

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

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

vs) No. 11-0760 (Ohio County 11-F-23)

**Joseph Suber, Defendant Below,
Petitioner**

FILED

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

MEMORANDUM DECISION

Petitioner Joseph Suber appeals the circuit court's order sentencing him to serve one to ten years for grand larceny and one to five years for conspiracy to commit grand larceny, following his guilty plea. 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.

Petitioner was indicted on one count of grand larceny, two counts of conspiracy, one count of attempted grand larceny and one count of petit larceny after he and a co-defendant stole over \$1,000 in merchandise from a Target store by using a closed checking account belonging to the co-defendant's father. Petitioner loaded the merchandise into the cart and left the store while his co-defendant was tied up at the register attempting to pass the bad check. Petitioner and his co-defendant attempted the same crime at Wal-Mart but petitioner was detained after the check was declined. Petitioner's competency was evaluated due to his limited intellectual capacity and his inability to read or write, and he was found competent and criminally responsible for his behavior. Petitioner then pled guilty to grand larceny and conspiracy. His counsel argued for home confinement; however, the circuit court sentenced petitioner to one to ten years for grand larceny and one to five years for conspiracy, to be served consecutively. Petitioner admits that he has prior felony convictions.

On appeal, petitioner argues that the circuit court abused its discretion in sentencing him to one to ten years for grand larceny and one to five years for conspiracy, consecutively, rather than granting him home confinement or running the sentences concurrently. Petitioner argues that the crime was not violent, and that he was not the mastermind of the crime due to his limited intellectual ability, and therefore his sentence, while within the statutory limits, is unduly harsh. The State responds, arguing that the sentences in this matter were not based on some impermissible factor, and is neither disproportionate nor shocking.

“‘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). “‘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.’ Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).” Syl. Pt. 3, *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010). A review of this case shows that the sentences in question were not based upon an impermissible factor, and do not violate any statute or constitutional provision. Thus, this Court finds no error in the sentences imposed 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