STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

State of West Virginia,
Respondent, Plaintiff below

vs) No. 11-1009 (Nicholas County 11-F-16)

John C. James,
Petitioner, Defendant below

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Kevin Hughart, arises from the Circuit Court of Nicholas County, wherein petitioner was sentenced to one to five years in prison, with credit for time served, subsequent to his no contest plea to the felony of child neglect resulting in injury. This sentencing order was entered by the circuit court on June 6, 2011. The State filed its response, by counsel Michelle Duncan Bishop, in support of the circuit court's sentencing order.

This Court has considered the parties' briefs and the 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 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.

In January of 2011, the grand jury indicted petitioner on two counts of child neglect resulting in injury, pursuant to West Virginia Code § 61-8D-3(a). These charges were based on reports that petitioner had abused his girlfriend's minor son. In March of 2011, the State and petitioner engaged in a plea agreement, in which the State offered to dismiss one of the two counts and to make a non-binding recommendation that petitioner serve one year in regional jail preceding his return to Indiana where he faced pending charges for battery and domestic battery. Petitioner's plea agreement indicated his understanding that the circuit court was not bound by the State's recommendation and also indicated his awareness of the possible statutory sentence as a result of his plea to child neglect resulting in injury. The circuit court accepted petitioner's plea and scheduled the matter for sentencing in May of 2011. A pre-sentence investigation report was submitted to the circuit court and discussed the bruises petitioner caused to his girlfriend's son by striking the child with a belt or with a closed fist. The pre-sentence investigation report also revealed Indiana's extradition hold on petitioner for one count of battery and one count of domestic battery. At sentencing, the State reiterated its recommendation for a one-year sentence in county or regional jail preceding petitioner returning to Indiana to face his charges there. Petitioner's counsel urged the circuit court to follow the State's recommendation. After considering petitioner's pre-sentence investigation report, arguments by counsel, and commenting that the petitioner's charges in Indiana were "pretty much the same [charge] as

here" and that "the crimes committed against children are probably the most heinous crimes under our criminal statutes, with the exception of maybe murder or robbery," the circuit court sentenced petitioner to serve one to five years imprisonment, pursuant to West Virginia Code § 61-8D-3, with credit for 217 days served. Petitioner James appeals this sentencing order, arguing two assignments of error.

The Court reviews sentencing orders under "'a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.' Syllabus point 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997)." Syl. Pt. 1, in part, *State v. Sulick*, No. 11-0043, 2012 WL 602889 (W.Va. Feb. 23, 2012). Moreover, "'[s]entences 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. 8, *State v. Sulick*, No. 11-0043, 2012 WL 602889 (W.Va. Feb. 23, 2012). With these standards in mind, we turn to discuss the issues before us.

Petitioner James first argues that the circuit court's sentence was erroneous because it used his charges in Indiana as an impermissible factor in determining his sentence. Petitioner relies on *State v. Smith*, 238 N.W.2d 662, 672-73 (N.D. 1976), to support his position. In *Smith*, although the Supreme Court in North Dakota found that the lower court did not consider the criminal defendant's pending charges, it found that consideration of such at sentencing would be an impermissible factor in determining sentence. *Id.* Petitioner argues that here, similarly, the circuit court relied on the fact that the State of Indiana had a detainer placed on him for the same type of charges for which he was being sentenced in West Virginia. He argues that the circuit court stated, "Well, in reviewing your pre-sentence report, the charge that I understand that you're wanted for in Indiana is pretty much the same one as here. It's battery and domestic battery, is what it says." Petitioner asserts that he had not been convicted of the pending charges in Indiana, he never admitted to those pending charges, and no facts were presented to show that he committed the subject offenses. Petitioner argues that the circuit court imposed the harshest penalty it could because petitioner was accused of similar crimes in another jurisdiction; at the same time, Petitioner also states that he does not allege that the sentence imposed on him is outside statutory limits.

The State responds, contending that the circuit court did not rely on an impermissible factor at petitioner's sentencing. The State argues that although the circuit court was aware of petitioner's pending charges in Indiana, there is no evidence that it took those charges into consideration when imposing the statutory sentence. The State asserts that, in fact, petitioner was the first to bring up his Indiana charges at the sentencing hearing and no objection was made to the discussion of these charges. The State further asserts that petitioner has not presented any West Virginia law to support his argument.

The Court finds no abuse of discretion by the circuit court in its basis for sentencing petitioner to the maximum statutory term of one to five years imprisonment. This Court has identified lack of remorse as a factor to be taken into account when sentencing a criminal defendant. *State v. Jones*, 216 W.Va. 666, 669, 610 S.E.2d 1, 4 (2004) (citing Syl. Pt. 2, in part, *State v. Buck*, 173 W.Va. 243, 314 S.E.2d 406 (1984)). Here, at petitioner's sentencing,

petitioner's counsel stated that petitioner admitted to a probation officer that he did spank the child but that petitioner also said that he "did not believe that he caused these injuries [subject bruises from belt and fist]." Petitioner's counsel also stated, "I will proffer to the [circuit] [c]ourt that, since I've been representing Mr. James in this case, he has maintained his innocence." Further review of the sentencing transcript provides the circuit court's mention of petitioner's Indiana charges after it was brought up by petitioner's counsel and acknowledged in petitioner's pre-sentence investigation report. The circuit court's mention of it, however, does not indicate that the circuit court relied on this factor in determining petitioner's sentence. Rather, in deciding petitioner's sentence, the circuit court subsequently stated as follows:

> [N]ow is not the time to say, "I really didn't do this." This is the time to make the determination of what the appropriate punishment is. . . . I think that the crimes committed against children are probably the most heinous crimes under our criminal statutes, with the exception of maybe murder or robbery. I have to look for a reason to put someone on probation because I think it depreciates the seriousness of the offense if I use an alternate sentence or place someone on probation. So, in looking at your case, I see no reason why the appropriate punishment of a penitentiary sentence should not be imposed.

Based on this review, the Court finds that the circuit court did not rely on any impermissible factor at sentencing. Nevertheless, even if the circuit court did give weight to the pending Indiana charges, petitioner raises no West Virginia statutory or case law that would support his argument that any reliance by the circuit court on his Indiana charges would have been impermissible at sentencing. We find no abuse of discretion or error by the circuit court in this regard.

Petitioner next argues that the circuit court committed plain and prejudicial error by imposing a sentence so disproportionate to his crime as to make the sentence unconstitutional. Petitioner argues that we have held as follows:

> Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5, that prohibits a penalty that is not proportionate to the character and degree of an offense.

Syl. Pt. 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983). Petitioner argues that here, his prior criminal history only consists of two misdemeanor convictions from Indiana and no felony convictions. Petitioner further argues that under West Virginia Code § 61-8D-3(a)[1], the sentencing court has the ability to impose two mutually exclusive sentences: (1) incarceration in the state penitentiary for not less than one nor more than five years or (2) incarceration in the regional jail for not more than one year. Petitioner argues that the circuit court chose not to

[1] In his brief, petitioner referenced West Virginia Code § 62-8D-3(a) as West Virginia Code § 61-8D-3(a) is the applicable statute here, we believe that this was an inadvertent typographical error and we correctly reference West Virginia Code § 61-8D-3(a).

impose the lesser of the two alternatives or any other alternative sentences, such as probation, due to his charges pending in Indiana. Petitioner argues that given the available sentencing alternatives and the State's recommendation that petitioner serve only one year of incarceration so that he may return to Indiana to face his pending charges there, the circuit court imposed a sentence that shocks the conscience and violates petitioner's constitutional rights.

The State responds, arguing that petitioner's sentence is not subject to appellate review because his sentence was well within statutory limits, and not disproportionate to the crime committed. Here, pursuant to West Virginia Code § 61-8D-3(a), petitioner's plea of no contest to child neglect resulting in injury carried a possible sentence of one to five years in prison or one year in the county or regional jail. The circuit court imposed a sentence of one to five years imprisonment, which is within the limits of West Virginia Code § 61-8D-3(a). The State further argues that even if petitioner's sentence was reviewable by this Court, his sentence is not disproportionate to his crime and does not shock the conscience. The State argues that here, petitioner has not accepted responsibility for his actions; at his sentencing hearing, he tried to present evidence to justify the child abuse he caused. The State concludes that the circuit court considered all of this information at sentencing and did not impose a sentence that was shocking, disproportionate to petitioner's crime, or outside the statutory limits.

The Court finds that the circuit court did not abuse its discretion in sentencing petitioner to one to five years in prison. The circuit court remained within the confines of West Virginia Code § 61-8D-3(a). We recognize Syllabus Point 5 of *State v. Cooper*, as cited by petitioner, and also reiterate that we have discussed the proportionality principle as follows:

> "In determining whether a given sentence violates the proportionality principle . . ., 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." Syl. Pt. 5, in part, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Syl. Pt. 5, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). Here, a review of the record on appeal provides a copy of petitioner's plea agreement, which indicates that he understood the crime with which he was charged and to which he was pleading no contest. The plea agreement also indicates that petitioner was aware of the possible penalty for his plea of no contest to child neglect resulting in injury and that petitioner understood that the circuit court would not be bound by any agreement or recommendation made by the State. The circuit court's sentence neither shocked the conscience of society nor was it disproportionate to petitioner's crime. In light of this review and the circumstances of this case, nothing in the record suggests that the circuit court abused its discretion or committed error at petitioner's sentencing.

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

Affirmed.

ISSUED: September 7, 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