

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

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

vs) No. 11-0835 (Berkeley County 06-F-346)

**Miguel Perez, Defendant Below,
Petitioner**

FILED

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

MEMORANDUM DECISION

Petitioner Miguel Perez, convicted by *Alford* plea of two counts of sexual abuse by a parent, guardian or custodian, one count of sexual abuse in the first degree, and one count of incest, appeals his sentences of ten to twenty years on each count of sexual abuse by a parent, to run concurrently; one to five years on the count of sexual abuse in the first degree, to run consecutively to the other sentences; and five to fifteen years on the incest count, also to run consecutively to the other sentences. 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.

In the summer of 2002, petitioner molested the daughter of his live-in girlfriend while his girlfriend was at work. Petitioner was later indicted on thirteen counts: five counts of sexual abuse by a parent, guardian or custodian; three counts of sexual assault in the first degree; two counts of sexual abuse in the first degree; and three counts of incest. Petitioner pled guilty via *Alford* plea to two counts of sexual abuse by a parent, guardian or custodian; one count of sexual abuse in the first degree; and one count of incest. He agreed in his plea to sentences of ten to twenty years on each count of sexual abuse by a parent, guardian, or custodian, to run concurrently; and one to five years on the count of sexual abuse in the first degree, to run consecutively to the other sentences.

On appeal, petitioner argues that the circuit court abused its discretion and committed reversible error when it sentenced petitioner to the statutory indefinite period of imprisonment and elected to run the sentences consecutively and not concurrently. Petitioner argues that his sentence is disproportionate because the sentences run consecutively. Petitioner further argues that the sentence shocks the conscience, as petitioner's offenses were not inherently violent, and were not technically incest as the child he molested was not related to him by blood. Further, recidivism is not a problem in this matter as petitioner will be deported to Mexico upon his release. Finally, petitioner argues that other jurisdictions would give him less time for these same crimes.

The State responds, arguing that the sentences are not subject to appellate review, and do not "shock the conscience." The State further argues that the circuit court has discretion to sentence petitioner to consecutive sentences, and that the crime in this matter was severe, given the age of the victim and the actions of the petitioner against the child. Moreover, the State argues that the sentences are not disproportionate to the crimes to which Petitioner pled guilty.

"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). Although the sentence in this matter is within the statutory limits, petitioner argues that his sentence violates the proportionality principle in the West Virginia Constitution. In *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), this Court recognized two tests to determine if a sentence violates the proportionality principle set forth in Article III, Section 5 of the West Virginia Constitution. The first is whether the sentence shocks the conscience, and if not, then the Court should proceed to the second test found in *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981), which considers the nature of the offense, the legislative purpose behind the punishment, and a comparison with other offenses within the same jurisdiction. This Court has noted that "[w]hile our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.' Syllabus point 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981)." Syl Pt. 3, *State v. Booth*, 224 W.Va. 307, 685 S.E.2d 701 (2009) (per curiam). Upon a review of the entire record in this matter, this Court finds that petitioner's sentence does not violate the West Virginia Constitution.

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