STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0119 (Ohio County 10-F-28)

James H. Wilson, Jr.,
Defendant Below, Petitioner

FILED
June 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner James H. Wilson, Jr. appeals his sentencing following his guilty pleas to two counts of distribution of materials depicting minors engaged in sexually explicit conduct. Petitioner seeks a reversal of his sentencing and a remand to the circuit court with instructions for re-sentencing. Respondent State of West Virginia has filed a summary response.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on March 24, 2011. 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 indicted on two counts of "use of a minor in filming sexually explicit conduct" in violation of West Virginia Code §61-8C-2; two counts of "distribution of material depicting minors engaged in sexually explicit conduct" in violation of West Virginia Code §61-8C-3; and one misdemeanor count of "attempted extortion" in violation of West Virginia Code §61-2-13.

The charges arose from an incident occurring on September 19, 2009, when petitioner invited two minor females, D.D. and S.S., ages sixteen and seventeen, respectively, to his

house to spend the evening with him and his brother.[1] The girls later reported that while at petitioner's home, and under a threat of "no ride home" to D.D.'s house where S.S. was spending the night, petitioner made the girls remove their clothing and kiss one another. Petitioner took a photograph of the nude girls with his cellular telephone. He then drove them to D.D.'s house.

Later that same evening, petitioner and D.D. began text messaging one another on their cellular telephones. These communications escalated into a heated exchange with petitioner threatening to disseminate the nude photograph of the girls over the Internet if D.D. did not sneak S.S. back out of the house. The next morning, petitioner sent the nude photograph of the girls to D.D., as well as to a male high school classmate of the girls, via a cellular text message.

On March 15, 2010, petitioner entered a *Kennedy*[2] plea to two counts of "distribution of material depicting minors engaging in sexually explicit conduct." Petitioner underwent a sex offender evaluation, the results of which were presented at the sentencing hearing held on July 1, 2010. The sexual offender evaluator concluded that petitioner presented "a relatively low risk of re-offending and would be a good candidate for an alternative sentencing option."

The circuit court denied the request for alternative sentencing and imposed a two-year prison term on each count,[3] which were ordered to run consecutively, for an effective determinate term of imprisonment of four years. The circuit court also ordered petitioner to register for life as a sexual offender and to serve ten years of extended supervision following his release from prison pursuant to West Virginia Code §62-12-36. Petitioner challenges only his term of imprisonment.

Petitioner asserts that his sentence is unduly harsh and disproportionate to the offense committed. *W.Va. Const., art. III, §*5. He argues that under the subjective prong of *State v.*

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[1] Petitioner states that he had a prior consensual relationship with D.D., which he describes as "on-again/off-again."

[2] *Kennedy v. Frazier*, 178 W.Va. 10, 357 S.E.2d 43 (1987).

[3] A violation of West Virginia Code §61-8C-3 carries a penalty of not more than two years in the penitentiary and a fine of not more than two thousand dollars.

Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), four years of imprisonment shocks the conscience of the court and society and is so offensive that it cannot pass a societal and judicial sense of justice. Petitioner states that he does not have a prior record of criminal convictions; that he had steady employment and earned his journeyman's license with a local Ironworker's Union while the instant charges were pending; and that the sex offender evaluator concluded that he was of relatively low risk of re-offending and would be a good candidate for an alternative sentence.

In the alternative, petitioner asserts that his sentence is excessive under the objective test set forth in syllabus point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981), fails to achieve the legislative intent, and serves no useful purpose. Petitioner asserts that he is not a "sex offender" in the traditional sense of the word and that state legislatures are scrambling to deal with the recent phenomena of "sexting."

The State responds that constitutional proportionality as an impermissible factor in sentencing is generally not applicable to criminal sentences that have a fixed maximum statutory period, such as West Virginia Code §61-8C-3, which carries a maximum two-year sentence. Regarding petitioner's argument that his sentencing fails to achieve the legislative intent, the State asserts that petitioner waived any right to argue that his conduct does not fall within the parameters of West Virginia Code §61-8C-3 by virtue of his guilty pleas. The State adds that the circuit court was justified to weigh the arguments against the facts of the case and conclude that the interest of justice required incarceration.

"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." Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). "'When a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentences run concurrently, and unless it does so provide, the sentences will run consecutively.' Syllabus point 3, *Keith v. Leverette*, 163 W.Va. 98, 254 S.E.2d 700 (1979)."; Syl. Pt. 3, *State v. Allen*, 208 W.Va. 144, 539 S.E.2d 87 (1999). "'While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.' Syllabus point 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981)." Syl Pt. 3, *State v. Booth*, 224 W.Va. 307, 685 S.E.2d 701 (2009)(per curiam).

Having reviewed the record and the parties' arguments on appeal, this Court finds no error in the sentencing imposed upon petitioner by the circuit court. Accordingly, we affirm.

Affirmed.

ISSUED: June 15, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum