

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

State of West Virginia
Plaintiff below, Respondent

vs) No. 11-0118 (Hampshire County 10-F-02)

Charles Muffley III
Defendant below, Petitioner

FILED

May 16, 2011

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

MEMORANDUM DECISION

Petitioner Charles Muffley III pled guilty to Manufacturing a Schedule I Controlled Substance, and now appeals the circuit court's order sentencing him to serve one to five years. Petitioner argues that the circuit court erred in not granting him probation, and that his sentence violates the proportionality principle of the West Virginia Constitution.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record 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 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.

Petitioner was arrested after his thirteen year old daughter went to the police and informed them that her father was growing and selling marijuana from his two year old twins' bedroom in his home. Petitioner was released on bond, but tested positive for marijuana, at which time he absconded. A Capias was issued and he later turned himself in. Petitioner then pled guilty to the charges, and at sentencing argued for probation. Petitioner has a history of several prior criminal charges. The circuit court denied his request for probation, and instead sentenced him to one to five years. The circuit court also denied a motion for reconsideration, finding that the circumstances had not changed.

On appeal, petitioner asserts that the circuit court erred in denying his motion for probation and then sentencing him to one to five years. Next, he argues that his sentence violates the proportionality principle of the West Virginia Constitution, as the sentence is so offensive that it shocks the conscience, considering the facts surrounding the offense.

Petitioner further argues that the sentence imposed violates the proportionality principle when considering the nature of the offense, the legislative purpose behind punishment, a comparison of the punishment inflicted in other jurisdictions, and a comparison of similar offenses in the same jurisdiction, considering the small amount of marijuana involved and the lack of any evidence that Petitioner was using the marijuana for any other purpose than personal consumption.

“The Supreme Court of Appeals reviews sentencing orders ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl.Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997); Syl. Pt. 1, *State v. Booth*, 224 W.Va. 307, 685 S.E.2d 701 (2009). This Court has held that criminal sentences within the statutory limits of a crime, unless based on some impermissible factor, will not subject to appellate review. See, *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007). West Virginia Code §60A-4-401(a)(ii) states that the punishment for Manufacturing a Schedule I Controlled Substance is one to five years. Therefore, petitioner was sentenced within the statutory limits of the crime.

Punishment is constitutionally impermissible if “it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” Syl. Pt. 5, in part, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983). *Cooper* provides a two part test to determine if a punishment violates the proportionality principle of the West Virginia Constitution: first, the Court must determine if the punishment shocks the conscience; if not, the Court must then consider “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.” *Cooper*, 172 W.Va. at 272, 304 S.E.2d at 857; Syl. Pt. 5, in part, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

After a review of the record, this Court finds that the circuit court did not err in sentencing petitioner to one to five years, and in refusing to grant petitioner’s motion for probation. The sentence issued is within the statutory limits for the crime in question, and under the facts of this case, does not violate the West Virginia Constitution.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 16, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh