

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff below, Respondent

v.) No. 22-902 (Ohio County CC-35-2022-F-40)

Jason William Gibbons,
Defendant below, Petitioner

MEMORANDUM DECISION

Petitioner Jason William Gibbons appeals the November 2, 2022, order of the Circuit Court of Ohio County sentencing him to sixty years of incarceration for first-degree robbery.¹ The petitioner argues that the sixty-year sentence is disproportionate to his crime. Upon our review, finding no substantial question of law and no prejudicial error, we determine that oral argument is unnecessary and that it is appropriate to issue a memorandum decision affirming the circuit court's order. *See* W. Va. R. App. P. 21(c).

On March 21, 2022,² the petitioner grabbed the victim's purse as she was walking into a fast food restaurant. The seventy-eight-year-old victim chased the petitioner to his vehicle as a third-party tried to block him inside the parking lot. However, the petitioner was able to get away, and in so doing, knocked the victim to the ground.

The grand jury indicted the petitioner for first-degree robbery and assault during the commission of a felony. Pursuant to a plea agreement, the petitioner pled guilty to first-degree robbery, and the State dismissed the assault during the commission of a felony charge. The parties remained free to argue their respective sentencing positions. The plea agreement specifically stated that the State intended to recommend a sentence of seventy years of incarceration and that the trial court was not bound to follow either party's sentencing recommendation.

The petitioner underwent a psychological evaluation to support his recommendation for a thirty-year sentence. Edward Baker, Ph.D., diagnosed the petitioner with polysubstance abuse disorder (K-2, cocaine, and Subutex) and unspecified personality disorder with antisocial and narcissistic traits. Dr. Baker found that the petitioner's criminal history was consistent with his

¹ The petitioner appears by counsel Elgine Heceta McArdle, and the State appears by Attorney General Patrick Morrissey and Deputy Attorney General Andrea Nease Proper.

² The petitioner was approximately forty years old at the time of the robbery.

antisocial personality traits and was related to his drug use.³ Dr. Baker stated that the petitioner had not availed himself of treatment programs in the community and had never been in a formal drug treatment program. For example, Dr. Baker noted that petitioner went to a few Alcoholics Anonymous meetings “for parole reasons,” but “was never committed to sobriety.” However, Dr. Baker determined that, with treatment and sobriety, the petitioner likely would not engage in behavior that endangers others. Dr. Baker recommended intensive drug treatment during the petitioner’s incarceration and thereafter, including placement in a long-term residential facility for at least twelve months following his release from prison. Dr. Baker stated that counseling should address “[the petitioner’s] criminal thinking styles of denial and narcissism.”

At the petitioner’s sentencing hearing, Dr. Baker testified that the petitioner could be a productive member of society if he maintains his sobriety but acknowledged that there was no way of predicting whether the petitioner would successfully complete rehabilitation. During his allocution, the petitioner apologized to the victim and stated that he indulged in extensive drug use for several years. However, the victim stated that the robbery caused her to lose trust in people and to keep her purse wrapped around her arm. As the victim’s belongings were not retrieved, she noted that she changed the locks to her residence and her vehicle and expressed the concern that “[her] identity was out there somewhere.” The victim indicated that the contents of her purse had financial and sentimental value. The victim stated that the petitioner’s actions aggravated her arthritis and that she just finished physical therapy. The State introduced photographs of the injuries to the victim’s arms and hands.

While the petitioner argued that a thirty-year sentence would provide for both his punishment and rehabilitation, the trial court stated that it could not tolerate violence toward a senior citizen, explaining that “it’s fortunate that [the victim] wasn’t run over and killed in this case” as the petitioner drove away while the victim was attempting to get her purse out of his vehicle. Nevertheless, the trial court did not adopt the State’s recommendation of a seventy-year sentence. Rather, the trial court imposed a sentence of sixty years of incarceration.

The petitioner appeals the trial court’s November 2, 2022, sentencing order. This Court “reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). We have held that “[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.” Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). However, because West Virginia Code § 61-2-12(a) does not set a maximum term for first-degree robbery,⁴

³ In the presentence investigation report, the probation officer noted that the petitioner had a criminal history dating back to 2009, including four prior felony convictions: (1) possession with intent to deliver marijuana; (2) fraudulent prescription, Suboxone; (3) grand larceny, and (4) entering without breaking.

⁴ West Virginia Code § 61-2-12(a)(1) provides, in pertinent part, that “[a]ny person who commits . . . robbery by: (1) [c]ommitting violence to the person . . . is guilty of robbery in the first degree and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than ten years.”

proportionality review is available pursuant to Article III, Section 5 of the West Virginia Constitution.⁵

On appeal, the petitioner argues that the sixty-year sentence imposed by the trial court is disproportionate because a lesser sentence would allow him to rehabilitate himself and become a productive individual in society. We have identified two tests to determine whether a sentence is so disproportionate to a crime that it violates the state constitution. *State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1982). As we explained in *Cooper*,

The first [test] is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test we spelled out in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981):

In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

⁵ In Syllabus Points 3 and 4 of *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981), we held:

“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).

While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is . . . no fixed maximum set by statute

Relying on *State v. Benny W.*, 242 W. Va 618, 857 S.E.2d 679 (2019), the State argues that the petitioner has inadequately raised the proportionality issue. However, this Court indicated that the “more important[]” reason that we did not conduct a proportionality analysis in *Benny W.* was because the sentences imposed there had fixed maximums and so a proportionality analysis was not available. *Id.* at 633, 857 S.E.2d at 694. In contrast, it is undisputed that constitutional proportionality review is available in the instant case due to the lack of a fixed maximum sentence for first-degree robbery. Therefore, we will review the proportionality of the petitioner’s sixty-year sentence.

Id. at 272, 304 S.E.2d at 857.

Regarding the subjective test, in *Cooper*, we reversed a forty-five-year sentence for robbery imposed upon a nineteen-year-old individual based on his crime, age, and prior record. *Id.* at 272-74, 304 S.E.2d at 857-59. While in this case the petitioner posits that his age supports a shorter sentence because a person tends to commit less crime as the person ages, the State argues that the generalization the petitioner makes does not apply to his case because he committed a violent robbery when he was nearly forty years old. In addition, petitioner was much younger than the seventy-eight-year-old victim, who suffered injuries and an aggravation of her arthritis. Therefore, we concur with the trial court's determination that the petitioner caused a substantial risk to the victim's health and life, and find that, in these circumstances, the sixty-year sentence imposed on the petitioner does not shock the conscience of this Court and society.

Regarding the objective test, in *State v. Williams*, 205 W. Va. 552, 519 S.E.2d 835 (1999), this Court considered sentences for robbery that were upheld in numerous jurisdictions to find that the eighteen-year-old defendant's fifty-year sentence was constitutionally proportionate to the character and degree of the offense. *Id.* at 558, 519 S.E.2d at 841. We have already discussed the extent to which the petitioner's and the victim's ages affected the character of the robbery committed in this case and found that there was a substantial risk to the elderly victim. We further find that the petitioner's rehabilitation argument is belied by the record which shows that he had little or no interest in substance abuse treatment prior to his conviction. Therefore, we conclude that the petitioner's sixty-year sentence is constitutionally proportionate to the character and degree of his offense.

For the foregoing reasons, we affirm the Circuit Court of Ohio County's November 2, 2022, sentencing order.

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