FILED
April 30, 2024
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 22-823 (Wood County CC-54-2022-F-130)

Kenny Alan Lumeyer,
Defendant Below, Petitioner

MEMORANDUM DECISION

The petitioner Kenny Alan Lumeyer appeals the sentencing order entered by the Circuit Court of Wood County on August 8, 2022, sentencing him to imprisonment for a period of not less than ten nor more than twenty years (with credit for 217 days previously served) for his conviction of sexual abuse by a parent, guardian, custodian or person in position of trust to a child ("sexual abuse") in violation of West Virginia Code § 61-8D-5(a), and for a period of not less than five nor more than fifteen years (with credit of zero days previously served) for his conviction of incest in violation of West Virginia Code § 61-8-12(b). The sentences were ordered to run consecutively.[1] The petitioner asserts that his consecutive sentences and the circuit court's refusal to grant an alternative sentence are tantamount to cruel and unusual punishment. 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).

A criminal complaint filed in magistrate court charged the petitioner with sexual abuse and incest. The petitioner was accused of having sexual intercourse with his developmentally-delayed minor relative, which resulted in the birth of his child. The petitioner and the State negotiated a plea agreement wherein the petitioner agreed to plead guilty to both charges. The petitioner acknowledged the statutory penalties for each charge: not less than ten nor more than twenty years and a possible fine of $500 to $5,000 for the sexual abuse charge and not less than five nor more than fifteen years and a possible fine of $500 to $5,000 for incest. The State, in turn, agreed to dismiss any other pending charges arising in Wood County. The plea also informed the petitioner of his obligations to register with the West Virginia State Police as a sex offender for the remainder of his life and make full restitution, and further notified him that he was subject to a period of extended supervision. The parties, however, did not reach an agreement concerning sentencing.

[1] Petitioner appears by counsel Travis C. Sayre, and the State appears by Attorney General Patrick Morrisey and Deputy Attorney General Andrea Nease Proper.

During the plea hearing, the circuit court questioned the petitioner concerning his waiver of indictment and proceeding by way of an information, the offenses to which he was pleading and the statutory penalties for each, the difference between concurrent and consecutive sentencing, and the contents of the plea agreement. The circuit court confirmed that the petitioner's counsel informed him of the evidence against him and the constitutional rights waived by pleading guilty. The circuit court found the petitioner's plea was freely, voluntarily, intelligently, and knowingly made. The petitioner also moved to be released on bond; however, the State argued against this request because of petitioner's repeated violations of a protective order.

At the sentencing hearing, the circuit court received arguments of counsel; victim impact statements from the minor, the minor's family, and the minor's therapist; and the petitioner's allocution. The petitioner and his family also filed letters in support of him. The circuit court sentenced the petitioner to not less than ten nor more than twenty years with credit of 217 days served upon his conviction for sexual abuse and to not less than five nor more than fifteen years with zero days credit for incest, which sentences were ordered to run consecutively.

On appeal, the petitioner asserts as his sole assignment of error the circuit court's decision not to run his sentences concurrently and to deny his request for alternative sentencing, which he believes amounts to cruel and unusual punishment. He argues that the circuit court should have considered certain "mitigating factors" in sentencing him, e.g. his expression of genuine remorse, his limited criminal record, his strong community ties, his unlikeliness to reoffend while under supervision, and the potential for the petitioner's harassment from the inmate population.

Our analysis is guided by Syllabus Point 4 of *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982), which states, "[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." "Impermissible factors" in sentencing include race, sex, national origin, creed, religion, and socioeconomic status. *See State v. Norman*, No. 21-0374, 2022 WL 3931414, at *3 (W. Va. Aug. 31, 2022) (memorandum decision). Additionally, "[w]hen 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." Syl. Pt. 3, *Keith v. Leverette*, 163 W. Va. 98, 254 S.E.2d 700 (1979).

With these precepts in mind, we have reviewed petitioner's sentences and determine they were within statutory limits, not based on any impermissible factor, and are, thus, not subject to appellate review. We cannot find that the circuit court abused its discretion in running petitioner's sentences consecutively considering the egregious nature of the crime, its impact upon the victim and her family, and petitioner's repeated violations of the protective order obtained to keep the victim and her family safe. Furthermore, the petitioner was not entitled to alternative sentencing. "Probation is a matter of grace and not a matter of right." Syl. Pt. 1, *State v. Rose*, 156 W. Va. 342, 192 S.E.2d 884 (1972). The petitioner knew the potential criminal penalties before the plea hearing, and the circuit court informed him of the possible penalties as well including the potential of consecutive sentencing.

To the extent that the petitioner makes a constitutional challenge to his sentence on proportionality grounds, Syllabus Point 4 of *State v. Booth*, 224 W. Va. 307, 685 S.E.2d 701 (2009), states:

> Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offence.' Syllabus point 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980)."

Our constitutional proportionality standards are "basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syl. Pt. 4, in part, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). Because this case involves neither the possibility of unlimited sentences nor a life recidivist statute, we need not apply proportionality principles to petitioner's sentence. *State v. Allen*, 208 W. Va. 144, 156, 539 S.E.2d 87, 99 (1999). Accordingly, we find this assignment of error to be without merit.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 30, 2024

CONCURRED IN BY:

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