

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

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

vs) No. 11-0155 (Wood County 06-F-108)

**Dennis Richard Moyers
Defendant below, Petitioner**

FILED

**May 16, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Dennis Richard Moyers appeals the circuit court order revoking his probation, arguing that his sentence after the revocation of his probation was excessive and disproportionate, and arguing that his probation should have been reinstated or that he should not have been resentenced.

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 pled guilty to one count of driving under the influence of alcohol ("DUI") and one count of fleeing other than the use of a vehicle ("fleeing") in August 2006. On October 26, 2006, petitioner was sentenced to five days for the DUI and one year for fleeing, but the sentence was suspended and petitioner was placed on two years' probation. On October 11, 2008, petitioner was arrested for domestic battery which allegedly occurred on July 30, 2008. On October 23, 2008, a petition to revoke petitioner's probation was filed, alleging several violations of petitioner's probation, including consumption of alcohol, failure to provide proof of numerous Alcoholic's Anonymous meetings, usage of Adderall without a prescription, failure to report to his probation officer for a period of two months, failure to obtain his GED, an arrest on a domestic battery charge and failure to report said arrest to the probation officer. These violations were spread throughout the two year probation period. Petitioner was arraigned on the probation violation in May 2010, after a capias was issued, although petitioner claims he was not aware of the capias. A hearing

regarding the petition to revoke probation was held in July 2010, and on August 25, 2010, at which time petitioner's probation was revoked, and he was ordered to serve his one year term, with credit for time served.

Petitioner asserts three assignments of error concerning the revocation of his probation. This Court has found as follows:

When reviewing the findings of fact and conclusions of law of a circuit court sentencing a defendant following a revocation of probation, we apply a three-pronged standard of review. We review the decision on the probation revocation 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. Duke*, 200 W.Va. 356, 489 S.E.2d 738 (1997). Petitioner's first assignment of error is that his sentence was excessive, based upon his education, age, the facts of the case and his prior record. This Court has repeatedly found that criminal sentences within the statutory limits of a crime, unless based on some impermissible factor, will not be subject to appellate review. See, *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007). Petitioner has not shown that the sentence was based on an impermissible factor and therefore this Court finds no error.

Petitioner's second assignment of error is that the sentence is disproportionate to the severity of the offense charged. This Court recognized two tests to determine if a sentence violates the proportionality principle set forth in Article III, Section 5 of the West Virginia Constitution in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983). The first is whether the sentence shocks the conscience, and if not, then the Court should proceed to the second test found in *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981), which considers the nature of the offense, the legislative purpose behind the punishment and a comparison with other offenses within the same jurisdiction. This Court finds that the sentence in this case is not disproportionate to the severity of the offense charged.

Petitioner's third assignment of error is that his probation should have been reinstated or he should not have been sentenced after the probationary period had ended. After a review of the record, it is clear that the motion for revocation of probation was made prior to the end of petitioner's probationary period. This Court has repeatedly found that probation is not a matter of right, but rather "a privilege of conditional liberty bestowed upon a criminal defendant through the grace of the circuit court." *State v. Duke*, 200 W.Va. 356, 364, 489 S.E.2d 738, 746. This Court finds no error in the circuit court's failure to reinstate probation.

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