

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

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

vs) **No. 11-1385** (Pendleton County 98-F-19)

**Ferlin Jay Heavener,
Defendant Below, Petitioner**

FILED

February 11, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Ferlin Jay Heavener, by counsel Brian J. Vance, appeals the Circuit Court of Pendleton County's order entered on August 25, 2011, denying petitioner's motion for reduction of sentence. Respondent State of West Virginia, by counsel Benjamin F. Yancey III, filed a response in support of the circuit court's decision.

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 Rules of Appellate Procedure.

Petitioner was indicted on sixty-one counts of third degree sexual assault with five different minor male victims, as well as sixty counts of delivery of a Schedule I controlled substance and one count of first degree sexual assault. Petitioner later pled guilty to twenty counts of third degree sexual assault and five counts of delivery of a controlled substance, then was sentenced to twenty consecutive one to five year terms of incarceration on the sexual assault charges, and five consecutive one to five year terms of incarceration for the delivery of a controlled substance charges. He later filed a motion for reduction of sentence pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure, which was denied after a hearing. Petitioner appealed the denial to this Court, and his appeal was refused. Petitioner then moved for a resentencing to reinstate his appeal rights, which was denied by the circuit court, then reversed by this Court. Petitioner was resentenced and appealed, but his conviction was affirmed by this Court via memorandum decision. Petitioner then moved for a reduction of sentence pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure. The circuit court denied his motion for reduction of sentence, and petitioner appeals.

This Court has adopted the following standard of review:

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.

Syl. Pt. 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

On appeal, petitioner argues that his Rule 35(b) motion should have been granted because he is a low risk to reoffend and should be released to alleviate prison overcrowding. Further, petitioner argues that his sentence is disproportionate. The State argues that lengthy hearings were held previously on the same issues found herein, and the same information presented herein was presented previously. The State also argues that the parole board and the Department of Corrections are in charge of housing inmates and deciding who should be released. Additionally, the State argues that petitioner cites no legal authority in support of the contention that it should have considered prison overcrowding in the context of the Rule 35(b) motion. As to the proportionality of the sentence, the State argues that these sentences are not subject to appellate review because they are within statutory limits. The State argues that the sentence was proportional considering petitioner's crimes, since he used drugs to entice underage males to have sex with him.

Our review of the record reflects no clear error or abuse of discretion by the circuit court. Accordingly, we affirm.

Affirmed.

ISSUED: February 11, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II