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. 22-868 (Wood County CC-54-2022-F-72)

Zachary A. Sandy,
Defendant Below, Petitioner

MEMORANDUM DECISION

The petitioner Zachary A. Sandy appeals the sentencing order entered by the Circuit Court of Wood County on November 18, 2022, sentencing him to three, consecutive four-year terms of imprisonment for his convictions for felony fraudulent use of an access device in violation of West Virginia Code § 61-3C-13(c).[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).

The petitioner was indicted in January 2022 on sixteen counts of fraudulent use of an access device. He was accused of using his employer's business credit card for personal use without authorization and incurring $32,000 in charges at various times and locations. After the parties negotiated an agreement, the petitioner pled guilty to Counts 1, 4, and 6. During the plea hearing, the circuit court found petitioner's plea was freely, voluntarily, intelligently, and knowingly made. The petitioner moved for alternative sentencing at that time, a presentence investigation report was requested, and a sentencing hearing was set.

At the sentencing hearing, the circuit court sentenced petitioner to four years of imprisonment with credit for ten days on Count 1, to four years of imprisonment with zero credit on Count 4, and to four years of imprisonment on Count 6. The sentences were ordered to run consecutively. The circuit court also denied petitioner's motion for probation or alternative sentencing because of his criminal record, the amount stolen from his employer, his positive drug screens, and his dishonesty with the probation officer about his drug use.

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

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

argues is cruel and unusual punishment. The petitioner submits his crimes were due to addiction, and he should have been afforded the opportunity to receive probation and attend a long-term substance use treatment facility.

Our analysis is guided by Syllabus Point 4 of *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982), which provides "[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, especially given the fact that the circuit court greatly reduced the statutory maximum ten-year sentence to a mere four years of imprisonment on each of the three counts.[2] Notably, petitioner was indicted on sixteen counts of fraudulent use of an access device for which his potential exposure was sixteen ten-year sentences to run consecutively, or 160 years imprisonment.

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

Moreover, petitioner's arguments were "skeletal" at best and unavailing. *See State v. Benny W.*, 242 W. Va. 618, 633, 837 S.E.2d 679, 694 (2019) (a skeletal argument does not preserve a

[2] West Virginia Code § 61-3C-13(c) provides for a "fine[] of not more than ten thousand dollars or imprison[ment] in the penitentiary for not more than ten years, or both."

claim). He argues that the circuit court should have considered certain "mitigating factors" when imposing sentence, but he did not set forth which factors the court failed to consider. Furthermore, 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 circuit court explained its rationale for denying alternative sentencing on the record. We observe that no substantial question of law exists, and no prejudicial error has crept into the record. Accordingly, we find petitioner's assignment of error lacks 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