (Berkeley County 06-F-25)

**Roger D. Smith,
Defendant Below, Petitioner**

FILED
April 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Roger D. Smith, pro se, appeals the Berkeley County Circuit Court order entered April 19, 2011, denying his motion to correct his sentence pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure. This appeal was timely perfected by the pro se petitioner, with petitioner's appendix accompanying the petition. The State, by counsel Christopher Quasebarth, 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 of Appellate Procedure.

Petitioner was sentenced to consecutive terms of life without parole for felony murder; eighty years for first degree robbery; two to ten years for malicious assault; one to ten years for possession of a stolen vehicle; one to ten years for attempted murder; and one year for fleeing on foot. In petitioner's first amended sentencing order, the circuit judge stated that:

It is further ORDERED that the [petitioner], through the Clerk of this Court, and from any prison labor performed during his lifetime, he shall pay the sum of \$7,505.00 to the Mary and Randy Steward, 195 Reunion Corner Road, Gerrardstown, West Virginia as restitution.

This restitution was to be paid for the funeral expenses of a fourteen-year-old girl that he killed during a robbery. Petitioner did not appeal the restitution order, but did appeal his sentence to this Court in 2007. Petitioner's appeal was refused in 2008. The circuit court then *sua sponte* amended the sentencing order again, this time modifying the restitution clause to order that restitution be paid

from “all income, inmate accounts, or from any funds received by the [petitioner], not just earned prison funds.” Petitioner then filed a motion to correct an illegal sentence pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure in order to restrict restitution to be paid only from prison labor performed by the petitioner. The State responds, stating that petitioner had to exhaust his grievance procedures through the Division of Corrections (“DOC”). Petitioner then filed a petition for writ of prohibition to this Court in an attempt to prohibit enforcement of the restitution order. The circuit court held its ruling on the Rule 35(a) motion pending this Court’s decision. This Court refused the writ. Petitioner exhausted his administrative remedies and was denied relief at every level. The circuit court then denied the Rule 35(a) motion, finding that the restitution language in the second amended order does not violate the West Virginia Code provisions governing restitution, nor does the order violate the DOC policy directives.

On appeal, petitioner argues that the amendment to the sentencing order requiring him to pay restitution from all income, not just on earned prison funds, is illegal as it contravenes West Virginia Code § 25-1-3c(1), which limits deductions to forty percent of the earnings of an inmate. Petitioner also argues that it contravenes the DOC policy directive which excludes deductions from funds provided to an inmate from family and friends. Petitioner argues that his substantive due process rights were violated as protected funds were taken from him. Petitioner’s reply brief reiterates these same arguments.

In response, the State argues that neither West Virginia Code § 25-1-3c nor DOC policy directives limit how a circuit court fashions a restitution order in a criminal case. Further, the State notes that the constitutional issues were not argued before the circuit court. The State points out that West Virginia Code § 25-1-3c does not define “earnings” or “income” and thus deductions can be made from monies given to the petitioner from family and friends. Additionally, the State argues that DOC Policy Directive 111.06 is not binding and does not have the force and effect of law like a legislative rule does, as it is an interpretive rule.

“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.” Syl. Pt. 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

Syl., *State v. Allen*, 224 W.Va. 444, 686 S.E.2d 226 (2009). In the present matter, this Court finds no abuse of discretion was committed by the circuit court. This Court agrees with the circuit court’s finding that the amended sentencing order in this matter does not violate the West Virginia Code, nor does it violate DOC policy directives.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 16, 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