

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

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

vs) No. 11-0857 (Gilmer County 10-F-25)

**Michael Marks, Defendant Below,
Petitioner**

FILED

March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Michael Marks, by counsel, Daniel R. Grindo, appeals the circuit court's order sentencing him to serve consecutive sentences of one to five years for conspiracy to commit an offense against the state, and one to fifteen years for delivery of a controlled substance within one thousand feet of a school. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response, by counsel Laura Young.

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 in this matter was indicted on charges of conspiracy to commit an offense against the state, delivery of a controlled substance within one thousand feet of a school, and possession of a controlled substance with intent to deliver. Pursuant to a plea agreement, petitioner pled guilty to conspiracy to commit an offense against the state and delivery of a controlled substance within one thousand feet of a school. A presentence investigation was completed, and petitioner moved for alternative sentencing. The circuit court denied petitioner's motion for an alternative sentence, and sentenced him to serve consecutive sentences of one to five years for conspiracy to commit an offense against the state, and one to fifteen years for delivery of a controlled substance within one thousand feet of a school.

On appeal, petitioner argues that the circuit court considered improper factors in issuing his sentence, and as a result imposed an excessive sentence. Petitioner asserts that the impermissible factor was that the circuit court described petitioner's activities as "trafficking" and not as "delivery" in the sentencing hearing. Petitioner argues that the circuit court therefore used improper statutory language. Further, petitioner argues that he has "a very limited criminal history" which includes no

prior felony convictions, and thus the sentence imposed violates the proportionality principles found in Article III, Section 5 of the West Virginia Constitution.

The State responds, arguing that petitioner offers no legal support that the use of the term “trafficking” is an impermissible factor. Further, the sentence is within statutory limits and is not subject to appellate review.

This Court has held that criminal sentences within the statutory limits of a crime are not subject to appellate review unless the sentence is based on some impermissible factor. Syl. Pt. 4, *State ex. rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007) (quoting Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)). Although the sentence in this matter is within the statutory limits, petitioner argues that his sentence is based on impermissible factors, and 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).

In the present case, the petitioner’s sentence is within the statutory limits for conspiracy to commit an offense against the State pursuant to West Virginia Code § 61-10-31, and for delivery of a controlled substance pursuant to West Virginia Code § 60A-4-401(a)(i). If a sentence is subject to appellate review, however, the Court must review it under the standards set forth in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), and Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 275 S.E.2d 205 (1981):

There are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution. *Accord, Stockton v. Leeke*, 269 S.C. 459, 237 S.E.2d 896, 897 (1977). The first is subjective and asks whether the sentence for the particular crimes shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test we spelled out in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981): In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a

comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

State v. Cooper, 172 W.Va. 266, 272, 304 S.E.2d 851, 857 (1983). This Court finds that the sentence imposed was not based upon an impermissible factor. Further, this Court finds that petitioner's sentence does not violate the West Virginia Constitution, as the sentence does not shock the conscience, nor is it disproportionate.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

NOT PARTICIPATING:

Justice Margaret L. Workman