

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

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

vs) No. 11-1077 (Hardy County 09-F-23)

**Christopher Snapp,
Petitioner, Defendant below**

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

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Lary D. Garrett, arises from the Circuit Court of Hardy County, wherein petitioner was sentenced to serve ten to twenty years in prison, with credit for 781 days served, subsequent to his guilty plea to the felony of sexual abuse by a person in a position of trust. This sentencing order was entered by the circuit court on July 18, 2011. The State has filed its response, by counsel C. Casey Forbes, supporting 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.

Petitioner was nineteen years old when he sexually assaulted the six-year-old victim in 2009. The grand jury indicted petitioner that June, charging him with one count of sexual assault in the first degree and one count of sexual abuse by a person in a position of trust. Between November of 2009 and December of 2010, the circuit court considered reports from physicians who diagnosed petitioner with mild mental retardation and who stated that petitioner was incompetent to stand trial. Consequently, the circuit court committed petitioner to undergo treatment at the William R. Sharpe Jr. Hospital through its Competency Restoration Program. After the second time the circuit court committed petitioner to undergo this program, it found that he was competent to stand trial. Petitioner pled guilty in December of 2010 to one count of the felony of sexual abuse by a person in a position of trust, in violation of West Virginia Code § 61-8D-5(a). The circuit court subsequently ordered petitioner to undergo a sixty-day evaluation and for the probation officer to complete a pre-sentence investigation report prior to petitioner's sentencing in June of 2011. At sentencing, the circuit court heard testimony from petitioner's evaluating psychologist, Dr. Pate, and heard a statement from the victim's mother. The circuit court also considered petitioner's pre-sentence investigation and arguments by counsel. In its sentencing order, the circuit court sentenced petitioner to serve ten to twenty years in prison, with credit for 781 days served and without a fine, followed by fifty years of probation. The circuit court denied petitioner's request to serve his sentence by probation or by suspension of

his sentence with commitment to a youthful offender center. Petitioner appeals the circuit court's 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 Snapp argues that the circuit court abused its discretion by denying him probation or in the alternative, by not suspending his sentence and committing him to a youthful offender center. Petitioner argues that due to his age, he was eligible to be committed to a youthful offender center pursuant to West Virginia Code § 25-4-1, et seq., and that the circuit court had the discretion to suspend his sentence and commit him accordingly. Petitioner Snapp primarily argues that because his case is distinguishable from that of the offender in *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010), the circuit court abused its discretion and the logic of the dissenting opinion in *Georgius* should be applied here. Challenging the circuit court's denial of his motion for reconsideration of his sentence, the petitioner in *Georgius* argued that the circuit court did not properly apply the case law set forth in *State v. Arbaugh*, 215 W.Va. 132, 595 S.E.2d 289 (2004), where we remanded the case back to the circuit court with instructions to grant the criminal defendant probation and allow him to attend a renowned sexual offender treatment program. Petitioner argues that unlike the offender in *Georgius*, he has no prior criminal record; he also admitted to the allegations of his charges and pled guilty, rather than have a trial that would have required the victim to testify and undergo further trauma. Moreover, he received a positive report on his sixty-day evaluation that recommended home confinement or extended probation. Petitioner further asserts that the circuit court should have committed him to a youthful offender program, rather than to imprisonment, because one of his psychologists had testified that a youthful offender program would be beneficial to him and the victim's mother also testified that she would like to see petitioner go elsewhere if it would help him. Petitioner relies on the dissenting opinion of *Georgius* to support his argument. Petitioner argues that he would be an eligible candidate for a youthful offender program, according to the dissenting opinion's guidelines for determining such.

The State responds, contending that the circuit court did not abuse its discretion at sentencing and that, because the circuit court remained within the statutory limits and did not consider impermissible factors, petitioner's appeal cannot be reviewed. The State argues that here, petitioner pled guilty to the felony of sexual abuse by a person in a position of trust, in violation of West Virginia Code § 61-8D-5(a). The Code provides that one who is convicted under this statute shall be sentenced to imprisonment for ten to twenty years or fined five hundred dollars to \$5,000 in addition to imprisonment for ten to twenty years. Here, petitioner's sentence of ten to twenty years imprisonment was within the statutory limits of West Virginia Code § 61-8D-5(a). Moreover, the State argues that the Court has discussed that many factors

may be considered at sentencing, such as one's prior criminal history, the community impact of the offense, and candor of the offender. *See State v. Jones*, 216 W.Va. 666, 670, 610 S.E.2d 1, 5 (2004); *State ex rel. Ballard v. Painter*, 213 W.Va. 290, 582 S.E.2d 737 (2003); and *State v. Broughton*, 196 W.Va. 281, 291, 470 S.E.2d 413, 423 (1996). Here, the State argues that the circuit court reviewed petitioner's pre-sentence investigation report and the underlying facts of his offense which petitioner himself admits are "heinous." The report recommending alternative sentencing for petitioner was not binding on the circuit court, and petitioner has not presented any evidence that indicates that the circuit court used any impermissible factor at sentencing. The State lastly argues that the majority opinion of *Georgius*, not the dissenting opinion, is authoritative here. Petitioner's assertions of factual distinctions between his case and that of *Georgius* do not undermine the legal reasoning set forth in *Georgius*. Accordingly, the State argues that the circuit court's sentencing order should be affirmed.

The Court finds no abuse of discretion by the circuit court in sentencing petitioner to ten to twenty years imprisonment. West Virginia Code § 25-4-6 provides, in pertinent part, that "[t]he circuit court may suspend the imposition of sentence . . . and commit the young adult to the custody of the West Virginia Commissioner of Corrections to be assigned to a center." This language authorizes the circuit court with sole discretion to either suspend a sentence of imprisonment or to impose it. We also reiterated in *Georgius* as follows: "It is not the proper prerogative of this Court to substitute its judgment for that of the trial court on sentencing matters, so long as the appellant's sentence was within the statutory limits, was not based upon any impermissible factors, and did not violate constitutional principles." *Georgius*, 225 W.Va. at 722, 696 S.E.2d at 24. The *Georgius* decision did not create any new standards or law upon which we must analyze the instant case but rather, reiterated the standards upon which we must review sentencing orders. Here, a review of the record on appeal includes a copy of petitioner's psychiatric evaluations and statements made by the victim, victim's uncle, petitioner, and petitioner's mother. The factual distinctions petitioner asserts in his case are not factors that would be impermissible for the circuit court's consideration at sentencing. The record also includes a copy of petitioner's sentencing hearing transcript. Petitioner's evaluating psychologist testified that petitioner is at moderate to high risk to reoffend and would recommend that petitioner be placed in sexual offender treatment. The circuit court reviewed the potential statutory sentences with petitioner prior to sentencing, and although the victim's mother testified that she would like to see petitioner receive help from someplace like the Anthony Center, she testified that she would also like to see him do some time in prison. Accordingly, because the circuit court did not consider any impermissible factors in determining petitioner's sentence and it remained within the statutory limits of West Virginia Code § 61-8D-5(a), we find that the circuit court did not abuse its discretion in sentencing petitioner to ten to twenty years in prison.

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