

FILED

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

Davis, Chief Justice, dissenting:

In this case, the majority opinion has affirmed the trial court's denial of Mr. Georgius' motion for reconsideration of his sentence. In doing so, the majority opinion focused upon Mr. Georgius' request to be granted probation. Although I am inclined to agree with the majority opinion that the trial court did not abuse its discretion in denying probation, I disagree with the majority's determination that the trial court did not abuse its discretion in denying Mr. Georgius' request to suspend his sentence and remand him to a youthful offender center.¹ Consequently, I dissent from the majority opinion. My dissent rests upon two grounds: (1) there are no meaningful guidelines for determining whether a defendant should be committed to a youthful offender center, and (2) compelling facts warranted reversing and remanding this case for the trial court to reconsider Mr. Georgius' request for youthful offender treatment. I will separately address my two concerns below.

¹The majority opinion disposed of this issue in a footnote.

A. There Are No Meaningful Guidelines for Determining Whether a Defendant Should Be Committed to a Youthful Offender Center

Under our Youthful Offender Act, W. Va. Code § 25-4-1, *et seq.*, a trial court may suspend a defendant's sentence and commit the defendant to a youthful offender center. The Legislature has determined that the purpose of the Act "is to provide appropriate facilities for the housing of young adult offenders convicted of or pleading guilty to violation of law . . . who are amenable to discipline other than in close confinement, and to give better opportunity to young adult offenders for reformation and encouragement of self-discipline." W. Va. Code § 25-4-1 (1999) (Repl. Vol. 2008). We have recognized that the underlying motivation behind the Act is to give "young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment." *State v. Turley*, 177 W. Va. 69, 73, 350 S.E.2d 696, 700 (1986) (quoting *United States v. Murray*, 275 U.S. 347, 357, 48 S. Ct. 146, 149, 72 L. Ed. 309, 313 (1928)). The statutory criteria by which a trial court may commit a defendant to a youthful offender center is set forth in W. Va. Code § 25-4-6 (2009) (Supp. 2009) which states, in relevant part:

The judge of any court with original criminal jurisdiction may suspend the imposition of sentence of any young adult, as defined in this section, convicted of or pleading guilty to a felony offense, other than an offense punishable by life imprisonment, including, but not limited to, felony violations of the provisions of chapter seventeen-c [§ 17C-1-1 *et seq.*] of this code, who has attained his or her eighteenth birthday but has not reached his or her twenty-third birthday at the time of the sentencing by the court and commit

the young adult to the custody of the West Virginia Commissioner of Corrections to be assigned to a center. . . .

Under W. Va. Code § 25-4-6, a trial court may commit a defendant to a youthful offender center if (1) the defendant's sentence was not punishable by life imprisonment or a felony traffic offense and (2) at the time of sentencing, the defendant was at least eighteen, but not older than twenty-two, years of age. Insofar as W. Va. Code § 25-4-6 states that a trial court "may" commit a defendant to a youthful offender center, the determination is a discretionary one. *See State v. Shaw*, 208 W. Va. 426, 430, 541 S.E.2d 21, 25 (2000) ("Since the dispositive statutory term is 'may,' there can be no question that the decision whether to invoke the provisions of the Youthful Offenders Act is within the sole discretion of the sentencing judge."). This Court attempted to guide a trial court's decision-making process under the Act in *State v. Hersman*, 161 W. Va. 371, 242 S.E.2d 559 (1978), where it was said that:

The determination of fitness for treatment as a youthful . . . offender should be predicated on factors relating to the subject's background and his rehabilitation prospects. Of necessity, the decision to treat a person as a youthful . . . offender is based on the fact that he will benefit and respond to the rehabilitative atmosphere of a detention center.

Hersman, 161 W. Va. at 376, 242 S.E.2d at 561. *Accord State v. Allen*, 208 W. Va. 144, 157-58, 539 S.E.2d 87, 100-01 (1999); *State v. Turley*, 177 W. Va. 69, 73 n.6, 350 S.E.2d 696, 701 n.6 (1986).

I believe that the general factors set out under *Hersman* are insufficient for meaningful assistance to trial courts in deciding whether to commit a defendant to a youthful offender center. Rather, in the instant proceeding, I believe the majority opinion should have undertaken the task of addressing the deficiencies inherent in the *Hersman* factors and articulated a more meaningful standard consistent with those adopted by other jurisdictions.

For example, the Massachusetts legislature has set out the following guidelines for trial courts to consider in deciding whether to sentence a defendant as a youthful offender:

In making such determination the court shall conduct a sentencing recommendation hearing to determine the sentence by which the present and long-term public safety would be best protected. At such hearing, the court shall consider, but not be limited to, the following factors: the nature, circumstances and seriousness of the offense; victim impact statement; a report by a probation officer concerning the history of the youthful offender; the youthful offender's court and delinquency records; the success or lack of success of any past treatment or delinquency dispositions regarding the youthful offender; the nature of services available through the juvenile justice system; the youthful offender's age and maturity; and the likelihood of avoiding future criminal conduct. In addition, the court may consider any other factors it deems relevant to disposition.

Mass. Gen. Laws, chap. 119 § 58(c) (1998).

Moreover, the Oklahoma legislature has set out the following guidelines for trial courts in deciding whether to sentence a defendant as a youthful offender:

C. 1. The court shall order an investigation to be conducted unless waived by the accused person with approval of the court. Any such investigation required shall be conducted by the Office of Juvenile Affairs.

2. At the hearing the court shall consider, with the greatest weight given to subparagraphs a, b and c:

a. whether the offense was committed in an aggressive, violent, premeditated or willful manner,

b. whether the offense was against persons and, if personal injury resulted, the degree of injury,

c. the record and past history of the accused person, including previous contacts with law enforcement agencies and juvenile or criminal courts, prior periods of probation and commitments to juvenile institutions,

d. the sophistication and maturity of the accused person and the capability of distinguishing right from wrong as determined by consideration of the psychological evaluation, home, environmental situation, emotional attitude and pattern of living of the accused person,

e. the prospects for adequate protection of the public if the accused person is processed through the youthful offender system or the juvenile system,

f. the reasonable likelihood of rehabilitation of the accused person if the accused person is found to have committed the alleged offense, by the use of procedures and facilities currently available to the juvenile court, and

g. whether the offense occurred while the accused person was escaping or on escape status from an institution for youthful offenders or delinquent children.

D. After the hearing and consideration of the report of the investigation, the court shall certify the person as eligible for the imposition of an adult sentence only if it finds by clear and convincing evidence that there is good cause to believe that the accused person would not reasonably complete a plan of rehabilitation or that the public would not be adequately protected if the person were to be sentenced as a youthful offender.

In its decision on the motion of the state for imposition of an adult sentence, the court shall detail findings of fact and conclusions of law to each of the considerations in subsection C of this section and shall state that the court has considered each of its guidelines in reaching its decision.

Okla. Stat. tit. 10A § 2-5-208 (2009).

Additionally, the courts of New York have developed criteria for determining whether a defendant should receive treatment as a youthful offender:

While the statute does not set forth any specific criteria to be considered upon an application for youthful offender status, a review of pertinent caselaw indicates that the factors to be considered include the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life.

People v. Cruickshank, 484 N.Y.S.2d 328, 336 (1985).

In light of the above standards from other jurisdictions, I propose the following guidelines for circuit courts to consider in making the determination of whether a defendant should be provided youthful offender treatment. In deciding whether a defendant should be accorded youthful offender treatment, a trial court should consider: (1) whether the offense was against a person or property; (2) the extent of the injury to the person or property; (3) whether a weapon was used in the commission of the offense; (4) the age of the defendant at the time of the offense; (5) the maturity of the defendant; (6) the defendant's educational level; (7) the defendant's family background; (8) the defendant's prior criminal record; (9) the opinion of the victim or his/her family; (10) recommendations in the presentence report; (11) psychological evaluation; (12) whether the defendant has accepted responsibility for the offense and expressed remorse; (13) institutional assessment of the defendant if he/she was confined prior to sentencing; (14) the best interests of the community; (15) the likelihood of reasonable rehabilitation of the defendant by the use of procedures, services, and facilities currently available at youthful offender centers; and (16) any other relevant mitigating or aggravating considerations.

In addition to the above guidelines, I would also require circuit courts to enter orders containing detailed findings of fact with respect to each of the aforementioned factors to afford this Court an opportunity for meaningful appellate review.

B. Compelling Facts Warranted Reversing and Remanding this Case for the Trial Court to Reconsider Mr. Georgius' Request for Youthful Offender Treatment

The record in this case shows that, at the age of fifteen, Mr. Georgius sexually assaulted his five-year-old niece. Mr. Georgius was prosecuted as an adult for the crime. A jury convicted Mr. Georgius in March 2005, and he was sentenced to a term of imprisonment of not less than fifteen nor more than thirty-five years. At the time of Mr. Georgius' initial sentencing, he continued to deny having committed the crime. Further, at the time of sentencing, the victim's mother, Mr. Georgius' sister, urged the court to give Mr. Georgius the maximum sentence allowable by law. Shortly after being sentenced, Mr. Georgius filed a motion for reconsideration of the sentence. The motion for reconsideration, filed in 2005, was not heard until June 17, 2008. During the hearing on the motion, the following was established:

1. Mr. Georgius had a troubled upbringing, including a father who made repeated vulgar sexual comments directed at him, and a drug-addicted mother who abandoned the family when Mr. Georgius was young;
2. Mr. Georgius admitted in open court to having committed the crime for which he was convicted, and expressed remorse;
3. Mr. Georgius indicated he denied the crime during the trial because he was ashamed of himself and his actions, and believed his family would shun him;
4. Mr. Georgius admitted his crime to his father and sister;
5. Mr. Georgius' mother died while he was incarcerated;
6. While incarcerated, Mr. Georgius obtained his GED, took instruction in anger management, parenting classes, stress management education, and a sex offender course;

7. Mr. Georgius scored high enough on his GED exam to qualify for a \$1,000.00 scholarship;

8. The victim's mother, Mr. Georgius' sister, testified at the initial sentencing hearing that she was extremely angry with her brother, and thus asked the judge to sentence Mr. Georgius to the maximum time permitted by law;

9. The victim's mother testified that she and her brother (Mr. Georgius) and sister had had an extremely difficult upbringing in that their mother was a drug addict and that their mother abandoned the family when Mr. Georgius was only nine years old;

10. The victim's mother testified that their father was mentally and emotionally abusive to his children and that he frequently made sexually inappropriate comments to his children;

11. The victim's mother's testimony provided an example of the type of vulgar behavior exhibited by her father, stating that if her brother (Mr. Georgius) procrastinated on a chore by saying he would do it later, her father would comment that "if you were living with your mother and you told [her boyfriend] 'later', then he'd stick his dick in your ass.";

12. The victim's mother testified that she witnessed first hand her father's mental and emotional abuse severely affecting her brother (Mr. Georgius) and that after their mother abandoned the family, her brother became very withdrawn, and his seclusion progressively worsened;

13. The victim's mother testified that her brother (Mr. Georgius) confessed his guilt to her during a prison visit, stated how sorry he was for what he had done, and expressed his hope that she could forgive him;

14. The victim's mother testified that she has come to realize that her brother (Mr. Georgius) was only fourteen years old at the time the crime was committed, and that she now believes the sentence was too harsh; and

15. The victim's mother testified that she would not object to her brother (Mr. Georgius) being sentenced to a youthful offender center, and that she did not believe he would pose a threat to the community.

In view of the maturation and educational progress Mr. Georgius made while incarcerated, the evidence of his painful upbringing, and the testimony of the victim's mother, I believe this case should have been reversed and remanded for the trial court to reconsider its decision. I believe a remand was appropriate, as opposed to this Court granting the requested relief, for two reasons. First, the record in this case does not, but should, contain a current institutional assessment of Mr. Georgius' behavior and an updated presentence report. Second, the case needed to be remanded to give the trial court an opportunity to reconsider its decision under the guidelines I have enunciated.

Based upon the foregoing, I respectfully dissent.