

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) **No. 22-951** (Berkeley County CC-02-2022-F-148)

Ricardo Jermaine Jennings,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Ricardo Jermaine Jennings appeals the Circuit Court of Berkeley County's November 15, 2022, order that sentenced him to determinate, consecutive terms of incarceration of five years for wanton endangerment, five years for possession of a firearm by a prohibited person, and one year for fleeing in a vehicle.¹ On appeal, he argues that the court abused its discretion by imposing consecutive sentences and considering an impermissible factor at sentencing. 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).

In May 2022, the petitioner was indicted for two counts of possession of a firearm by a prohibited person, three counts of wanton endangerment, and one count of fleeing from law enforcement with reckless indifference. The petitioner entered into a plea agreement with the State in August 2022, whereby he agreed to plead no contest to one count of wanton endangerment, one count of possession of a firearm by a prohibited person, and one count of misdemeanor fleeing from law enforcement in a vehicle. In exchange, the State agreed to remain silent as to sentencing, not seek a recidivist sentence enhancement, and dismiss all remaining counts in the indictment.

At sentencing, the petitioner, through counsel, advised the circuit court that his charges had resulted in proceedings to revoke his federal supervised release pertaining to a 2003 conviction for second-degree murder and that, upon the revocation of his supervised release, he would be required to serve between thirty-five and forty-seven months imprisonment, which he claimed would be imposed consecutively to the sentence imposed by the circuit court. The petitioner requested the court to order concurrent sentences so that he could begin to serve his federal sentence sooner. The petitioner noted that, during his prior incarceration, he had received his high school diploma, GED, and certificates in carpentry, psychology, and culinary arts. The petitioner also pointed out that his

¹ The petitioner appears by counsel B. Craig Manford. The respondent appears by Attorney General Patrick Morrissey and Deputy Attorney General Andrea Nease Proper.

first conviction (distribution of cocaine) occurred over twenty years ago and claimed his second-degree murder conviction was the result of a jury compromise. The petitioner noted that he had maintained gainful employment and was active in the lives of his five children. Lastly, the petitioner claimed that the basis of his wanton endangerment charge—the discharge of a firearm—was accidental. The petitioner also exercised his right to allocution and spoke of his plan to start a nonprofit organization aimed at diverting children away from the drug culture.

The circuit court acknowledged the petitioner’s “industriousness” since his release from federal prison, his educational achievements, and the fact that “the federal government has basically locked in fairly punitive sentences for violations of its supervised release.” However, the circuit court expressed concern over the petitioner’s criminal history, the nature of the offenses, and his possession of a firearm. The court also noted that the petitioner was benefiting from the plea agreement, in that he was avoiding exposure to certain sentencing enhancements. Ultimately, the circuit court sentenced the petitioner to a determinate term of five years of imprisonment for possession of a firearm by a prohibited person, five years of imprisonment for wanton endangerment, and one year of imprisonment for fleeing from law enforcement in a vehicle. The court ordered that the sentences be served consecutively, with the sentence for fleeing from law enforcement in a vehicle to be served first.

On appeal, the petitioner argues that that the circuit court abused its discretion in sentencing him to consecutive sentences. According to the petitioner, these consecutive sentences are disproportionate, excessive, and shock the conscience of this Court and society because his federal supervised release will be revoked, and any sentence imposed will run consecutively with his state sentences. He also claims that consecutive sentencing is excessive given that he demonstrated that the basis of his wanton endangerment charge—discharge of a firearm—was accidental.

We review “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 consistently maintained that our review of sentencing orders is limited. “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.” Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). We have also held that “[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.” Syl. Pt. 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).

Here, the petitioner’s sentences are undisputedly within statutory limits with fixed maximum sentences, and he was not sentenced pursuant to a recidivist statute.² While the

² West Virginia Code § 61-7-7(b)(1)-(2) provides that any person who has been convicted of a “felony crime of violence against [another] person” and “possesses a firearm . . . shall be guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than five years.” West Virginia Code § 61-7-12 provides that any person convicted of wanton endangerment involving a firearm “shall be confined in the penitentiary for a definite term of years of not less than one year nor more than five years.” Lastly, West Virginia Code § 61-5-

petitioner claims that running his sentences consecutively, rather than concurrently, resulted in a disproportionate sentence, we have long held that “[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). The fact that the petitioner was facing a federal post-revocation sentence, which is a continuation of the legal consequences of his unrelated second-degree murder conviction, did not preclude the circuit court from running his state sentences consecutively, nor does it rise to the level of a disproportionate sentence. The circuit court set forth several reasons for why it believed consecutive sentences were necessary, including the nature of the offenses, the petitioner’s significant criminal history, his possession of a firearm despite knowing he was prohibited from possessing one, and the court’s duty to the public. Upon review, we find no error in the circuit court’s decision to order that the petitioner’s sentences be served consecutively.

Petitioner also argues that the circuit court considered an impermissible factor when it considered the plea agreement and noted that the petitioner received a “significant reduction in exposure by virtue of his plea agreement.” Petitioner claims that, in so doing, the circuit court usurped the role of trier of fact, assumed that a jury would have found the petitioner to be a recidivist, and imposed a harsher punishment to account for the State’s leniency.

We are unable to conclude that the circuit court’s remarks regarding the plea agreement constitute an impermissible factor. “[T]he impermissible factors a court should not consider in sentencing include such matters as ‘race, sex, national origin, creed, religion, and socioeconomic status’ *United States v. Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991).” *State v. Moles*, No. 18-0903, 2019 WL 5092415, at *2 (W. Va. Oct. 11, 2019) (memorandum decision). The statements about which the petitioner complains are not categorically prohibited under these considerations. Moreover, while the petitioner claims that the court’s mention of the favorable terms of his plea agreement meant that it had presumed that he would have been found a recidivist, such an assertion is not supported by the record. To the contrary, the circuit court mentioned several times that the petitioner simply avoided “exposure” to certain enhancements and did not make any findings as to his guilt. Accordingly, we find the petitioner is entitled to no relief in this regard.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 30, 2024

17(e) provides that any person convicted of fleeing from an officer in a vehicle “shall be confined in jail not more than one year.”

CONCURRED IN BY:

Chief Justice Tim Armstead

Justice Elizabeth D. Walker

Justice John A. Hutchison

Justice William R. Wooton

Justice C. Haley Bunn