

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

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

vs.) No. 11-0942 (Ohio County 09-F-33)

**Sara Kathleen Hamby,
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 Ohio County, where the circuit court, by order entered June 13, 2011, revoked petitioner's probation and imposed her underlying sentence of a determinate term of five years of incarceration for the crime of taking the identity of another, pursuant to petitioner's guilty plea. The appeal was timely perfected by counsel, Shayne M. Welling, with petitioner's appendix accompanying the petition. The State, by counsel Laura Young, 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 one count of forgery and one count of taking the identity of another person. On April 14, 2009, petitioner was sentenced to not less than one nor more than ten years of incarceration for her conviction of forgery, and a determinate term of five years for her conviction of the crime of taking the identity of another person, said sentences to run consecutively. The circuit court, however, ordered that the sentence for taking the identity of another person was to be suspended in lieu of three years of supervised probation. On April 21, 2010, petitioner was released from incarceration and placed on parole. Despite direction in the original sentencing order to meet with her probation officer upon release from incarceration, petitioner did not report to her probation officer until September 2, 2010. On November 4, 2010, petitioner was arrested and charged with the offense of aggravated driving under the influence of alcohol, and she entered a guilty plea to the crime of non-aggravated DUI on March 14, 2011. The next month, petitioner's probation officer filed a motion for revocation of petitioner's probation for the following three violations, all stemming from her DUI arrest; (1) violation of the criminal laws of the State of West Virginia; (2) entering an establishment that served intoxicating beverages and consuming intoxicating beverages; and, (3) violation of curfew. Petitioner filed a motion to dismiss

the revocation of probation, arguing that she was not on probation at the time because she was still serving parole on the forgery conviction, but the circuit court denied the same and revoked her probation. It is from this order that petitioner appeals. On appeal, petitioner alleges that the circuit court was without jurisdiction at the time it revoked petitioner's probation because she had not yet discharged from her sentence for forgery as she was still serving parole on that conviction and her sentences were ordered to run consecutively, and further that the circuit court abused its discretion in denying her motion to dismiss because it applied an incorrect legal standard in ignoring the original plea and sentencing order by construing ambiguity in the State's favor and against her. Each of petitioner's 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 lacked jurisdiction to revoke her probation, as petitioner's two sentences were ordered to run consecutively and she had not yet discharged her sentence for forgery. According to petitioner, because she was still serving parole in regard to the forgery sentence, she therefore was not subject to the three years of supervised probation related to her conviction for taking the identity of another person. She argues that while she was released from incarceration, such release does not constitute termination of or discharge from her sentence. Petitioner cites our prior case law to support this argument, and states that “[t]he revocation of parole relates to the underlying sentence and it is under this sentence that the parolee is returned to confinement.” *Conner v. Griffith*, 160 W.Va. 680, 690, 238 S.E.2d 529, 534 (1977). She further argues that, under a consecutive sentencing scheme, a criminal defendant simply cannot begin serving the second sentence until discharged from the first sentence. According to petitioner, our prior holdings dictate that release from incarceration on parole does not trigger the beginning of the second sentence previously ordered to run consecutively.

In response, the State argues that it is clear that petitioner believed she was on probation prior to the revocation hearing, based upon the fact that she began reporting to her probation officer in September of 2010, and even signed a First Circuit Adult Probation Terms form which clearly stated that she “shall be placed on probation for a term of THREE (3) YEARS, from April 21, 2010.” The State further argues that while petitioner's sentence for forgery had not been discharged as of the first parole revocation hearing, the sentence was discharged on August 8, 2011 at a final revocation hearing. The State argues that based on the sentencing order and the terms of probation that petitioner signed, the circuit court had jurisdiction to revoke the same. The State further argues that it was only to petitioner's benefit to allow the probation to begin before her first sentence was fully discharged. Upon a review of the appendix, the Court declines to find that the circuit court lacked jurisdiction in regard to this parole revocation matter. In revoking petitioner's probation, the circuit court noted that petitioner “was placed on supervised probation on September 2, 2010,” based upon

her meeting with her probation officer and executing the probation terms form. As can be seen from petitioner's actions, she believed that she was serving her term of three years of supervised probation prior to the full discharge of her sentence for forgery. Further, nothing in the underlying sentencing order or our prior holdings requires that petitioner be fully discharged from the sentence in order to begin serving her probation. The original sentencing order in petitioner's criminal proceeding stated that petitioner "shall report to her Probation Officer, William Ball, upon her release from incarceration, at which time the terms and conditions of probation will be reviewed with her." While the order did not expressly state that the probation would commence at this time, the implication is that petitioner would begin her probation upon release from incarceration, as evidenced by her execution of the probation terms form. For these reasons, we decline to find that the circuit court lacked jurisdiction over petitioner for purposes of this probation revocation proceeding, and we find that the circuit court did not err in entering its order revoking petitioner's probation.

As to petitioner's second assignment of error, she argues that the circuit court erred when it denied her motion to dismiss the petition for probation revocation because she alleges that the wrong legal standard was applied when the circuit court construed an ambiguity in the original sentencing order in favor of the State. Petitioner argues that the language of the plea and sentencing order is ambiguous in that the requirement that she review the terms and conditions of probation upon release from incarceration is not tantamount to commencing the start of probation, and further is ambiguous in the scope of the word "incarceration" as used in the order. Petitioner argues that the only language directing when her probation was to commence is the use of the term "consecutively," and that it is clear that her probation would not begin until such time as she fully discharged her sentence for forgery. According to the petitioner, when denying her motion to dismiss, the circuit court relied heavily upon the requirement that she meet with her probation officer to review the terms of her probation upon release from incarceration. If the circuit court's interpretation is accepted, then there is an inconsistency in the sentencing order, because petitioner would have been serving her two sentences concurrently rather than consecutively. Petitioner further argues that any ambiguity must be construed in her favor, and that the circuit court failed to do so in finding that petitioner should have raised these issues at the time the plea was entered into. She argues that the circuit court should have held the poor drafting against the State and dismissed the petition. In short, petitioner argues that she would not have known of the defect at the time the plea was entered into because she contemplated the language to be based on the consecutive sentencing scheme.

In response, the State argues that it was simply required to prove the probation violation by clear and convincing evidence, and further that petitioner clearly violated the terms of probation that she signed on September 2, 2010. According to the State, the circuit court appropriately conducted a full revocation hearing, presented evidence of the probation violation, and fully complied with the terms of *Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976). Whether there was language in the sentencing order providing when the probation was to commence is tangential, according to the State, and the circuit court applied the correct legal standard. Based upon our review of the appendix, the Court finds that the correct legal standard for probation revocation was applied, and we decline to find error in the circuit court's denial of petitioner's motion to dismiss the petition. Petitioner's argument is premised upon her understanding of the consecutive sentences as laid out in the circuit

court's original sentencing order, and she alleges that she could not have perceived any alleged defect in that order at the time of her plea. However, it is clear that petitioner knew or should have known she was serving her three year term of supervised probation prior to the petition for revocation being filed. As noted above, petitioner met with her probation officer and signed a probation terms form on September 2, 2011. The Court finds that in allowing the petitioner's term of probation to run concurrent with her ongoing parole on the forgery charge, the circuit court did resolve the ambiguity in petitioner's favor; this interpretation of the original sentencing order allowed petitioner to begin her term of probation earlier than she would have been allowed to if she had been required to first fully discharge from that sentence. Unfortunately, petitioner chose to violate the terms of that probation, and we decline to find that the circuit court in any way held the alleged ambiguity in the circuit court's sentencing order against her as a result of her illegal conduct which violated the terms of her probation. For these reasons, we find that the circuit court did not err in denying petitioner's motion to dismiss the petition for probation revocation.

For the foregoing reasons, we affirm the circuit court's order revoking petitioner's 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