STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 11-0940 (Berkeley County 08-F-176)

Samuel Smeltzer,
Defendant Below, Petitioner

FILED
April 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Berkeley County, where the circuit court, by order entered May 20, 2011, revoked petitioner's probation and imposed the following underlying sentences, pursuant to petitioner's guilty pleas: (1) one year of incarceration for the misdemeanor crime of contributing to the delinquency of a minor; (2) one year of incarceration for the misdemeanor crime of domestic battery; and, (3) an indeterminate term of one to five years for the felony crime of sexual assault in the third degree. Per the sentencing order, the two misdemeanor sentences were to run concurrently to each other, and consecutively to the felony sentence, though the circuit court noted that petitioner had already completed the misdemeanor sentences prior to beginning his probationary term. The appeal was timely perfected by counsel, Shawn R. McDermott, with petitioner's appendix accompanying the petition. The State, by counsel Christopher C. Quasebarth, 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 of Appellate Procedure.

In the criminal proceeding below, petitioner originally pled guilty to contributing to the delinquency of a minor, domestic battery, and sexual assault in the third degree. Petitioner was sentenced to one year of incarceration for contributing to the delinquency of a minor, one year of incarceration for domestic battery, and an indeterminate term of one to five years for sexual assault. The one year sentences were ordered to run concurrently with each other and consecutive to the one to five year sentence, though the circuit court originally suspended the one to five year sentence in lieu of probation. Upon discharging from the concurrent sentences, petitioner was placed on probation with the following terms: no contact with the victims or any minor; undergo sex offender treatment at petitioner's own expense; truthfulness with his probation officer; no association with known felons; and, payment of probation supervision fees of thirty dollars per month. On

November 3, 2010, petitioner's probation officer moved for revocation of probation upon allegations that petitioner had multiple contacts with one of the minor victims of his crimes, was untruthful with the probation officer, failed to report the aforementioned contact to the probation officer, associated with known felons, failed to pay his probation supervision fees, and failed to complete his sex offender treatment. Following multiple hearings on the revocation, the circuit court found sufficient evidence existed to prove that petitioner violated the terms of his probation, revoked the same, and ordered that the original sentence be imposed. On appeal, petitioner argues that the circuit court erred when it found that petitioner's failure to pay his supervision fees, his counseling fees, and his court costs was a violation of the terms of petitioner's probation, when it did not find that the non-payment was contumacious. He further alleges that the circuit court erred when it failed to order the State to provide him with the statement or statements a victim, K.H.[1], made to her probation officer regarding the contact between her and petitioner. According to the petitioner, the circuit court erred in failing to examine the requested material at an in camera hearing. Each of these assignments of error, as well as the State's responses thereto, are addressed in turn below.

"'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. Hosby*, 220 W.Va. 560, 648 S.E.2d 66 (2007). Petitioner first argues that the circuit court erred when it held that his non-contumacious failure to pay his supervision fees constituted a violation of a term of petitioner's probation. Petitioner argues that the law in this state is clear that a circuit court must consider a probationer's economic situation and that probation may not be revoked for non-payment unless the same is done contumaciously. Citing the circuit court's ruling that petitioner's failure to pay his fees and costs was a violation of the terms of his probation "regardless" of any explanation, the petitioner argues that the circuit court's ruling was against this Court's long-standing requirements. In response, the State argues that the clear preponderance of the evidence makes it apparent that petitioner's non-payment was contumacious, especially in light of testimony establishing that he was employed for about a third of the time he was on probation. Further, the State argues that petitioner's probation revocation should be upheld because petitioner does not contest the circuit court's other findings as to his probation violations. The Court agrees.

We have previously held that "'[w]here probation is revoked on one valid charge, the fact that other charges may be invalid will not preclude upholding the revocation.' Syllabus Point 3, *State v. Ketchum*, [169] W.Va. [9], 289 S.E.2d 657 (1981)." Syl. Pt. 4, *State v. Cooper*, 167 W.Va. 322, 280 S.E.2d 95 (1981). A review of the circuit court's revocation order indicates that it found sufficient evidence to support the following probation violations, in addition to the non-payment of his fees and costs: contact with one of the minor victims of his crime, untruthfulness in denying said

[1]In keeping with the Court's policy of protecting the identity of minors and the victims of sexual crimes, the victim in this matter will be referred to throughout by her initials.

contact to his probation officer, and failure to maintain his required sex offender treatment. As noted above, petitioner does not challenge the sufficiency of all the violations the circuit court found in regard to the terms of his probation. Upon review of the evidence, the Court finds that the circuit court's findings in regard to these violations is supported by the evidence, and declines to address the appropriateness of the circuit court's finding in regard to petitioner's failure to pay the costs and fees associated with his probation supervision. Based upon our prior holdings, because petitioner's probation was revoked on at least one valid charge, the fact that any other charge may be invalid does not preclude upholding the revocation.

As to petitioner's second assignment of error, he alleges that the circuit court erred when it denied his motion for disclosure of the statement of the State's witness, K.H., to her probation officer pursuant to West Virginia Rule of Criminal Procedure 26.2. Specifically, he argues that the statement was timely requested and should properly be considered to meet the definition of "statement", as that term is used in Rule 26.2. As such, petitioner argues that the circuit court should have granted the motion for production, or at least held an in camera review of the statement to determine whether it had to be disclosed. In response, the State argues that the primary fallacy in petitioner's argument is that a "statement" from the victim to her juvenile probation officer actually exists. As used in Rule 26.2, a statement is defined as one of the following:

> 1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness; (2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical or other recording or a transcription thereof or; (3) A statement, however taken or recorded or a transcription thereof, made by the witness to a grand jury.

The State argues that there is nothing in the record to indicate that such a recorded statement exists. According to the State, the only reference in the petition to K.H.'s juvenile probation officer is that "on December 1, 2009, [petitioner's probation officer] was notified by [K.H.'s probation officer] that the Defendant/Probationer had been communicating with [K.]H." The State argues that nothing in the petition suggests that a physical, memorialized statement was made, and further that any contact notes that the juvenile probation officer may have in K.H.'s confidential probation file were not "statements" for the purposes of Rule 26.2. Lastly, the State argues that there is ample other evidence sufficient to support the finding of fact that petitioner was having continued contact with this minor victim. Again, the Court agrees. Simply put, we decline to find an abuse of discretion in the circuit court denying petitioner's motion for production of an alleged "statement" under Rule 26.2.

We have previously held as follows:

> "Rule 26.2 of the West Virginia Rules of Criminal Procedure imposes certain conditions for the disclosure of the prior statements of a witness, who is not the defendant, to the adverse party for purposes of impeachment. There are four basic conditions that must be met to require disclosure under Rule 26.2. First, a witness'

> prior statement being sought for the purpose of impeaching the direct testimony of that witness must satisfy the definition of a witness' prior statement pursuant to Rule 26.2(f). Second, the statement must be possessed by the proponent of the witness. Third, the witness' prior statement must relate to the subject matter of the witness' testimony on direct examination. Fourth, the prior statement need not be disclosed earlier than the conclusion of the witness' testimony on direct examination." Syllabus Point 5, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998).

Syl. Pt. 1, *State v. Lewis*, 207 W.Va. 544, 534 S.E.2d 740 (2000). As noted above, petitioner has failed to establish that a statement even exists, let alone satisfies the definition of a witness' prior statement pursuant to Rule 26.2(f). In his petition for appeal, petitioner argues that "[a]t the close of [K.H.'s] direct examination, however, it became apparent that there were additional statements made by [K.H.] to her probation officer regarding her contact with [p]etitioner that had not been provided." The Court has reviewed the juvenile victim's testimony, and there is nothing therein to indicate that she created, or caused to be created, any physical "statement" as that term is used in Rule 26.2. Simply put, it appears that petitioner is confusing the dictionary definition of statement with the term as it is used in the rule. It does appear, through review of the testimony, that the juvenile made verbal statements to her probation officer when she spoke about contact with petitioner. However, even petitioner's counsel admitted that he was unsure of the existence of any formal statements, as the term is used in Rule 26.2, when he engaged in the following dialogue with the circuit court: "I believe that there are statements. I don't know for sure, but I suspect that that's going to be the case." Based upon a review of the appendix, it is apparent that petitioner was unable to satisfy the elements necessary for disclosure of statements under Rule 26.2. Specifically, the petitioner could not establish that such statement existed, let alone fit the definition of a statement under Rule 26.2 as our prior holdings require. For these reasons, the circuit court did not err in denying petitioner's motion for production without holding an in camera review of any materials for potential disclosure.

For the foregoing reasons, we affirm the circuit court's order revoking petitioner' probation and imposing the underlying sentence.

Affirmed.

ISSUED: April 16, 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