STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) **No. 11-0939** (Upshur County 10-F-12)

Jeremy Boyd Williams,
Defendant Below, Petitioner

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal with accompanying appendix, filed by counsel Thomas Prall, arises from the Circuit Court of Upshur County, wherein the circuit court denied petitioner's motion for alternative sentencing by order entered on May 23, 2011. The State, by its attorney C. Casey Forbes, responds in support of the circuit court's order.

This Court has considered the parties' briefs and the appendix record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix 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 of Appellate Procedure.

Petitioner was indicted in January of 2010 for two felony counts of delivery of a controlled substance and one felony count of delivery of a controlled substance within 1000 feet of a public or private college. Pursuant to a plea agreement, in March of 2011, petitioner pled guilty to simple possession of marijuana under West Virginia Code § 60A-4-401(c). In May of 2011, the circuit court sentenced petitioner to six months in jail and denied petitioner's request for probation or other alternative sentencing. The pre-sentence report indicated that in the time between his plea and sentencing, petitioner tested positive for marijuana twice and that petitioner had two previous convictions for marijuana possession. Following sentencing, petitioner filed a motion under Rule 35(b) of the West Virginia Rules of Criminal Procedure for a reduction of sentence, which the circuit court denied by order entered on May 23, 2011. Petitioner appeals this order, arguing that the circuit court abused its discretion in denying his request for a reduced sentence. Pending this appeal, petitioner has been released on post-conviction bail. He has served two months of his six-month sentence.

Petitioner argues that the circuit court erred in sentencing him to the maximum sentence for his conviction and in denying his motion for reduced sentencing. Petitioner argues that under *State*

v. Arbaugh, 215 W.Va. 132, 595 S.E.2d 289 (2004), the circuit court abused its discretion at sentencing. In *Arbaugh*, the Court found that the circuit court abused its discretion when it prohibited petitioner from enrolling in a rehabilitation program and instead, ordered him to serve his sentence in prison. Here, petitioner asserts that he is a recent college graduate with potential for success. At sentencing, he had plans to enter a substance abuse program and to obtain employment in Maryland. Petitioner argues that because he plans on being a productive citizen and that his problem is solely limited to marijuana, he did not deserve the maximum sentence of six months in jail.

The State responds, contending that the circuit court did not abuse its discretion in sentencing petitioner to six months in jail and subsequently denying his motion for reduction of sentence. The State further argues that petitioner's sentence is not subject to appellate review. "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)." *State v. Proctor*, 227 W.Va. 352, 362, 709 S.E.2d 549, 560 n.17 (2011). The State first asserts that petitioner's sentence was within the limits of the West Virginia Code. An individual convicted under West Virginia Code § 60A-4-401(c) is subject to imprisonment of not less than ninety days nor more than six months or a fine of not more than $1,000, or both. The State further asserts that petitioner's sentence was not based on an impermissible factor because the circuit court considered the recommendations by the State and petitioner's probation officer for a sentence in jail, petitioner's prior criminal history as a repeat drug offender, and petitioner's two failed drug screens. Moreover, the State argues that *Arbaugh* is distinguishable from the instance case and asserts that this Court declined to apply *Arbaugh* in *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010).

The Court reviews decisions on Rule 35 motions as follows:

> "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).

Syllabus, *State v. Allen*, 224 W.Va. 444, 686 S.E.2d 226 (2009).

The Court finds no error in the circuit court's order denying petitioner's motion for reduction of sentence. A review of the appendix record supports the circuit court's order. The appendix record includes a copy of petitioner's pre-sentence report, which indicates petitioner's prior criminal history of drug possession, his failed drug tests before sentencing, and the recommendation by petitioner's probation officer to serve his sentence. The sentencing transcript indicates that petitioner sought an appointment with a drug rehabilitation center only two days before the sentencing hearing. There was no change in circumstances in the week petitioner was in jail when he filed his motion for reduction of sentence. Further, *Arbaugh* did not create any new standards, guidelines, or requirements to follow

in sentencing. In *Georgius*, we applied the standard set forth in *Goodnight* and reiterated our holding from *State v. Sugg*, 193 W.Va. 388, 406, 456 S.E.2d 469, 487 (1995): "As a general proposition, we will not disturb a sentence following a criminal conviction if it falls within the range of what is permitted under the statute." *Georgius*, 225 W.Va. at 722, 696 S.E.2d at 24. Here, the circuit court remained within the limits of West Virginia Code § 60A-4-401(c) in sentencing petitioner to the full-term of six months in jail and it did not consider any impermissible factor in deciding petitioner's sentence. This Court finds no error.

For the foregoing reasons, we affirm the circuit court's decision.

Affirmed.

ISSUED: May 29, 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