STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,
Plaintiff below, Appellee

vs.) No. 35656 (Wood County 95-F-10)

ROY "IKE" JUNIOR CUNNINGHAM,
Defendant below, Appellant

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Appellant Roy "Ike" Junior Cunningham (hereinafter "appellant") appeals a December 11, 2009, order of the Circuit Court of Wood County, sentencing him to indeterminate terms of two to 20 years for first degree arson, one to 10 years for second degree arson and life imprisonment because of prior felony convictions.[1] After carefully reviewing the record provided, the briefs of the parties[2], and taking into consideration the relevant standards of review as well as the State's concession of error[3], the Court determines that the lower court committed error in sentencing the appellant to indeterminate, rather than determinate, sentences on the arson convictions. The Court further finds that this case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the West Virginia Revised Rules of Appellate Procedure.

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[1]W. Va. Code §61-11-18 (2010) provides for additional penalties for persons who were previously convicted of crimes punishable by imprisonment in the penitentiary. This statute is commonly referred as the recidivist statute.

[2]The parties waived oral argument and this matter was submitted for decision on February 9, 2011.

[3]On appeal, the State conceded that the trial court should have resentenced the appellant to determinate terms for the arson convictions. We are not, however, bound to act upon the State's confession of error. "This Court is not obligated to accept the State's confession of error in a criminal case. We will do so when, after a proper analysis, we believe error occurred." Syl. Pt. 8, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991).

The appellant was initially charged on January 11, 1995, in a 26-count indictment, including 11 counts of first degree arson, 10 counts of second degree arson, three counts of attempted murder, one count of felony murder and one count of conspiracy to commit first and second degree arson. After a trial in January of 1996, the appellant was convicted of five counts of first degree arson, four counts of second degree arson and one count of conspiracy to commit first and second degree arson.[4] Following his trial and conviction, the State of West Virginia filed a recidivist information against Appellant, charging that he had two prior felony convictions and was thereby subject to a life sentence consistent with the guidelines of W. Va. Code §61-11-18(c).[5]

On August 30, 1996, the appellant entered into a plea agreement with the State, wherein he agreed to plead guilty to the recidivist charge in exchange for the prosecution's recommendation that he receive a life sentence, with parole eligibility in 15 years, on the recidivist charge, sentences of two to 20 years on the first degree arson charges, one to 10 years for the second degree arson charges and one to five years on the conspiracy to commit first and second degree arson. The plea agreement contemplated that the sentences for first and second degree arson, as well as the conspiracy to commit first and second degree arson, would all run consecutively to each other, and that the life sentence on the recidivist charge would run concurrently with the underlying arson and conspiracy sentences.

The appellant was initially sentenced on August 30, 1996. The circuit court sentenced the appellant to two to 20 years on each count of first degree arson; one to 10 years on each count of second degree arson; one to five years on the conspiracy conviction and life imprisonment on the recidivist conviction. The lower court ordered that all sentences run consecutively, in deviation from the state's recommendation that the recidivist charge would run concurrent with the arson and conspiracy sentences.

On November 23, 2009, the appellant moved the circuit court to sentence him to definite sentences, as opposed to the indefinite sentences previously imposed. He argued that he was entitled to select a definite sentence on the arson charges, as opposed to the indefinite sentence proscribed by the current statute, because of statutory changes made by

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[4]The appellant was acquitted of six counts of first degree arson, six counts of second degree arson and the three attempted murder counts. Prior to the commencement of the trial the second degree arson count that constituted Count 24 of the indictment, as well as the felony murder count that constituted Count 25, were severed from the remainder of the counts in the indictment.

[5]The appellant was previously convicted of robbery and federal interstate transportation of stolen vehicles.

the Legislature in 1997. These changes were made to W. Va. Code §§ 61-3-1 and 61-3-2 (2010). The effective date of the changes made to these statutes was 90 days after the date of passage, which was April 12, 1997. The appellant argues, and the State concedes, that the appellant's sentence did not become final until the conclusion of the January, 1997, term of court in Wood County. As such, he was eligible for the benefit of any statutory changes passed by the legislature in 1997. Prior to the effective date of the revised statutes, the sentence for first degree arson was an indeterminate term of imprisonment of two to 20 years, and the sentence for second degree arson was one to 10 years. The amended statute altered the penalty to a determinate term within the same range of years.

The appellant's entitlement to select the law under which he is sentenced was pronounced by this Court in *State ex rel Arbogast v. Mohn*, 164 W. Va. 820, 260 S.E.2d 820 (1979), in Syllabus Point 2, which states:

> When a general savings statute specifically provides for the application of mitigated penalties upon the election of the affected party, he is entitled to choose the law under which he wishes to be sentenced. W. Va. Code s 2-2-8.

On December 11, 2009, the circuit court resentenced the appellant. Once again the appellant was sentenced to indeterminate sentences, not a determinate sentence. The appellant was sentenced to five indeterminate terms of two to 20 years on the first degree arson convictions; four indeterminate sentences of one to 10 years on the second degree arson convictions; an indeterminate term of one to five years on the conspiracy conviction; and life imprisonment on the recidivist charge. The arson and conspiracy sentences were ordered to run consecutive to each other, while the life sentence for the recidivist conviction ran concurrent to those sentences. This appeal followed the sentencing order.

Our standard of review of sentences is as follows: As a general rule, the sentence imposed by a trial court is not subject to appellate review. "Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review." Syllabus Point 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). However, in cases such as the case at bar where an appropriate ground for appellate review has been established, we apply a three-pronged 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." Syllabus Point 1, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996).

The issue before us is whether the appellant should receive the benefit of the 1997 statutory changes to W. Va. Code §§ 61-3-1 and 61-3-2. The key to our consideration of this issue is W. Va. Code § 2-2-8 (2006), which states:

> The repeal of a law, or its expiration by virtue of any provision contained therein, shall not affect any offense committed, or penalty or punishment incurred, before the repeal took effect, or the law expired, save only that the proceedings thereafter had shall conform as far as practicable to the laws in force at the time such proceedings take place, unless otherwise specifically provided; and that if any penalty or punishment be mitigated by the new law, such new law may, with the consent of the party affected thereby, be applied to any judgment pronounced after it has taken effect.

We have previously interpreted this provision to allow a defendant to elect the statute under which he wishes to be sentenced when the penalty provisions of the statute have been modified. "The statute in force at the time of the commission of an offense governs the character of the offense, and generally the punishment prescribed thereby, unless, as provided by our statute, the defendant elects to be punished as provided in an amendment thereof." Syllabus Point 4, *State v. Wright*, 91 W. Va. 500, 113 S.E. 764 (1922). In Syllabus Point 2 of *Arbogast v. Mohn*, 164 W. Va. 6, 220 S.E.2d 820 (1979), we reiterated: "When a general savings statute specifically provides for the application of mitigated penalties upon the election of the affected party, he is entitled to choose the law under which he wishes to be sentenced.

Having established that the appellant was entitled to elect to be sentenced under the amended arson statutes to a determinate term, rather than an indeterminate term, we must determine whether these amendments apply to the case at bar. When a general savings statute specifically provides for the application of mitigated penalties upon the election of the affected party, he is entitled to choose the law under which he wishes to be sentenced. W.Va.Code s 2-2-8. Syllabus Point 2, *State ex rel. Arbogast v. Mohn*, 164 W.Va. 6, 260 S.E.2d 820 (1979).

"The general rule supported by the weight of authority is that a judgment rendered by a court in a criminal case must conform strictly to the statute which prescribes the punishment to be imposed and that any variation from its provisions, either in the character or the extent of the punishment inflicted, renders the judgment absolutely void." Point 3, Syllabus, *State ex rel. Nicholson v. Boles*, 148 W. Va. 229, 134 S.E.2d 576 (1964)]. Syl. pt. 1, *State ex rel. Boner v. Boles*, 148 W. Va. 802, 137 S.E.2d 418 (1964), overruled

on other grounds by *State v. Eden*, 163 W. Va. 370, 256 S.E.2d 868 (1979). When a sentence imposed in a criminal case is void, either because of a lack of jurisdiction or because it was not warranted by statute for the particular offense, the court may set aside such void sentence and pronounce a valid sentence even though the execution of the void sentence has commenced, and without regard to the time when, or the term within which, such void sentence was imposed. Syl. pt. 6, *State ex rel. Boner v. Boles*. See also Syl. pt. 4, *id*. ("A sentence at variance with statutory requirements is void and may be superseded by a new sentence in conformity with statutory provisions, and such new sentence may be rendered after such prior sentence has been partially served or after the term of court has expired even though such new sentence imposes a greater punishment.").

We conclude therefore that the sentence imposed by the circuit violated the statutory mandates for a determinate sentence of years, as opposed to an indeterminate range of years.

For the foregoing reasons, we find that the circuit court erred in sentencing the appellant to an indeterminate, rather than a determinate, sentence on the first and second degree arson convictions. As such, we reverse the December 11, 2009, order of the Circuit Court of Wood County and remand this case for resentencing.

Reversed and remanded.

ISSUED: June 14, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh