

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 23-17 (Kanawha County 21-F-110)

Dekotis E. Thomas,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Dekotis E. Thomas appeals the sentencing order entered by the Circuit Court of Kanawha County on December 8, 2022, sentencing him to imprisonment for life without mercy for his first-degree murder conviction.¹ He argues the circuit court committed plain error and abuse of discretion in sentencing him to life without mercy for first-degree murder after considering remarks wrongfully attributed to him. 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 charged in an eight-count indictment with first-degree murder following an October 2019 shooting; the use or presentment of a firearm during the commission of a felony in October 2019; two counts of wanton endangerment in October 2019; one count of first-degree murder resulting from an April 2021 shooting; the use or presentment of a firearm during the commission of a felony in April 2021; and two counts of wanton endangerment in April 2021. Sometime thereafter, the parties negotiated a plea agreement wherein the petitioner agreed to plead guilty to one count of first-degree murder involving the death of Kelvin (“KJ”) Taylor, Jr., in April 2021, who was the unintended target of a drive-by shooting that the petitioner instigated, in exchange for the State’s dismissal of all other counts of the indictment. The agreement advised that the maximum penalty that could be imposed was imprisonment for life, and the State agreed to stand silent during the mercy recommendation. Both parties agreed the plea would be pursuant to *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987), which allows an accused to consent to imposition of a prison sentence even though he is unwilling to admit participation in the crime; however, the State would give a factual basis for the guilty plea.

During the plea hearing, the circuit court inquired about the terms of the parties’ agreement, including the specific charge to which the petitioner would plead guilty and the possible maximum sentence. The court conducted a plea colloquy and informed the petitioner of his constitutional

¹ The petitioner appears by counsel Joseph H. Spano, Jr., and the State appears by Attorney General Patrick Morrissey and Deputy Attorney General Andrea Nease Proper.

rights, during which the petitioner responded appropriately. The petitioner was again advised of the maximum penalty for first-degree murder, i.e. incarceration for life without the possibility of parole. The State then laid the factual foundation for the plea. After the petitioner tendered a verbal and written plea, the court found the petitioner's guilty plea to first-degree murder was freely and voluntarily made. The petitioner requested a forensic psychological evaluation ("evaluation") prior to sentencing, and the court granted that request. A presentence investigation was also requested, and the sentencing hearing was scheduled.

At the sentencing hearing, the circuit court asked if the parties received the presentence report, and the petitioner's counsel responded affirmatively. The court also asked for any corrections or additions that the petitioner's counsel wished to be made. In response, the petitioner's counsel advised, "No, Your Honor. I conferred with my client today and previous to this week. We do not see any additions or corrections, Your Honor. I think it's very thorough, and we don't see any." The court also received the West Virginia Crime Victim's Compensation Fund supplemental report and the petitioner's evaluation. The petitioner's counsel then argued for mercy because of the petitioner's "rough childhood" and lack of support during his development, as demonstrated in the evaluation. The court, however, noted the evaluator's conclusion, "[The petitioner] at least has the potential to improve his capacity for rational decision-making and impulse control in the years to come; however, it is not possible to predict with an acceptable degree of professional certainty whether he will avail himself of that potential." The petitioner apologized to KJ's family for their loss and said he "hate[d] that they all have to go through this," that KJ's "spirit will always be with them every step of the way," that he would "forever keep them in [his] prayers," and that "[i]t was never his intention to hurt KJ." After the petitioner personally addressed the court, KJ's mother explained the impact of her only child's murder upon her and her husband. She requested more than once that the petitioner be sentenced to life without mercy for her son's killing. Another close relative of KJ's expressed the effect the killing had upon him as well.

Before pronouncing sentence, the circuit court stated,

And what is remarkable, as I read the presentence report, are your remarks and your words which I'm going to read right back to you, Mr. Thomas, and you glibly said that KJ was a casualty of war, and all wars have casualties, and that [the intended victim] was a dead man walking, and nobody should be walking beside a dead man walking.²

So whether or not it was KJ or not, you, sir, were intent on killing. And you have zero remorse. That is hardly impulsive behavior.

The court considered the petitioner's criminal history, which included first-degree robbery, possession of a firearm by a prohibited person, and another murder charge; his failure to accept responsibility; his lack of cooperation with law enforcement including a standoff with federal law enforcement officers in Ohio during which the petitioner set a residence on fire and threw Molotov

² According to the presentence report, detectives spoke with an individual whose relative relayed the petitioner's statements to that individual.

cocktails at law enforcement; and the petitioner's fighting extradition to West Virginia on the instant charge. In rendering its sentence, the court remarked,

“[I]n your case, [your] behavior has been, and is, in my view, likely will continue to be menacing, and I believe in the best interest of the protection of the public and in protecting society, in my view, sir, it is best to permanently remove you from it, and I am going to sentence you to life without mercy.”

On appeal, the petitioner argues the circuit court committed plain error and abuse of discretion by considering statements improperly attributed to the petitioner in sentencing him to life without mercy for first-degree murder. The “plain error” doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made. *State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995). “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* at 7, 459 S.E.2d at 118, Syl. Pt. 7.

Our review of the record reveals petitioner's counsel informed the court at sentencing that he and the petitioner had conferred more than once and had no changes or additions to the “thorough” presentence report. The court, therefore, did not commit error in considering the contents of the report at sentencing. The petitioner's inability to meet the first prong of the conjunctive *Miller* test is fatal to his claim. *See id.* Assuming arguendo the “casualty of war” and “dead man walking” comments were, indeed, improperly attributed to the petitioner, significant other information was available to and relied upon by the court in formulating the petitioner's sentence. Specifically, the court possessed the petitioner's psychological evaluation advising of his capacity to improve rational decision-making and impulse control, but no prediction could be made as to whether the petitioner would avail himself of that potential; the petitioner's lack of actual remorse about the killing; the petitioner's criminal history, which includes first-degree robbery, possession of a firearm by a prohibited person, and another murder charge; his lack of cooperation with law enforcement including a standoff with federal law enforcement officers during which the petitioner set a house on fire and threw Molotov cocktails at law enforcement; the petitioner's fighting extradition to West Virginia on the instant charge; five handwritten victim impact statements from family; the telephonic victim impact statement of a close cousin during the sentencing hearing; and the victim impact statement of KJ's mother requesting the court sentence petitioner to life without mercy.

Moreover, Syllabus Point 4 of *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982), 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 (W. Va. Aug. 31, 2022) (memorandum decision). The petitioner does not allege that any impermissible factors were considered when the court imposed his sentence. The petitioner's sentence was also within statutory limits. The court's thoughtful, detailed analysis encompassed the relevant information and interests before it. Consequently, we conclude the court did not commit plain error and did not abuse its discretion in sentencing the

petitioner to the maximum sentence for first-degree murder. Accordingly, we find the petitioner's assignment of error is 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