IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 18-0481

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

KRISTAFER AVERY BLECK,

Defendant Below, Petitioner.

SUMMARY RESPONSE

ON APPEAL FROM
THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA,
CASE NO. 17-F-88

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I.

INTRODUCTION

The State of West Virginia, by counsel, Shannon Frederick Kiser, Assistant Attorney General, West Virginia Office of the Attorney General, herein responds to the brief on appeal filed by Kristaffer Avery Bleck ("Petitioner"), following the denial of his Motion under Rule 35(a) of the West Virginia Rules of Criminal Procedure by the Circuit Court of Jefferson County, West Virginia ("circuit court"). On appeal, Petitioner claims that the circuit court erred in sentencing him to a term of incarceration, because it inappropriately considered a previously-expunged charge of domestic assault. Petitioner, however, failed to correct the alleged error in the presentence investigation report, and failed to object to the State's utilization of the charge for purposes of arguing in favor of his incarceration. As a result, Petitioner was incarcerated pursuant to the recommendation provided in the plea agreement. Because of Petitioner's failure to object to the alleged error at the time it occurred, it is subject to plain error analysis. As discussed below, Petitioner fails to show that he is entitled to remand for purposes of resentencing under the plain error doctrine.

II.

STATEMENT OF THE CASE

A. Statement of Facts

On March 14, 2016, Petitioner and Mr. Hess forced their way into the residence of Kory Farmer and assaulted him. They strangled him, held a knife to his throat, and beat him physically to the point that he had a black eye and severe lacerations to his wrist, head, chin, and throat. (Appendix Record ["AR"] at 28.) Specifically, Mr. Farmer was home with his two-year-old son on the night of the 14th, when his girlfriend texted him and told him that she was going to the Dollar Tree to obtain Tums. (AR at 135.) Five minutes later, there was a knock at his door. (*Id.*) When he opened the door, no one was there. (*Id.*) He closed the glass front door of the house and turned the on flashlight on his phone to investigate further, but was surprised by two men. (*Id.*; *see also* AR at 110.) Mr. Hess was wearing a clown mask, and Petitioner did not conceal his identity. (AR at 110.) While Mr. Farmer attempted to fight them back, the two men, Petitioner and Mr. Hess, held Mr. Farmer down and tried to choke him out. (AR at 135.)

Eventually, Petitioner held a hunting knife to Mr. Farmer's throat and told him "if you move I will fucking slit your throat." (AR at 135-36.) Mr. Farmer stopped resisting, and heard his two-year-old son, behind him crying. (AR at 136.) About this time, Mr. Hess reappeared carrying Mr. Farmer's gun safe, and demanding to know "where's the fucking shotgun." (*Id.*) Mr. Hess then dragged Mr. Farmer into a back room of the house, knocking over the Mr. Farmer's two-year-old son in the process. (*Id.*) Mr. Hess and Petitioner then grabbed Mr. Farmer's shotgun and told him that if he moved, they would "fucking blow [his] head off." (*Id.*)

Mr. Farmer, fearful for his life, managed to flee from the window of the back room to his girlfriend's parents' house to contact police. (*Id.*) He later acknowledged that he left his son back

at the house, because he knew that the guns Petitioner and Mr. Hess stole were loaded and he did not want to cause them to start firing by reinitiating a confrontation. (*Id.*) He also believed that Petitioner and Mr. Hess had left the residence by the time he attempted to escape. (AR at 137.) As a result, the two-year-old boy was left alone on the front porch, terrified and crying. (AR at 138.)

The ensuing investigation of the crime thereafter revealed that Mr. Hess and Mr. Farmer's girlfriend, Megan Henshaw, were having an affair. (AR at 109.) Mr. Hess started pressuring Ms. Henshaw to steal Mr. Farmer's guns. (*Id.*) On the date of the crime, Mr. Farmer and Ms. Henshaw were involved in argument, and she ultimately organized a time wherein Mr. Farmer would be alone with his son at the house so that Mr. Hess could rob him. (*See* AR at 109-10.)

Meanwhile, Mr. Hess convinced Petitioner that the Mr. Farmer had molested his own son and physically assaulted Ms. Henshaw. (AR at 29.) Mr. Hess therefore sought Petitioner's "help" in rescuing them. (AR at 29.) While the police investigation later revealed that Mr. Hess was, in fact, involved in a plot with the victim's girlfriend to steal the victim's firearms, Petitioner and Mr. Hess travelled to the victim's home, forced their way in, physically harmed the victim, and took the victim's safe and guns. (*Id.*) Surprisingly, although Petitioner claimed he was there to rescue Mr. Hess's friend and her child, the pair left the small child there, alone, terrified, and wondering what had happened to his father. (*See generally* AR at 147.) Indeed, the image of Mr. Farmer's terrified child is an image that later haunted Petitioner every day thereafter. (*Id.*)

B. Procedural History

On April 19, 2017, a Jefferson County Grand Jury returned a multi-count indictment against Petitioner, charging him with one count of first degree robbery ("Count 1"), one count of felony conspiracy ("Count 2"), one count of assault in the commission of a felony ("Count 3"), and one count of burglary ("Count 4"). (AR at 7-9.) Thereafter, on January 26, 2018, the State

extended Petitioner a plea offer wherein Petitioner would plead "no contest" to Counts 2, 3 and 4, and the State would agree to drop the most severe charge of first degree robbery. (AR at 12.) Moreover, the State identified that it would recommend concurrent sentencing, resulting in "an overall sentence of not less than two years nor more than fifteen years in the penitentiary." (AR at 13.) Petitioner accepted the plea offer (AR at 15), and was convicted of the counts agreed-to therein on January 31, 2018. (AR at 16-17.)

Prior to sentencing, Petitioner moved for probation, arguing: (1) he was not a danger to the community; (2) he was gainfully employed and responsible for caring for his family; (3) he had a low risk of re-offending; and (4) "his continued supervision by Probation, instead of incarceration, [was] the most effective course for his rehabilitation." (AR at 18.) Petitioner further argued that he had no prior felony convictions, "but rather three misdemeanor convictions dating back six years ago in 2012 (Driving Revoked . . .), 2011 (DUI . . .), and 2010 (Obstruction . . .)." (AR at 18-19.) Petitioner further argued that he merely "thought [he and his co-defendant] were going to help a friend of Hess's that was being held against her will." (AR at 19.) Petitioner also attempted to minimize that fact that the victim received a laceration to his throat (caused by Petitioner's holding a knife there), and "was beaten to the point [where the victim] had staples placed in his head and wrist." (AR at 21.) Ultimately, Petitioner conveyed that he was "extremely remorseful" for the crime he committed. (AR at 24.)

The circuit court held Petitioner's sentencing hearing on April 9, 2018. (AR at 120.) During the hearing, the circuit court accepted the presentence investigation report ("PSI report") with clarification from Petitioner regarding his statement to police, and clarification from the State regarding Petitioner's drug and alcohol use prior to the crime. (*See* AR at 121-23.) There were no other material inaccuracies address by either party regarding the PSI report. (AR at 123.)

Petitioner's mother, Tina Bleck, then made a statement to the circuit court. (AR at 124.) She contended that Petitioner did not go to Mr. Farmer's residence with the intent to rob him, but rather believed he was assisting Mr. Hess "to help [Ms. Henshaw] and her son get out of this abusive situation." (AR at 125.) Petitioner's wife, Katelyn Bleck, testified to much the same, stating that she "knew [Mr. Hess] wasn't a good person[,]" and that Petitioner would not have agreed to accompany Mr. Hess if he knew that the entire purpose of Mr. Hess's plan was to rob Mr. Farmer. (AR at 126-28.) Finally, counsel for Petitioner incorporated his motion for probation, which included a statement from Petitioner's father-in-law, which contended that Petitioner "displays honorable intentions to do the right thing by those around him[, including] his family and friends and, yes, even strangers." (AR at 129-30.)

Petitioner also referenced the PSI report's finding that Petitioner is a provider for his family, and that he maintained gainful employment even throughout his criminal proceedings. (AR at 130.) He noted that his criminal record only contained three prior misdemeanors, for which he completed probation. (*Id.*) And he urged the court to find that he was "hoodwinked" into committing the crime against Mr. Farmer. (AR at 130-33.) As such, Petitioner requested the circuit court to alternatively sentence him to probation. (AR at 133.)

In response, the State called Mr. Farmer to provide a victim statement. (AR at 134.) Mr. Farmer testified that he was brutally injured by Petitioner and Mr. Hess during a home invasion, that Petitioner threatened to kill him while holding a large knife to his throat (so tightly that it caused a laceration to Mr. Farmer's throat), that Petitioner and Mr. Hess forced him to knock over his toddler son, and that Mr. Hess and Petitioner fled his property with stolen guns and left his son crying on the front porch. (AR at 134-37.) He testified that he did not know Petitioner prior to the crime. (AR at 138.) As a result of Mr. Hess's and Petitioner's brutality, Mr. Farmer suffered a

laceration to his wrist which required three staples; a laceration to his chin which required stitches; and a laceration to his head which also required staples. (AR at 139-40.) Mr. Farmer agreed with the State's recommendation of a cumulative sentence of two (2) to fifteen (15) years. (AR at 143.)

After Mr. Farmer's testimony, the State reiterated its sentence recommendation and argued that, while Petitioner receives some mercy because of Mr. Hess's likely deception, Petitioner was still involved in a violent home invasion robbery. (AR at 144.) The State challenged Petitioner's motivations for committing the crime, however, noting that, prior to the crime, Petitioner consumed alcohol and cocaine. (AR at 145.) The State also noted Petitioner's familiarity with the law, identifying that his first misdemeanor charge was an obstruction charge to which he pled guilty in exchange for the State's dismissal of a domestic assault charge. (AR at 145-46.) Petitioner did not object to this summarization. (*See generally id.*)

Defendant then spoke to the circuit court, apologizing to the victim and identifying that he was haunted by the sheer terror experienced by the victim's son:

> I would like Mr. Farmer to know that I see his son's face every time I close my eyes. I hear his voice screaming every night. It's haunted me and it will continue to haunt me as it should. I take full responsibility for that. I would give anything to take it back but I can't. That's why I took the agreement the Court offered.

(AR at 147.) Afterwards, the circuit court sentenced Petitioner to the recommendation provided within the plea agreement. (AR at 148-49.) The court revealed that, "if this was the first violent act of [Petitioner it] might consider probation, but we had a 2010 domestic assault that was also part of our record in the PSI[.]" (AR at 148.) The court also concluded that "the State has granted a plea agreement that gives [Petitioner] the benefit of him accepting responsibility but he still needs to serve some time for his conduct in this event." (*Id.*) Petitioner did not object to the circuit court's findings. (*See* AR 148-50.)

Following his sentencing, Petitioner moved for a reconsideration of sentence under Rule 35 of the West Virginia Rules of Criminal Procedure. (AR at 43.) Therein, Petitioner contended that the circuit court improperly considered the information from the PSI report which indicated that Petitioner's domestic assault charge in 2010 was dismissed as part of a plea agreement wherein Petitioner pled no contest to an obstruction charge. (AR at 46.) Petitioner argued that the Berkeley County Magistrate Court had no record of an arrest or dismissal in 2010 for domestic assault or battery. (*Id.*) Rather, the arrest was expunged pursuant to W. Va. Code § 61-11-25. (AR at 48.) Thus, Petitioner asserted that the circuit court inappropriately relied upon the PSI report's contention that he was previously arrested for domestic assault. (*Id.*)

The circuit court denied Petitioner's motion for reconsideration on June 4, 2018. (AR at 152.) Petitioner now appeals, arguing that the circuit court abused its discretion by denying his motion for reconsideration and sentencing him to a period of incarceration rather than placing him on probation. (*See* Pet'r's Br. at 4.)

III.

ARGUMENT

A. Standard of Review

This Court applies a three-pronged standard of review to the findings of fact and conclusions of law made by a circuit court on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure. Syl. Pt. 1, *State v. Tex B.S.*, 236 W. Va. 261, 778 S.E.2d 710 (2015) (citing Syl. Pt. 1, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996)). The circuit court's decision is reviewed under an abuse of discretion standard, the facts are reviewed under a clearly erroneous standard, and questions of law are subject to a *de novo* review. *Id.* This Court "reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates

statutory or constitutional commands." Syl. Pt. 2, *State v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010) (citing Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)). Generally, "[s]entences imposed by the trial court, it 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).

B. Plain Error Review.

"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." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The plain error doctrine should "be used sparingly and only in those circumstances in which a miscarriage of justice would otherwise result." Syl. Pt. 2, *State v. Hatala*, 176 W. Va. 435, 345 S.E.2d 310 (1986). As such, even when all requirements of the plain error doctrine are met, "whether to correct error remains discretionary with the appellate court." *State v. LaRock*, 196 W. Va. 294, 317, 470 S.E.2d 613, 636 (1996).

C. The Circuit Court's Reliance on the PSI Report's Information Regarding Petitioner's Expunged Criminal Charge for Domestic Assault Was Not an Impermissible Factor for Purposes of Sentencing, and Did Not Constitute Plain Error.

On appeal, Petitioner challenges that the circuit court's reliance on an expunged criminal charge during sentencing (as to whether Petitioner should be alternatively sentenced to probation), was an impermissible factor despite (1) his failure to object to such a finding below, and (2) the State's ability to use such information in subsequent prosecutions. A criminal defendant's contention that the sentencing court utilized an impermissible factor in determining how to sentence him is a question of law which is reviewed *de novo* by this Court. *State v. Jones*, 216 W. Va. 666, 669, 610 S.E.2d 1, 4 (2004). However, precedent in this State allows a sentencing court

to utilize factors such as a person's involvement in the crime, prior criminal records, rehabilitative potential, post-arrest conduct, age, maturity, remorse, credibility, and whether that person took responsibility for the crime charged. *See Jones* at Syl. Pts. 5-6.

Here, Petitioner challenges facts as reported in his PSI report. This Court has observed that "[a]ny facts which would have a bearing on the sentencing should be brought out in the presentence report or by witnesses called in open court in the presence of the defendant so that the defendant has an opportunity to refute" such evidence. *State v. Maxwell*, 174 W. Va. 632, 636, 328 S.E.2d 506, 510 (1985). Pursuant to W. Va. R. Crim. P. 32(b)(6):

> (B) Within a period prior to the sentencing hearing, to be prescribed by the court, the parties shall file with the court any objections to any material information contained in or omitted from the presentence report.
>
> (C) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

The information contained in the presentence investigation report allows the sentencing court to make a proper determination of whether "the character of the offender and the circumstances of the case indicate that he is not likely again to commit crime and that the public good does not require that he be fined or imprisoned. . . ." W. Va. Code § 62-12-3; *see also Sattler v. Holliday*, 173 W. Va. 471, 474, 318 S.E.2d 50, 53 (1984).

Petitioner also argues that his prior domestic assault charge was expunged, and that the circuit court's observation of such an arrest during sentencing was an impermissible factor for purposes of sentencing him to a period of incarceration. A criminal defendant who has been acquitted of a charge or had a charge dismissed may seek expungement of that charge from his

criminal record. *See* W. Va. Code § 61-11-25. Expungement of a criminal charge typically results that charge remaining undisclosed to private parties and government agencies:

> Upon expungement, the proceedings in the matter shall be deemed never to have occurred. The court and other agencies shall reply to any inquiry that no record exists on the matter. The person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit or other type of application.

W. Va. Code § 61-11-25(e). However, expungement does not necessarily exclude a prosecutor from disclosing that charge in conjunction with later criminal proceedings:

> Inspection of the sealed records in the court's possession may thereafter be permitted by the court only upon a motion by the person who is the subject of the records *or* upon a petition filed by a prosecuting attorney that inspection and possible use of the records in question are necessary to the investigation or prosecution of a crime in this state or another jurisdiction. If the court finds that the interests of justice will be served by granting the petition, it may be granted.

W. Va. Code § 61-11-25(f).

Taken together, Petitioner must prove that his expunged criminal charge was an impermissible factor for purposes of sentencing and that the circuit court's reliance on the charge was plain error. He cannot. The PSI report prepared for purposes of Petitioner's sentencing includes all of Petitioner's criminal history, and it necessarily includes his expunged arrest for domestic violence. The inclusion of such a charge on a PSI report for purposes of criminal adjudication falls outside of the purview of protections afforded under W. Va. Code § 61-11-25, which specifically prevents dissemination of expunged charges to private parties such as creditors and employers. Indeed, W. Va. Code § 61-11-25(f) provides an avenue for prosecutors to use information in the form of expunged charges in future criminal proceedings. As such, the circuit court's reliance on such information is not "(1) an error, (2) that is plain." Syl. Pt. 7, *Miller*.

Even assuming, *arguendo*, that the PSI report's inclusion of Petitioner's expunged criminal charge without first having the State file a petition to release such information was error, it did not affect Petitioner's substantial rights or result in manifest injustice. Rather, it was information which *could* be obtained by the State and was certainly relevant to Petitioner's criminal proceedings. Petitioner's prior act of violence, demonstrated by his domestic violence arrest, was an important factor in determining whether Petitioner should be incarcerated for committing a violent home invasion which resulted in severe bodily harm to Mr. Farmer. Because Petitioner's prior criminal records are permissibly considered under *Jones*, the circuit court did not commit error in finding that Petitioner was not a suitable candidate for probation.

Further, the facts of Petitioner's case support incarceration. While Petitioner contends that he only went along with Mr. Hess to free Ms. Henshaw and her two-year old son from Mr. Farmer, we willingly complied in the theft of Mr. Farmer's property and the violence against Mr. Farmer's person. Notably, he willingly left the two-year-old child (who he allegedly went there to rescue) crying and terrified on the front porch. At no point did Petitioner try to stop Mr. Hess upon "finding out" that the reason for being there was actually a robbery. Instead, Petitioner went along with Mr. Hess and helped commit the crime to its fruition. As a result, the circuit court sentenced Petitioner to the term of incarceration recommended in the plea agreement. Petitioner was therefore previously notified of the sentence he received, as he agreed to a plea offer extended by the State which informed him of such a sentence. Thus, Petitioner's sentencing is statutorily permissible, the least restrictive period of incarceration, and supported by the evidence.

As such, this Court should find as follows on review: (1) Petitioner's assignment of error is subject to plain error analysis because of his failure to object to the PSI report at the time of sentencing; (2) the circuit court's observation of Petitioner's expunged domestic assault charge

was not plain error, because such relevant information may be utilized by the State in subsequent prosecutions; (3) the circuit court's observation of Petitioner's expunged domestic assault charge was thus not an impermissible factor for purposes of Petitioner's sentencing; (4) the facts below support the circuit court's sentence; (5) the circuit court's sentence was statutorily permissible; and (6) therefore, the circuit court did not abuse its discretion when it denied Petitioner's motion to correct his sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure.

IV.

CONCLUSION

WHEREFORE, the State of West Virginia respectfully requests that this Honorable Court affirm the order of the Circuit Court of Jefferson County, West Virginia.

Respectfully Submitted,

STATE OF WEST VIRGINIA,

***Respondent,* By Counsel,**

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