

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

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

vs) No. 11-1064 (Wirt County 10-F-20)

**James Michael David Herrington
Defendant Below, Petitioner**

FILED

May 29, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner James Michael David Herrington, by counsel, Joseph G. Troisi, appeals the Wirt County Circuit Court order dated June 9, 2011, denying his Motion for Reduction of Sentence. The State, by counsel, Desiree Halkias Divita, 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.

Petitioner initially pled guilty to felony grand larceny in early 2009, and eventually served time in a regional jail for that crime. While he was being prosecuted for grand larceny, petitioner became a suspect in another grand larceny involving the theft of a safe from Giovanni's Pizza restaurant. Petitioner was eventually indicted on three counts related to the Giovanni's Pizza incident: breaking and entering, grand larceny, and conspiracy. Petitioner's counsel moved to dismiss the indictment because the two different incidents were not joined, but this motion was denied. Petitioner then pled guilty to one count of grand larceny. At sentencing, petitioner sought an alternative sentence because he was gainfully employed and had a young child. The evidence shows that petitioner failed a drug test approximately one month before the sentencing hearing, and has a prior criminal record. The circuit court sentenced petitioner to one to ten years in the penitentiary. Petitioner filed a motion for reduction of sentence pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure, again seeking an alternative sentence. This motion was denied by the circuit court without a hearing.

On appeal, petitioner argues that although the sentence imposed was within statutory limits, the circuit court still has the discretion to place him on probation or home confinement. Petitioner

argues that after his prior incarceration, but before his incarceration in the present case, his circumstances had improved, as he was employed full-time and had a child. Petitioner argues that he can be a more productive member of society if he is not incarcerated. Petitioner makes a cursory argument that the sentence was disproportionate to the crime.

In response, the State argues that there is no basis for a reduction of sentence, as petitioner's sentence was within statutory limits. The State points out that the circuit court gave adequate reasoning for petitioner's sentence, including his history of criminal behavior. Although petitioner argues that the circuit court erred in not holding a hearing on his Rule 35 motion, the State responds that there is no authority requiring a hearing. The State argues that the sentence was both objectively and subjectively appropriate.

“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.” Syllabus Point 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

Syl. Pt. 1, *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010).

Further, a hearing on a Rule 35 motion is not required if the court had a sufficient record at sentencing. *State v. King*, 205 W.Va. 422, 425, 518 S.E.2d 663, 666 (1999). “‘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).” Syl. Pt. 4, *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007). 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, 305 S.E.2d 851 (1983), and Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 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 Five 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). In the present case, petitioner admits that his sentence is within the statutory limits. This Court finds that the sentence does not shock the conscience nor does it violate the proportionality principle. Finally, this Court finds no error in the circuit court's denial of the Rule 35 motion without a hearing.

For the foregoing reasons, we affirm.

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