STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-1076 (Gilmer County 11-F-9)

Mary Ann Starcher,
Defendant Below, Petitioner

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

MEMORANDUM DECISION

Petitioner Mary Ann Starcher, by counsel Christina C. Flanigan, appeals the Circuit Court of Gilmer County's sentencing order dated July 1, 2011. Petitioner argues that the circuit court erred in denying her motion for an alternative sentence. The State, by counsel, Michele Bishop Duncan, has filed its response.

This Court has considered the parties' briefs and the appendix 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 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 arrested for child neglect creating a risk of injury. She was later indicted on eighty counts of child abuse resulting in injury and one count of conspiracy to commit an offense against the State after it was determined that she and her girlfriend had abused her girlfriend's children. Petitioner admitted to "shocking" the children with a homemade device that omitted an electrical shock. Petitioner later pled guilty to five counts of child abuse resulting in injury and one count of conspiracy to commit an offense against the State. The circuit court sentenced her to one to five years in prison on each of the six counts, all to run consecutively. Petitioner's request for an alternative sentence was denied.

On appeal, petitioner argues that the circuit court erred by refusing to grant her an alternative sentence or concurrent sentences. Petitioner argues that she was thirty-five years old with no criminal record prior to her arrest in this matter, and that both she and her co-defendant relinquished any parental rights to these children, so she would not have been in contact with them if granted an alternative sentence. Petitioner further argues that she had a positive work history before the arrest and had served almost five months in jail prior to her sentencing. Finally, petitioner argues that the children were not seriously injured in this matter.

In response, the State argues that alternative sentencing is not mandatory and is at the circuit court's discretion. The State also argues that the sentence is within statutory limits and, therefore, is not subject to appellate review. The State further argues that the sentence in this matter is fair, as petitioner was indicted on eighty counts and therefore received the benefit of a significantly reduced sentence by pleading guilty to only six counts. Importantly, the State argues that petitioner's statements show a distinct lack of remorse and therefore the sentences imposed are necessary for the protection of society.

"'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, 275 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).

Here, the record reflects that the circuit court adhered to the statutory limits of West Virginia Code § 61-8D-3 and § 61-10-31, and did not base its sentences on any impermissible factor. Accordingly, petitioner's sentences are not subject to appellate review. Even if her sentences were subject to appellate review, the requirements under the subjective test from *Cooper* and the objective test from *Wanstreet* are not satisfied here because her sentences neither shock the conscience of society nor are they disproportionate to her crimes.

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