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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MAR 1 1 2021

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 20-0706
Case No. 19-F-125
Circuit Court of Wood County

SCOTTY JOSEPH BYERS,

Petitioner.

PETITIONER'S REPLY BRIEF

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REPLY STATEMENT REGARDING ORAL ARGUMENT

Petitioner renews his request for oral argument and a signed opinion. Pursuant to the Rules of Appellate Procedure matters of first impression are suitable for Rule 20 arguments before this Court.[1] Respondent conceded that the question of whether appearing virtually at sentencing satisfies the right to be present under West Virginia Rule of Criminal Procedure 43 and West Virginia Code § 62-3-2, and the West Virginia and United States Constitutional Due Process Clauses[2] is an issue of first impression for this Court.[3]

REPLY ARGUMENT

Respondent conceded that use of video conferencing over Petitioner's objection was reversible error. Respondent further acknowledged that every federal court asked to consider the question has reached the same decision.[4] The split in authority among the federal courts on this issue involves the standard of review to apply when a Rule 43 violation is identified. There are two approaches: 1) Rule 43 violations are *per se* prejudicial and require remand for a new sentencing hearing that complies with the personal presence requirement; and 2) upon the finding of a Rule 43 violation the sentencing will stand if the error is proven to be harmless.

As the Respondent conceded that the trial court erred by holding a video sentencing over Petitioner's objection, Petitioner must prevail if this is per-se error. But he also must prevail under a constitutionally-sound harmless error analysis. Those jurisdictions that apply harmless error only permit a sentence to stand if the Respondent

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[1] W.Va. R. App. P., Rule 20.

[2] The United States Constitution contains two Due Process Clauses. The Fifth Amendment applies to the federal government and the Fourteenth applies to the states. However, they are substantively identical so opinions applying the Fifth in federal court are equally binding in the state courts.

[3] Respondent's Brief at 8.

[4] Respondent's Brief at 5.

can prove with certainty that the Petitioner did not receive a harsher sentence.[5] As these courts note, this is almost an impossible task.[6] The Respondent can usually only achieve this standard by showing that the defendant received the absolute lowest sentence possible.

Each case is different, involving a unique set of factors a court may draw from to fashion the appropriate sentence. Courts hold broad discretion to ensure these factors are considered in the sentence and, therefore, the value of face-to-face sentencing cannot be underestimated.[7] That is why when a Rule 43 violation occurs, Respondent must be able to point to unique factors of the case that prove with *certainty* the same sentence would have been imposed had Petitioner been physically present in the court room. It is not enough for the Respondent to assert that Petitioner might have received the same sentence if the hearing would have taken place in person.[8]

This Court follows a similar approach in allocution cases.[9] The right to allocution, as found in W.Va. R. Crim. P. 32(3)(c)(3), mandates that a sentencing court address the defendant personally to determine if the defendant wishes to speak regarding

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5 *Chapman v. California,* 386 U.S. 18, 24 (1967). See Also *United States v. Gillis*, 592 F.3d 696, 699 (6th Cir.2009) (The Respondent must provide the reviewing court "proof with certainty that the error at sentencing did not cause the defendant to receive a more severe sentence.") (internal quotation marks and citation omitted).

6 *United States v. Johnson*, 467 F.3d 559, 564 (6th Cir.2006). (There can be no harmless error unless the appellate court can determine from the record that the same sentence would be imposed on remand.); *United States v. Thompson*, 599 F.3d 595, 601 (7th Cir.2010) (rejecting harmless-error argument where the district court violated Rule 43 by conducting a supervised-release revocation hearing by video conference because "there is no way to know what the judge would have done had he been present ... and face-to-face with [the defendant]").

7 A sentence handed down by a trial court that is within the statutory guidelines, not based on an impermissible factor, and not in violation of a statutory of constitutional command is not subject appellate review. Syl. Pt 4, *State v. Goodnight,* 169 W.Va. 366, 287 S.E.2d 504 (1982); Syl. Pt. 1, *State v. Lucas,* 201 W.Va. 271, 496 S.E.2d 221 (1997).

8 "Although the United States is correct that Williams might have received the exact same sentence if he had been physically present, it has offered nothing to convince us that he certainly would have and, therefore,... we cannot now substitute our judgment for that of the district court and speculate as to what sentence Williams might have received had he been physically present." *United States v. Williams*, 641 F.3d 758, 765 (6th Cir. 2011).

9 Another line of cases that follows a similar line of reasoning from this Court deals with the prosecution's violation of a plea agreement. See *State v. Myers,* 204 W.Va. 449, 513 S.E.2d 676 (1978).

his/her sentencing and mitigation.[10] This Court has consistently held that a violation of the right to allocution by a trial court is *per se* prejudicial and requires remand for a proper sentencing that complies with W.Va. R. Crim. P. 32(3)(c)(3).[11]

The right of allocution has roots in common law. The United States Supreme Court held that while criminal law and its application has changed significantly since the right of allocution was created, the right of allocution still serves an important purpose and should be maintained.[12] "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."[13] Allocution "is designed to temper punishment with mercy in appropriate cases, and to ensure that sentencing reflects individualized circumstances. Furthermore, allocution 'has value in terms of maximizing the perceived equity of the process'. . ."[14] This Court deemed the right of allocution to be so important to a proper sentencing that a trial court must provide the opportunity to every defendant even without a specific request: "the judge or magistrate shall, *sua sponte*, afford to any person about to be sentenced the right of allocution before passing sentence."[15]

As discussed above, Petitioner can meet both standards federal courts apply when analyzing a denial of the right to presence at sentencing. However, Petitioner urges this court to treat a violation of W.Va. R. Crim. P. 43, requiring physical presence, as per se prejudicial just as it currently treats a violation of W.Va. R.Crim.P. 32(3)(c)(3), mandating the right of allocution.[16]

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[10] W.Va. R.Crim.P. 32(3)(c)(3).
[11] *State v. West,* 197 W.Va. 751, 753, 478 S.E.2d 759, 761 (1996); Syl. Pt. 2, *State v. Lawson,* 165 W.Va. 119, 267 S.E.2d 438 (1980); Syl. Pt. 6, *State v. Holcomb,* 178 W.Va. 455, 360 S.E.2d 232 (1987).
[12] *Green v. United States,* 365 U.S. 301, 304 (1961) (Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing.).
[13] Id.
[14] *State v. Posey*, 198 W.Va. 270, 271-72, 480 S.E.2d 158, 159-60 (1996)(internal citations omitted). See also *State v. Bruffey*, 207 W. Va. 267, 272, 531 S.E.2d 332, 337 (2000).
[15] Syl. Pt. 6, in part, *State v. Berrill,* 196 W.V. 578, 474 S.E.2d 508 (1996). See also *U.S. v. Cole,* 27 F.3d 996, 998 (4th Cir.1994) (Because it may be the defendant's only opportunity to address the court, it carries great importance, and its omission will ordinarily justify reversal).
[16] W.Va. R.Crim.P. 32(3)(c)(3)

Petitioner did not receive the alternative sentence that he requested during his virtual sentencing hearing. Petitioner and counsel prepared a plan to present in support of an alternative sentence at his sentencing hearing.[17] While virtual hearings may satisfy the requirements for routine hearings involving little to no disagreement, they cannot take the place of in person hearings when the consideration involves something as important as whether alternative sentencing is appropriate. "The rule [43] reflects a firm judgement, however, that virtual reality is rarely a substitute for actual presence and that even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."[18]

Respondent has failed to provide this Court with any factual representation that proves "*with certainty*" that Petitioner's virtual sentencing did not cause Petitioner to receive a more severe sentence. Respondent cannot prove its assertion that the trial court would not be swayed by presence because the Petitioner was unsuccessful during a previous attempt at substance abuse treatment.[19] Further, it is immaterial that the trial court did not impose the specific sentence requested by the State.[20] The court also did not impose the minimum sentence of incarceration, or the alternative sentence requested by Petitioner. More importantly, it is impossible to say with certainty what sentence the trial court would have imposed if the hearing had taken place in person, as required by W.Va. R. Crim. P. 43 and as requested by the Petitioner.

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[17] Petitioner's Brief 2-3

[18] *U.S. v. Lawrence,* 248 F.3d 300, 304 (2001).

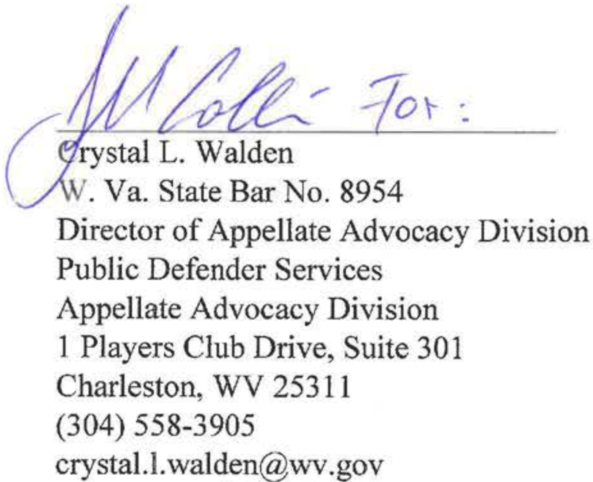
[19] "Moreover, these brain changes endure long after an individual stops using substances. They may produce continued, periodic craving for the substance that can lead to relapse: More than 60 percent of people treated for a substance use disorder experience relapse within the first year after they are discharged from treatment, and a person can remain at increased risk of relapse for many years." (U.S. Department of Health and Human Services (HHS), Office of the Surgeon General, *Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health.* https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf, Chapter 2, page 2-2, November 2016).

[20] Respondent's Brief at 13.

CONCLUSION

Petitioner requests that this Court reverse the trial court's judgment of sentence and remand his case for a new sentencing hearing that complies with W.Va. R. Crim. P. 43's requirement of physical presence.

Respectfully submitted,
Scotty Joseph Byers
By Counsel



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CERTIFICATE OF SERVICE

I, Crystal L. Walden, counsel for Petitioner, Scotty Joseph Byers, do hereby certify that I have caused to be served upon counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Reply"* to the following:

Scott E. Johnson
Office of the Attorney General
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812 Quarrier Street, Sixth Floor
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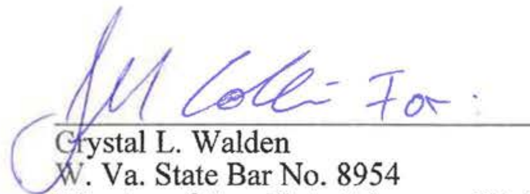
by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 11th day of March, 2021.



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