STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0777 (Jackson County 08-F-48)

David Kestner, Defendant Below,
Petitioner

FILED
March 9, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner David Kestner, by counsel, Courtney L. Ahlborn, appeals from the circuit court's order revoking his probation and reimposing his original sentence of five to eighteen years in prison. Respondent State of West Virginia, by counsel, Benjamin F. Yancey, III, has filed a response brief.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on September 2, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record 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 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.

Facts

On October 4, 2007, petitioner was arrested for the armed robbery of a convenience store in Silverton, West Virginia. Petitioner's accomplice, Roy Schweinsberg, drove petitioner's truck, which he remained in while petitioner entered the store with his face covered with a cloth and armed with a large metal wrench. When a store employee ran from the store and asked Schweinsberg to call 911, Schweinsberg fled the scene in petitioner's truck. Ultimately, petitioner ran from the store with its cash box while being pursued by a store employee who had possession of the wrench. Petitioner threw the cash box into some brush during his escape.

Petitioner and Schweinsberg were jointly indicted on one count of first degree robbery and one count of conspiracy to commit first degree robbery. Petitioner moved to dismiss the indictment on the basis that the State used the language of subsection (a)(2) of the robbery statute, West Virginia Code §61-2-12, which involves the use of threat of deadly force by the presenting of a firearm or other deadly weapon, but cited subsection (a)(1) of that statute, which involves actually committing violence to the person. The indictment in the record shows that the numeral "1" in this parenthetical

is crossed through and handwritten above it is the numeral "2" with the trial judge's initials and date beside this alteration. Petitioner's motion to dismiss was denied. His motion to sever the charges against him in the indictment from those charging Schweinsberg was granted.

Petitioner entered into a plea agreement with the State pursuant to which he agreed to plead guilty to second degree robbery in violation of West Virginia Code §61-2-12(b). In return, the State agreed to dismiss the conspiracy count in the indictment and to stand silent at sentencing. A hearing was held during which petitioner pled guilty to second degree robbery. By order entered on February 3, 2009, the trial court accepted petitioner's guilty plea and adjudged him guilty of second degree robbery. Because it was later learned that petitioner failed a drug screen that same day, a hearing was held on February 27, 2009, during which the voluntariness of petitioner's guilty plea was affirmed.

In the trial court's order entered on June 12, 2009, petitioner was sentenced to five to eighteen years in prison. On September 22, 2009, petitioner filed a motion for reconsideration of his sentence requesting that he be placed on probation. Following a hearing, the trial court granted the motion in an order entered on October 30, 2009, placing petitioner on four years of supervised probation subject to written terms and conditions, including a prohibition against possessing or using any controlled substance; a requirement that he submit to random drug testing; and a requirement that he not do anything to attempt to deceive such drug testing.

On September 27, 2010, petitioner's probation officer filed a notice charging that petitioner had violated the terms and conditions of his probation by testing positive for methamphetamine, by failing to meaningfully participate in an outpatient substance abuse program as directed by his probation officer, by using an interfering substance in an attempt to deceive a drug screen, and by providing an abnormal and diluted urine specimen. This notice also advised petitioner, his counsel, and the prosecutor of the hearing date for the trial court to address the allegations. Before that hearing took place, a drug test showed that petitioner again had an interfering substance in his system, which resulted in a second notice dated October 26, 2010, notifying petitioner of two additional probation violations: using an interfering substance in an attempt to deceive a drug screen and delivering a controlled substance (oxycodone).

On October 28, 2010, a hearing was held on the probation revocation. On November 8, 2010, the trial court entered an order revoking petitioner's probation for his willful and substantial violation of the terms of his probation finding that the State had sufficiently proven by clear and convincing evidence the allegations set forth in paragraphs one, two, and four of the notice of probation violation filed on September 27, 2010.[1] On November 10, 2010, following a hearing, the trial court entered an order reimposing its original sentence of five to eighteen years in prison with credit for time served.

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[1] Paragraph one charged that petitioner used a controlled substance (methamphetamine); paragraph two charged that petitioner failed to meaningfully participate in an outpatient substance abuse program as directed by his probation officer; and paragraph four charged that petitioner provided an abnormal and diluted urine specimen for a drug test.

Sufficiency of Indictment

Petitioner asserts that the trial court erred by denying his motion to dismiss the indictment on the basis that it cited West Virginia Code §61-2-12(a)**(1)**, but recited the elements of robbery set forth in West Virginia Code §61-2-12(a)**(2)**(emphasis added).[2] Petitioner asserts that in syllabus point 4 of *State v. Johnson*, 219 W.Va. 697, 639 S.E.2d 789 (2006) (per curiam), this Court held that "[a]n indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based." (Citations omitted). Petitioner argues that he was not certain if he was charged with the actual use of violence, as described in West Virginia Code §61-2-12(a)**(1)**, or merely with the threat of deadly force, as described in West Virginia Code §61-2-12(a)**(2)**.

"'Generally, the sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations.' Syl. pt. 2, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996)." Syl. Pt. 3, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999). Count one of petitioner's indictment specifically alleges that he committed first degree robbery by stealing money from the convenience store by threatening its two employees with a large wrench with a sharp edge. Under the facts and circumstances of this case and with the correction to the statutory citation in the indictment, as initialed by the trial judge, all of which predated petitioner's guilty plea to a lesser included offense, the Court finds no error.

Sentencing

Petitioner asserts that his constitutional rights were violated when the trial court imposed disparate sentences on him and co-defendant Schweinsberg, who pled guilty to an attempt to commit a misdemeanor and was sentenced to three months in the regional jail and three months on home confinement. Petitioner asserts that there was no substantial difference between their actions and both were indicted on the same charges.

"Disparate sentences for codefendants are not per se unconstitutional. Courts consider many factors such as each codefendant's respective involvement in the criminal transaction (including who was the prime mover) . . . ." Syl. Pt. 5, in part, *State v. Jones*, 216 W. Va. 666, 669, 610 S.E.2d 1, 4 (2004) (per curiam) (citing Syl. Pt. 2, in part, *State v. Buck*, 173 W.Va. 243, 314 S.E.2d 406

[2] Petitioner raised a similar issue in relation to an earlier indictment arising out of the same robbery which resulted in the trial court dismissing that indictment. The State re-indicted petitioner and, when petitioner again moved to dismiss for a similar issue, it appears from the record that the trial court corrected the indictment by crossing out the "1" in the parenthetical in the citation to West Virginia Code §61-2-12(a)(1) and writing directly above it a "2," as initialed and dated by the trial judge.

(1984)). The record reflects that Schweinsberg stayed in the vehicle during the robbery while petitioner covered his face with a cloth, entered the store, and demanded money while threatening the employees with a wrench that he was carrying. The record also reflects that petitioner was sentenced within statutory limits following his guilty plea to second degree robbery. "'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. 2, *Jones*, 216 W. Va. 666, 610 S.E.2d 1. The Court finds no error in petitioner's sentencing.

Probation Revocation

In his Petition for Appeal, petitioner asserts that his constitutional right to due process entitled him to "prior notice of the grounds of the claimed [probation] violation." Petitioner asserts that although the notice of probation violation stated in paragraph two that he had failed to meaningfully participate in an outpatient substance abuse program, during the sentencing hearing held following his probation revocation, the trial court seemed to focus on the fact that he had not participated in an inpatient drug treatment program. However, regardless of comments made at the post-revocation sentencing hearing, the trial court's revocation order entered on November 8, 2010, stated that the State had proven the allegations in paragraph two of the notice of probation violation (charging petitioner with failing to meaningfully participate in an outpatient substance abuse program as directed by his probation officer), as well as paragraph one (charging use of methamphetamine) and paragraph four (charging the provision of an abnormal and diluted urine specimen). Petitioner does not challenge these other probation violations.

As this Court has previously stated:

> "When reviewing the findings of fact and conclusions of law of a circuit court sentencing a defendant following a revocation of probation, we apply a three-pronged standard of review. We review the decision on the probation revocation 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." Syllabus Point 1, *State v. Duke*, 200 W.Va. 356, 489 S.E.2d 738 (1997).

Syl. Pt. 1, *State v. Inscore*, 219 W.Va. 443, 634 S.E.2d 389 (2006). The Court finds that the procedure for probation revocation was met here and that there was no abuse of discretion or error in the revocation of petitioner's probation.

Guilty Plea

Petitioner asserts that his guilty plea was not freely, knowingly, and voluntarily entered because (1) he met with and talked to both the prosecuting attorney and a law enforcement officer prior to entering his plea without his attorney being present, and (2) his attorney told him and his

family that he had to take the plea and that he would receive an alternative sentence or probation if he entered into the plea agreement. Petitioner asserts that he was unduly influenced to take the plea due to these factors. Other than petitioner's statement that these meetings and representations occurred, there is nothing in the record to confirm the same.

In *State v. Neuman*,179 W.Va. 580, 584, 371 S.E.2d 77, 81 (1988), we stated that "[i]n *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975), we detailed the procedural safeguards to be undertaken on the record by the trial judge before accepting a defendant's guilty plea, so that a reviewing court could determine that the defendant's waiver of rights was voluntary, knowing, and intelligent. *Id.* 159 W. Va. at 196-197, 220 S.E.2d 668-69." Here, the record reflects that the trial court took the necessary steps to ensure that petitioner's guilty plea was freely, knowingly, and voluntarily made and that petitioner was fully advised of all the rights he was giving up by pleading guilty. The record also reflects that petitioner unequivocally informed the trial court that he understood his rights; that he wished to plead guilty to second degree robbery; and that no one had unduly influenced him to plead guilty. For these reasons, the Court finds that petitioner knowingly, freely, intelligently, and voluntarily pled guilty to second degree robbery.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 9, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman

DISQUALIFIED:

Justice Thomas E. McHugh