

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

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

vs) No. 11-1321 (Gilmer County 08-F-6)

**Walter Wallace Adkins Jr.,
Defendant Below, Petitioner**

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 Christina Flanigan, arises from the Circuit Court of Gilmer County, wherein petitioner was sentenced to one to ten years in prison, pursuant to West Virginia Code § 61-3-24(a)(3). This sentence followed his conviction by jury of one count of fraudulent schemes, in violation of West Virginia Code § 61-3-24d(a). The original sentencing order was entered by the circuit court on August 24, 2011, and an amended sentencing order was entered on August 31, 2011. The State filed a response, by counsel Michele Duncan Bishop, 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.

In July of 2008, the grand jury indicted petitioner on one count of fraudulent schemes. This charge arose from petitioner's collection of \$4,500 from the victim after falsely representing that he would deliver a sign to the victim. Petitioner never delivered the sign and in July of 2011, petitioner was tried by jury for fraudulent schemes. The jury found petitioner guilty. Subsequently, at sentencing in August of 2011, petitioner moved for alternative sentencing or for probation, which the circuit court denied. Consequently, the circuit court sentenced petitioner to one to ten years in prison, pursuant to West Virginia Code § 61-3-24(a)(3), with credit for time served. Petitioner appeals this order, arguing one assignment 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 issue before us.

Petitioner argues that the circuit court committed reversible error by refusing to grant him probation or alternative sentencing. He relies on *State v. Shaw*, 208 W.Va. 426, 429, 541 S.E.2d 21, 24 (2000) (quoting *State v. Shafer*, 168 W.Va. 474, 284 S.E.2d 916 (1981), in arguing that “the [d]ecision of a trial court to deny probation will be overturned only when, on the facts of the case, that decision constituted a palpable abuse of discretion.” Petitioner argues that here, there are several reasons why the circuit court’s denial of his request for probation or alternative sentencing was a palpable abuse of discretion. In particular, petitioner asserts that at sentencing, he had already been incarcerated for seven and a half consecutive months. He has a limited criminal history and he has a work history prior to his arrest in a field with potentially great income. He did not commit a heinous crime or a crime involving injury to a person, and with restitution so important in this matter, the victim would be served by allowing petitioner to work. Petitioner argues that for these reasons, the circuit court should have granted him alternative sentencing or probation.

The State responds, contending that the circuit court’s sentence is without error. The State argues that the circuit court has the discretion to decide whether to place a criminal defendant on probation, relying on the case of *State v. Wotring*, 167 W.Va. 104, 118, 279 S.E.2d 182, 192 (1981), in support. The State further argues that similarly, the circuit court has the discretion to decide whether to place one on home confinement, citing *State v. Shelton*, 204 W.Va. 311, 314-15 n.3, 512 S.E.2d 568, 571-72 n.3 (1998). The State asserts that here, there is nothing in the record to suggest that the circuit court abused its discretion in denying petitioner probation, home confinement, or other alternative relief. Besides the facts of petitioner’s crime, petitioner also had a history of incarceration and probation violations in other states; he had left four jobs over a one-year period, even though he claimed that he had a successful work history. Although he expressed his desire to live with his father if the circuit court granted him probation, his father has a history of alcohol abuse. The State further argues that petitioner has passed prior bad checks and recently has been charged with violating a protective order. There is no residence available for petitioner for home confinement. The State argues that under these circumstances, the circuit court did not abuse its discretion at sentencing.

The Court finds that the circuit court did not abuse its discretion in denying petitioner’s requests for alternative sentencing or probation and in sentencing petitioner to one to ten years in prison. Pursuant to West Virginia Code § 62-12-1, the circuit court has the authority to order probation on one who has been convicted of a crime. Similarly, pursuant to West Virginia Code § 62-11B-4(a), the circuit court also has the discretion to place a criminal offender on home confinement, rather than incarceration. Neither probation nor home confinement are mandatory, but rather, are alternatives that the circuit court has the discretion to order. Here, the record on appeal includes petitioner’s pre-sentence investigation report, which discusses his prior criminal history, employment history, and medical history. The appellate record also includes a copy of the sentencing hearing transcript. Our review of the record reflects that the circuit court considered the circumstances of petitioner’s crime; considered petitioner’s history outlined in his pre-sentence investigation report; and, found at the hearing that, given these circumstances, probation would “depreciate the seriousness of [petitioner’s] crime.” The circuit court’s sentence of one to ten years incarceration is within the bounds of West Virginia Code § 61-3-24(a)(3).

For the foregoing reasons, we find no abuse of discretion in the circuit court's sentence of one to ten years incarceration and payment of \$4,500 in restitution. Accordingly, we affirm.

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