

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 22-664 (Roane County CC-44-2021-F-98, CC-44-2021-F-99, and CC-44-2022-F-26)

Michael David Goodwin,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Michael David Goodwin appeals the July 19, 2022, order entered by the Circuit Court of Roane County sentencing him to a thirty-year term of imprisonment for conspiracy, a ten-year term of imprisonment for fraudulent use of an access device, and credit for time served on a reduced charge of misdemeanor brandishing of a deadly weapon.¹ The sentences are to run consecutively. Upon our review, finding no substantial question of law and no prejudicial error, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court's order is appropriate. *See* W. Va. R. App. P. 21(c).

Petitioner was indicted by the grand jury in three indictments charging him with numerous crimes. In Indictment 21-F-14, petitioner was charged with possession of a firearm by a prohibited person, battery, assault, and brandishing of a deadly weapon. Indictment 21-F-98 charged petitioner with possession with intent to deliver methamphetamine and conspiracy. Additionally, Indictment 21-F-99 charged petitioner with delivery of a controlled substance.² Petitioner was also charged in Information 22-F-26 with fraudulent use of an access device. The parties negotiated a global plea to resolve these four cases.³

¹ Petitioner appears by counsel John J. Balenovich, and the State appears by Attorney General Patrick Morrissey and Assistant Attorney General Mary Beth Niday.

² George Cosenza represented petitioner in 21-F-14, and Mr. Balenovich represented petitioner in 21-F-98, 21-F-99, and 22-F-26.

³ Petitioner agreed to plead guilty to misdemeanor brandishing of a deadly weapon to resolve Indictment 21-F-14, conspiracy in Indictment 21-F-98, and fraudulent use of an access device in Information 22-F-26. In turn, the State agreed that it would recommend credit for time served regarding the brandishing charge in Indictment 21-F-14 and dismiss the remaining charges of possession of a firearm by a prohibited person, battery, and assault in Indictment 21-F-14, possession with intent to deliver a controlled substance in Indictment 21-F-98, and delivery of a controlled substance in Indictment 21-F-99.

During the plea hearing, the circuit court inquired of the State's evidence against petitioner. The State tendered officers' reports, without objection, and requested the circuit court accept them in 21-F-14, 21-F-98, and 21-F-99. Because the State did not yet have the officer's report for the charge of fraudulent use of an access device (22-F-26), the State proffered that petitioner had been named the victim's payee, that victim was likely a "protected person," that petitioner removed approximately \$18,000 from the victim's bank account on numerous occasions to benefit himself and others, and that telephone calls recorded by a regional jail revealed petitioner and his girlfriend talked about using the victim's access card to make purchases.

After the State's proffer, the circuit court questioned petitioner whether he would be pleading guilty based upon the State's evidence, based upon what petitioner (himself) knew, and because he was guilty. Petitioner responded affirmatively. Petitioner's counsel, Mr. Balenovich, interjected and informed the circuit court that he and petitioner spoke generally about the charge, but did not have discovery or the officer's report for 22-F-26 to review specific details. The circuit court inquired of petitioner whether he was entering pleas because he was guilty and if he understood the evidence proffered by the State. Petitioner responded affirmatively.

The circuit court engaged in a thorough plea colloquy with petitioner pursuant to Rule 11 of the West Virginia Rules of Criminal Procedure and Syllabus Point 3 of *Call v. McKenzie*, 159 W. Va. 191, 220 S.E.2d 665 (1975).⁴ Petitioner affirmed that he had reviewed and discussed the plea agreement with his counsel, understood its terms and maximum possible penalty, and understood the circuit court was not bound by the parties' recommendations. Petitioner signified he was pleading guilty of his own free will. He also discussed with counsel and responded in writing to questions in the "Defendant's Statement in Support of Guilty Plea" and "Rights Waived by Guilty Plea Form." Petitioner signed and filed both forms in circuit court. Petitioner further professed that he understood his constitutional rights pertaining to waiver of jury trials and recognized his limited appellate rights. Based upon petitioner's responses, the circuit court accepted the guilty pleas and found the pleas and waivers of petitioner's rights were made freely,

⁴ When a criminal defendant proposes to enter a plea of guilty, the trial judge should interrogate such defendant on the record with regard to his intelligent understanding of the following rights, some of which he will waive by pleading guilty; 1) the right to retain counsel of his choice, and if indigent, the right to court appointed counsel; 2) the right to consult with counsel and have counsel prepare the defense; 3) the right to a public trial by an impartial jury of twelve persons; 4) the right to have the State prove its case beyond a reasonable doubt and the right of the defendant to stand mute during the proceedings; 5) the right to confront and cross-examine his accusers; 6) the right to present witnesses in his own defense and to testify himself in his own defense; 7) the right to appeal the conviction for any errors of law; 8) the right to move to suppress illegally obtained evidence and illegally obtained confessions; and, 9) the right to challenge in the trial court and on appeal all pre-trial proceedings.

Syl. Pt. 3, *Call v. McKenzie*, 159 W. Va. 191, 220 S.E.2d 665 (1975).

voluntarily, and intelligently. A sentencing hearing was set.

During the sentencing hearing, the State argued its sentencing recommendations on all the charges to which petitioner pled. In addressing its recommendations for fraudulent use of an access device, the State described the victim as a defenseless, “protected person” known in the community for having issues with alcohol and getting into trouble.⁵ The State characterized the victim as someone who “has nothing” and sits on a bench in front of the courthouse almost daily. The State also argued that petitioner could have been charged with “dozens” more counts considering the number of transactions.

While pronouncing sentence, the circuit court stated petitioner took advantage of “the poor guy that’s sitting out there on the bench 90 percent of the time.” The circuit court continued, “[Victim] is clearly a person who is a protected person, and you took over \$19,000 of his money and used it.”⁶ The circuit court also recognized petitioner as a “ringleader” and as “a major source of the methamphetamine” in its county. In its rationale for sentencing petitioner for his conviction to fraudulent use of an access device, the circuit court reiterated the State’s description of the victim. The circuit court characterized petitioner as a “career criminal” who spent his adult life being a criminal, who did not take much responsibility, and who had “shown virtually no remorse.” The circuit court explained that it must “protect the public from people who commit crimes like [petitioner did].” The circuit court denied petitioner’s requests for alternative sentencing and sentenced him to 90 days imprisonment, with credit for time served for misdemeanor brandishing of a deadly weapon; to 30 years imprisonment for conspiracy; and to 10 years imprisonment for fraudulent use of an access device, which sentences would run consecutively. Petitioner appealed.

On appeal, petitioner contends the circuit court erred by finding his plea to fraudulent use of an access device voluntary, by considering an impermissible sentencing factor, by sentencing him to a disproportionately severe sentence, and by denying requests for alternative sentencing because of the circuit court’s personal experiences with the victim. We discuss these assignments of error in turn.

First, petitioner asserts his plea to fraudulent use of an access device was involuntary because he lacked the requisite knowledge of the State’s evidence prior to the plea hearing. Our review of this ground is guided by Syllabus Point 1 of *State v. Sims*, 162 W. Va. 212, 248 S.E.2d 834 (1978), which provides “[a] direct appeal from a criminal conviction based on a guilty plea will lie where an issue is raised as to the voluntariness of the guilty plea or the legality of the sentence.”

⁵ A victim’s status as a “protected person” is not an element of the charge of fraudulent use of an access device in West Virginia Code § 61-3C-13.

⁶ The State proffered that \$18,000 was taken from the victim, while the circuit court pronounced that \$19,000 was taken. This discrepancy in amount is immaterial to our analysis. The victim received \$18,333 in Social Security back award benefits, which petitioner accessed and used. But, restitution and interest totaled \$19,787.55 at the time of sentencing.

Here, the circuit court performed a comprehensive plea colloquy wherein petitioner had conferred with his counsel about the plea agreement, its terms, and penalties. Petitioner also affirmed that he understood the circuit court remained unbound by the parties' recommendations, understood his constitutional rights regarding waiver of jury trial, recognized the limited issues that could be raised on appeal, and indicated he would plead guilty of his own free will. In addition, petitioner stated more than once that he understood the State's proffered evidence against him and that he was, in fact, guilty. The circuit court also questioned petitioner concerning both of his counsel's representation and the adequacy of their representation, and then received and reviewed Mr. Balenovich's "Attorney's Statement in Support of Guilty Plea" during the hearing. Accordingly, we find no merit to this assignment of error.

Because petitioner's last three assignments of error assert errors in sentencing, we combine them for purposes of review. "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. 2, *State v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010) (quoting Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)). "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." *Georgius*, 225 W. Va. at 717, 696 S.E.2d at 19, Syl. Pt. 3 (quoting Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982)).

Petitioner contends that an "impermissible factor" was considered in sentencing him for fraudulent use of an access device. "Impermissible factors" in sentencing include race, sex, national origin, creed, religion, and socioeconomic status. See *State v. Norman*, No. 21-0374, 2022 WL 3931414 (W. Va. Aug. 31, 2022) (memorandum decision). We observe that petitioner fails to allege any of factors listed in *Norman* on appeal; rather, petitioner argued the circuit court had "personal feelings and relationship with [the] victim" that biased him during sentencing. Petitioner failed to produce any evidence of his claim, only argument. During sentencing, the State argued that petitioner's actions in taking the victim's money were especially egregious as victim was likely a "protected person." In pronouncing sentence, the circuit court referred to the victim as "the poor guy that's sitting out there on the bench 90 percent of the time." The circuit court also stated, "[Victim] is clearly a person who is a protected person, and [petitioner] took over \$19,000 of his money and used it." Although the State and the circuit court were cognizant of the victim, their awareness of him is not an "impermissible factor." The record demonstrates that the circuit court did no more than reiterate the State's characterization of the victim in setting forth its sentencing rationale. Accordingly, we find this assignment of error without merit.

Next, petitioner asserts he received a disproportionately severe sentence. "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." *Goodnight*, 169 W. Va. at 366, 287 S.E.2d at 505, Syl. Pt. 4. Petitioner concedes an aggregate 40-year sentence is within the statutory framework. Furthermore, "[w]hile 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." *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 531, 276 S.E.2d 205, 211 (1981). Because this case involves neither the possibility of unlimited sentences nor a life recidivist statute, we decline petitioner's invitation to apply

proportionality principles herein. *See State v. Allen*, 208 W. Va. 144, 156, 539 S.E.2d 87, 99 (1999).

In sentencing petitioner, the circuit court properly considered petitioner’s life as a “career criminal,” his failure to take responsibility for his actions, and his lack of remorse, as well as the circuit court’s general concern for the public. The circuit court did not consider any “impermissible factors.” Moreover, the statutory terms of imprisonment do not shock the conscience, nor do they persuade us that the consecutive, penitentiary sentences are objectively unreasonable. Therefore, we find petitioner’s assignment of error to be without merit.⁷

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 20, 2024

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn

⁷ In his final assignment of error, petitioner argues the circuit court committed “plain error” by relying on the aforementioned “impermissible factor” in sentencing. Because we have determined no “impermissible factor” was considered in sentencing, we decline to apply the plain error doctrine to reach the final assignment of error.