IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-672

STATE OF WEST VIRGINIA,

Respondent,

v.

RACHEL ADKINS,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the July 22, 2022, Order
Circuit Court of Cabell County
Case No. 15-F-302

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INTRODUCTION

Respondent, State of West Virginia, by counsel, Lara K. Bissett, Assistant Attorney General, responds to Rachel Louise Adkins's ("Petitioner") brief filed in the above-styled appeal. While Petitioner wants this Court to believe that she agreed to accept a binding plea agreement that was later breached by the Court, the record makes clear that, in fact, sentencing remained at the discretion of the trial court all along. Petitioner received the benefit of the bargain she made: four pending charges were dismissed in exchange for her plea to a single count of driving under the influence causing death after she thoughtlessly and recklessly operated a vehicle at a high rate of speed while under the influence of drugs, causing the death of a wholly innocent man and seriously injuring three others, including her own child. That gracious deal allowed Petitioner to trade the possibility of six to ten years of incarceration for just two to ten years. But whatever mercy Petitioner hoped she might receive from the court, it was never a part of the bargain. Because the trial court was not bound to a particular sentence in Petitioner's *Kennedy*[1] plea and because Petitioner was not a model candidate for alternative sentencing in any event, Petitioner has failed to demonstrate the existence of reversible error in her prison sentence. Therefore, this Court should affirm her conviction and sentence.

ASSIGNMENT OF ERROR

Petitioner advances a single assignment of error in her brief: did the circuit court err in denying Petitioner's motion to withdraw her plea? Pet'r's Br. 1.

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[1] *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987).

STATEMENT OF THE CASE

I. Underlying Facts and Indictment.

Petitioner was indicted in 2015 on one count of driving under the influence causing death, one count of driving under the influence of drugs with an unemancipated minor, and three counts of driving under the influence causing bodily injury. App. 331-32. The facts underlying the indictment are these: in November 2014, Cpl. Willis Hash of the West Virginia State Police responded to an automobile accident on Route 10 in Cabell County. App. 5, 39. According to a crash reconstructionist, Petitioner was driving 87 to 90 miles per hour in a 55 miles per hour zone. App. 7; *see also* 56. An eyewitness to the crash had just swerved to avoid being hit by Petitioner when she looked in her rearview mirror and saw Petitioner's white vehicle collide with a red vehicle. App. 8, 43-44. The reconstructionist confirmed that Petitioner had crossed the center line into the red vehicle's lane. App.8, 56.

Upon arrival at the crash scene, Cpl. Hash found Petitioner outside her vehicle, tending to her daughter, who was injured and later admitted to the pediatric intensive care unit. App. 5-6, 46. The daughter was then just ten years old. App. 16. The driver of the red vehicle, David Sadler, had to be extricated from his vehicle. App. 6. He suffered extensive injuries to his legs and abdomen and later died. App. 6-7. Mr. Sadler's wife, Angela, was also injured and transported to the hospital. App. 6. Mr. Sadler's rear seat passenger, Gary Ross, suffered injuries as well, including fractured vertebra. App. 7. Petitioner was not injured at all. App. 16, 41.

When Cpl. Hash arrived at the hospital to check on the victims, he found Petitioner in her daughter's hospital room. App. 9, 50. Cpl. Hash already knew that Petitioner had been driving without insurance, so he read Petitioner her *Miranda*[2] rights. App. 10, 45, 48. After that, Petitioner

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

told the officer that she was prescribed Neurontin, Ultram, Imitrex, Topamax, Tramadol, and Gabapentin. App. 11. She had taken Ultram and Neurontin approximately 30 minutes prior to the crash. App. 11, 42-43, 49. She also admitted that she had smoked methamphetamine the night before. App. 12, 50. Petitioner consented to a blood draw, which was sent to a toxicologist. App. 12, 50. The toxicologist determined that Petitioner's "prior use/abuse of methamphetamine had caused excess fatigue and its stimulant effect could not overcome [the fatigue]. [Petitioner] was under the influence of numerous drugs when she mis-operated her vehicle and . . . [t]hese drugs contributed to her impairment," which directly caused Mr. Sadler's death and the other victims' injuries. App. 15.

Petitioner subsequently gave another *Mirandized* statement at the Lincoln County Detachment of the State Police. App. 59, 88. Petitioner was cooperative, and her statement was consistent with what she told Cpl. Hash previously. App. 59.

II. Poor Performance on Home Confinement.

Petitioner was placed on home confinement pending trial on May 15, 2015. App. 334, 347-49. In May 2016, Petitioner asked to be removed from home confinement and returned to jail. App. 334. She apparently was later released back to home confinement but, in July 2017, Petitioner was again returned to jail per her request. App. 364. She was released back to home confinement on March 12, 2019. App. 367.

Petitioner violated the terms of her home confinement and/or bond on several occasions: June 2015 (failing to comply with her approved schedule), App. 335; March 2019 (failing to report to her probation officer and leaving her drug rehabilitation program), App. 369-70; February 2020 (found in an unauthorized location), App. 424; August 2020 (driving vehicle without valid license or insurance), App. 424; and October 2020 (found in an unauthorized location and driving vehicle

without valid license or insurance), App. 424. Additionally, a petition to revoke home confinement was filed in March 2020, alleging that Petitioner possessed "several needles and a small bag that contained . . . meth." App. 381. That petition further alleged that Petitioner had recently failed a drug screen. App. 381. Petitioner was arrested and, once at the jail, admitted to further drug use. App. 382. She was returned to home confinement by agreement of the parties a week later. App. 401.

Petitioner failed to show up for scheduled court hearings in this case on March 5, 2018, App. 124; March 22, 2018,[3] App. 134; April 24, 2018, App. 151; December 27, 2018, App. 162; February 8, 2019, App. 171; and February 20, 2019,[4] App. 180. She admitted to or screened positive for drug use on at least five occasions: November 6, 2019, App. 394; January 20, 2020, App. 397; February 11, 2020, App. 395; March 1, 2020, App. 393; and June 12, 2020, App. 422.

When she appeared in court on March 12, 2019, Petitioner admitted on the record that she would test positive for methamphetamine. App. 212. Petitioner went to a 28-day rehabilitation program shortly thereafter. *See* App. 222-24. She completed that program on April 9, 2019, and moved on to a long-term program. App. 233.

Petitioner was released from home confinement on February 26, 2021. App. 405.

III. The Alleged Agreement.

On January 5, 2022, "counsel for the prosecutor's office and [counsel for] the defendant" (but not counsel of record in the case) approached the circuit court "to talk to [the judge] in private . . . concerning the resolution" of the case. App. 241, 285. The court "agreed to meet with them

[3] Petitioner's counsel was also not present that day, despite agreeing to the date. *See* App. 126, 134.

[4] Allegedly, Petitioner was "flooded in." App. 180.

informally." App. 285. The court shared its "opinion" with counsel, indicating what it "might do," App. 285, "[a]nd they were to go back to the defendant and talk to her," App. 241. The following day, the court met (apparently off the record) with the assigned prosecutor and defense counsel and encouraged defense counsel to discuss the matter with Petitioner. *See* App. 242. On the record, defense counsel clarified, "[O]ne question I had about the offer and to make sure [*sic*]. Obviously she gets credit for the time she was in jail . . . so that would be deducted from the two years?" App. 249. The court answered affirmatively, noting that Petitioner was entitled to that by law. App. 249.

IV. *Kennedy* Plea.

The parties returned on February 9, 2022, at which time the court stated, "I understand you all have an agreement in this case for a plea?" App. 254. The court asked defense counsel to spread the terms of the plea on the record. App. 254. Defense counsel explained that Petitioner would plead to DUI causing death in exchange for the dismissal of the remaining four charges. App. 254. Petitioner asked for a pre-sentence investigation ("PSI") "and sentencing will be by the [c]ourt. And we'll both argue at sentencing." App. 254. The State clarified that, in fact, it would stand silent at sentencing. App. 254, 269. There was then an off-the-record discussion at the request of defense counsel. App. 255. Following that discussion, it was clarified that Petitioner would enter a *Kennedy* plea. App. 255.

The court then undertook a full and careful colloquy with Petitioner. App. 255-60. Petitioner expressed that she spoke with her daughter, sister, and mother about the plea. App. 257. She further asserted—and counsel agreed—that defense counsel left the decision to her. App. 257-58. Petitioner affirmed that she heard the plea agreement as explained by her attorney and that she understood that to be the agreement. App. 258. She also affirmed that she was made

no other promises by anyone to induce her plea. App. 258. She signed a written questionnaire confirming the same. App. 409-14.

The court asked, "Do you understand that I can sentence you just the same if you've been found guilty by a jury even though you plead guilty by a *Kennedy* plea?" App. 261. Petitioner stated, "Yes." App. 261. When asked if she knew what the penalty for her crime was, Petitioner answered, "It's two to ten." App. 263. The court responded, "Right." App. 263. The court accepted the plea. App. 263, 427-29.

The court asked Petitioner if she had "ever been arrested before for anything." App. 263. She responded that she had not. App. 264. The court asked, "Never?" and Petitioner again responded, "No." App. 264.

V. Sentencing.

At the sentencing hearing, Petitioner made no objections, corrections, or additions to the PSI report. App. 274-75. Petitioner spoke on her own behalf. App. 275. Defense counsel, too, had "a lot to say." App. 275. First, defense counsel acknowledged that "all of us know that the maximum sentence is a two to ten." App. 276. Defense counsel then went to great lengths to try to allocute on behalf of Petitioner, noting that she was not "a lifelong criminal" and arguing that the sentence "should be based on the history of the defendant." App. 276. Defense counsel further argued that Petitioner "should not receive the same sentence" as someone who was not employed and who had not completed rehabilitation, which Petitioner had. App. 277. Defense counsel argued for home confinement. App. 277-78. In so doing, defense counsel acknowledged "the position of the State and the family." App. 278. Defense counsel argued that "if we got to that point to where home confinement would be appropriate," then Petitioner should be credited for at least some of the time she had already served on home confinement. App. 278-79. Defense

counsel then offered, "I think the appropriate [*sic*] would be . . . that she receive a two to ten, the maximum sentence – but we differentiate between her like and some others, and that she get home confinement and be credited one year . . . ." App. 279.

The State stood silent on sentencing, though family members of the victims spoke to the court. App. 280-82.

The court then clarified that when it met with the colleagues of the State and defense counsel, it "gave them [its] opinions," but that no agreement was reduced to writing. App. 285-86. The court questioned, "[D]id I in this case – do I have an offer, an acceptance, and consideration, and do I – a meeting of the minds? Was I involved in a meeting of the minds?" App. 286. The court then went through all the things it learned in the PSI that it did not previously know. For instance, in May 2016, Petitioner stated that she did not even want to be on home confinement. App. 287-88. In 2018—after the DUI crash and when Petitioner's license should have been suspended—Petitioner was cited multiple times for driving-related charges, after which she failed to show up in court to contest. App. 290-91. In March 2019, she tested positive for methamphetamine and admitted to other violations. App. 288. In May 2019, she failed to report to probation as required. App. 288. Petitioner then entered the drug treatment program at Prestera in September 2019, but did not complete the program. App. 288. In October 2019, Petitioner tested positive for marijuana and methamphetamine. App. 288. She tested positive for methamphetamine again in November 2019, January 2020, and February 2020. App. 289. In July 2021, she again had a driving-related offense, for which she failed to show up to magistrate court. App. 291.

The court also learned from the PSI that, despite denying previously that she had ever been arrested before, App. 264, Petitioner had been charged with 22 misdemeanors and one felony and been convicted of three misdemeanors, App. 288, 303.

The court further noted that the charge to which Petitioner pled in this case is so serious that the Legislature has since increased the penalty for it, and the misdemeanors that were dismissed pursuant to the plea agreement are now felonies. App. 288.

The court explained, "I did not fully have all of the facts when I told [the attorneys from the prosecutor's office and public defender's office who were not assigned to the case] what I thought I would do as far as the sentencing in this case." App. 289. The court clarified that "very much so, we were talking about . . . whether or not she should get credit for any time that she had served on home confinement." App. 289. The court reflected on Petitioner's "disregard for the law" and determined that "whatever I told them that I might do was not really a valid contract." App. 291. The court concluded, then, that Petitioner should not get any credit for time served on home confinement. App. 292. The court then announced that it would sentence Petitioner to a period of not less than two nor more than ten years in prison, with credit for time served in jail. App. 292.

Defense counsel objected, asserting that "the only reason she entered the plea against my advice" was that "she was assured at that time that –," at which point the court interrupted counsel. App. 293-94. The court pointed out that the agreement as placed on the record in the plea hearing made no stipulation as to sentencing. App. 294. Defense counsel asserted that "we had the conversations in chambers" as to "what the disposition would be." App. 294-95. The court stated that it was giving Petitioner 45 days to file a petition for writ of prohibition with this Court.

App. 295-96. Defense counsel moved "to set aside the plea," but the court reminded him that he would need to file a proper motion. App. 295.

VI. Motion for Reconsideration.

Petitioner filed a Rule 35(b) motion for reconsideration of sentence on April 26, 2022. App. 432-36. In it, Petitioner alleged that in the January 5, 2022, informal, off-the-record meeting between the court and unaffiliated counsel, the unaffiliated public defender proposed allowing Petitioner to receive "all or most of the credit for the [h]ome [c]onfinement she had previously served." App. 433. Petitioner alleged that the court "was unwilling to give [Petitioner] any credit for [h]ome [c]onfinement but would . . . sentence her to a 2-10-year sentence that she could serve on [h]ome [c]onfinement." App. 433.

The proposal was presented to assigned defense counsel, who presented it to Petitioner. App. 433. Petitioner wanted assurance that if she entered a plea, she would not face prison time. App. 434. It was defense counsel, who had no personal knowledge of the informal, off-the-record conversation, who promised Petitioner that she would not serve prison time if she entered a plea. App. 434.

The State never agreed to reduce the proposal to writing. App. 434.

The Motion asserted that Petitioner "would have never pled guilty to this charge had there not been a guarantee of [h]ome [c]onfinement as a sentence." App. 435. The motion was heard, and the State, again, stood silent. App. 302-03, 306. The court denied the motion by order entered June 10, 2022. App. 486. Again, the court gave the defense time to file a petition with this Court. App. 311.

VII. Motion to Withdraw Plea.

Petitioner filed a motion to withdraw her plea on May 20, 2022, over a month after she was sentenced. App. 445-54. In it, Petitioner asserted that the plea proposal was a binding plea agreement. App. 448. Finding that there was no manifest injustice and the entered plea was not illegal and was properly entered, the court denied the motion. App. 487-88. The court re-sentenced Petitioner for purposes of this appeal. App. 488.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3) and (4).

SUMMARY OF THE ARGUMENT

The record simply does not support a finding that the plea agreement in this case was binding upon the trial court at sentencing. It is clear from Petitioner's impassioned plea during allocution and the State's agreement to stand silent at the sentencing hearing that, ultimately, sentencing remained in the discretion of the court. Petitioner may have hoped and believed that she would receive home confinement in lieu of prison time, but her hopes and beliefs did not obligate the trial court. Moreover, the pre-sentence investigation report makes clear that Petitioner is not a good candidate for alternative sentencing. Her consistent non-compliance with supervision leading up to her plea, along with the gravity of her offense, lend credence to the lower court's decision to sentence Petitioner to prison instead. This Court should not disturb that decision.

ARGUMENT

I. There was not a binding plea agreement in this case.

A. Standard of review.

> Cases involving plea agreements allegedly breached by either the prosecution or the circuit court present two separate issues for appellate consideration: one factual and the other legal. First, the factual findings that undergird a circuit court's ultimate determination are reviewed only for clear error. These are the factual questions as to what the terms of the agreement were and what was the conduct of the defendant, prosecution, and the circuit court. If disputed, the factual questions are to be resolved initially by the circuit court, and these factual determinations are reviewed under the clearly erroneous standard. Second, in contrast, the circuit court's articulation and application of legal principles is scrutinized under a less deferential standard. It is a legal question whether specific conduct complained about breached the plea agreement. Therefore, whether the disputed conduct constitutes a breach is a question of law that is reviewed *de novo*.

Syl. Pt. 1, *State ex rel. Brewer v. Starcher,* 195 W.Va. 185, 465 S.E.2d 185 (1995).

B. Petitioner cannot demonstrate a manifest injustice; therefore, she is not entitled to withdraw her plea. She is also not entitled to specific performance of a "binding agreement" that never existed.

Petitioner argues that she did not receive the benefit of her bargain because the court promised to impose home confinement in lieu of a prison sentence and then "reneged" on that promise. Pet'r's Br. 7-10. Petitioner's entire argument is premised on her assertion that there was a binding plea agreement in this case. There was not. Petitioner has failed to provide any written memorialization of the plea agreement because there was not one. *See* App. 285-86, 434. In fact, neither the assigned prosecutor nor the defense counsel of record even participated in the discussion of the plea agreement, which was had with the court informally and off the record. App. 241, 285, 433. Nonetheless, it is clear from the record that whatever proposal was eventually presented to the prosecutor and defense counsel by their colleagues and the court, there was no binding agreement regarding sentencing. Thus, there was no breach of the agreement and no

manifest injustice. This Court should affirm the ruling of the lower court as well as Petitioner's conviction and sentence.

1. *There was no binding plea agreement regarding sentencing.*

To be sure, "when a defendant enters into a valid plea agreement with the State that is accepted by the trial court, an enforceable 'right' inures to both the State and the defendant not to have the terms of the plea agreement breached by either party." Syl. Pt. 4, *State v. Myers,* 204 W.Va. 449, 513 S.E.2d 676 (1998). This Court has noted, however, that "a *trial court* cannot be bound by a plea agreement unless a specific sentence is involved. In accordance with Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure, a plea becomes binding when there is an agreement to a specific sentence." *State v. Shrader*, 234 W. Va. 381, 389 n.18, 765 S.E.2d 270, 278 n.18 (2014) (emphasis added). In that case, "a circuit court has no authority to vacate or modify, *sua sponte,* a validly accepted guilty plea under Rule 11(e)(1)(C) . . . because of subsequent events that do not impugn the validity of the original plea agreement." Syl. Pt. 5, in part, *SER Brewer*, 195 W. Va. 185, 465 S.E.2d 185. When such a breach does occur, this Court recognizes two remedies: specific performance of the agreement or withdrawal of the plea. Syl. Pt. 8, in part, *SER Brewer*, 195 W.Va. 185, 465 S.E.2d 185. Deciding the appropriate remedy hinges on prejudice to the defendant. *Id.* But, first, there must be a breach.

Here, there was no breach because there was no binding plea agreement. First of all, when the defense set forth the plea agreement on the record, it was quite simple: Petitioner would plead to DUI causing death in exchange for the dismissal of the remaining four charges. App. 254. There was no mention of a binding sentencing agreement. There was not even any mention of a *recommended* sentence. To the contrary, Petitioner went on to request that a PSI report be prepared and acknowledged that "sentencing will be *by the* [*c*]*ourt*," reserving her right to "argue at

sentencing."[5] App. 254 (emphasis added). It stands to reason—and only makes sense—that there would be no need to request a PSI or to argue at sentencing if the defense believed that sentencing had already been settled as part of a binding plea agreement. Indeed, Petitioner affirmed on the record that she was made no other promises by anyone to induce her plea. App. 258.

Second of all, during the *Call*[6] colloquy, the court clarified with Petitioner, "Do you understand that I can sentence you *just the same if you've been found guilty by a jury even though you plead guilty by a* Kennedy *plea*?" App. 261 (emphasis added). Petitioner stated, "Yes." App. 261. And when asked specifically if she knew what the penalty for her crime was, Petitioner answered, "It's two to ten." App. 263. The court responded, "Right." App. 263. She signed a written questionnaire stating the same. App. 409-14.

Of course, at the time of Petitioner's crash, the statutory penalty for DUI causing death was "*imprison*[*ment*] in a state correctional facility for not less than two years nor more than ten years." W. Va. Code § 17C-5-2(a)(2) and (3) (2010). The penalty was not two to ten years of probation or home confinement or community service; the penalty was two to ten years of *imprisonment*. So, when Petitioner, App. 263, and defense counsel, App. 275, acknowledged on the record that the penalty Petitioner was facing was "two to ten," surely they were short-handing their recognition that the penalty Petitioner faced was "two to ten years *in prison*."

Third, when the time came for sentencing, Petitioner stood to allocute on her own behalf, followed by defense counsel who went to great lengths to try to differentiate between Petitioner, who he said had recognized the error of her ways and rehabilitated herself, and "a lifelong

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[5] Petitioner affirmed that defense counsel's explanation of the plea agreement was just as she understood it. App. 258.

[6] *Call v. McKenzie*, 159 W. Va. 191, 220 S.E.2d 665 (1975).

criminal." App. 276-76. Defense counsel then argued that "*if* we got to that point to where home confinement would be appropriate," *then* Petitioner should be credited for at least some of the time she had already served on home confinement. App. 278-79 (emphasis added). Defense counsel offered, "*I* think the appropriate [*sic*] would be . . . that she receive a two to ten, the maximum sentence – but we differentiate between her like and some others, and that she get home confinement . . . ." App. 279 (emphasis added). Again, if there was a binding sentence agreement, there would be no need to make such an argument. Because there was no such binding agreement, Petitioner and defense counsel made a joint plea to the court for mercy where none was otherwise guaranteed.

Perhaps even more telling are the court's own words. In explaining why it had decided to sentence Petitioner to prison rather than allow her to serve her sentence on home confinement, the court pointed out that "whatever I told [the unaffiliated attorneys who proposed the agreement] that I *might* do was not really a valid contract." App. 291 (emphasis added). Indeed, the court pointed out, the agreement as placed on the record in the plea hearing made no stipulation as to sentencing. App. 294. The record is clear, then, that whatever misunderstandings or misapprehensions Petitioner and defense counsel may have had about what the court intended to do at sentencing, they do no rise to the standard of a binding plea agreement that entitles Petitioner to relief now.

2. *There was no fraud or other misrepresentation by the court or the State.*

If Petitioner was able to demonstrate fraud or misrepresentation, then this Court would have to assess whether it was necessary to "penalize[e the] deceitful behavior engaged in during the negotiating of a plea agreement, in its presentation to the court, or in its execution by the defendant." Syl Pt. 6, in part, *SER Brewer*, 195 W. Va. 185, 465 S.E.2d 185. Tellingly, Petitioner

is very careful to not accuse the trial court or State of acting fraudulently. Rather, she insists that "[t]here was no real dispute of fact: the court indicated it would sentence Petitioner to home confinement." Pet'r's Br. 8. Respondent, though, *does* dispute that "fact."

Again, the record demonstrates that the court indicated that, in its informal, off-the-record conversation with the prosecutor's and defense counsel's colleagues, it stated only that it "might" grant Petitioner home confinement. App. 285, 291. Petitioner is hard-pressed to dispute the court's assertion—and certainly cannot prove fraudulent misrepresentation—because neither she nor her trial counsel was actually party to that conversation. App. 241, 285, 433. The only information they have about the conversation is secondhand, and it certainly does not disprove or otherwise credibly rebut the court's on-the-record explanation of the discussion.

It is interesting to note that the defense never called upon the two unaffiliated attorneys who *were* party to the conversation to go on the record regarding the discussion. In fact, to this day, all we have in the record are undocumented assertions by Petitioner: that in January 2022, a colleague of defense counsel proposed allowing Petitioner to receive "all or most of the credit for the [h]ome [c]onfinement she had previously served" and that the court "was unwilling to give [Petitioner] any credit for [h]ome [c]onfinement but would . . . sentence her to a 2-10-year sentence that she could serve on [h]ome [c]onfinement." App. 433. The court roundly refuted that assertion, however, clarifying that it merely shared its "opinion" with the colleague of defense counsel and indicating what it "*might* do," App. 285 (emphasis added). The court disagreed that there was "a meeting of the minds" at the end of the discussion and asserted that "whatever I told them that I *might* do was not really a valid contract." App. 286, 291 (emphasis added). The court pointed out that, at that point, it did not "have all the facts" regarding Petitioner's history. App. 289.

Respondent acknowledges that Petitioner and defense counsel perhaps strongly believed that, in the end, the court would show its mercy on Petitioner and allow her to serve her sentence on home confinement. The court seemed to believe that, too, before it read the PSI report. *See* App. 289 ("I did not fully have all of the facts when I told [the unaffiliated counsel] what I *thought* I would do as far as the sentencing in this case." (emphasis added)). But, again, surely Petitioner and defense counsel must have realized that their hope was not a guarantee. Otherwise, there was no need for a PSI or for such impassioned pleas of allocution. *See supra,* pp. 12-13.

Whether the circuit court overstepped in participating in plea discussions with two attorneys who were not affiliated with the case is of no moment in the end. *See* Pet'r's Br. 11[7]. First, while Petitioner asserts that "there was no agreement until the judge entered negotiations and made it," Pet'r's Br. 12, Petitioner acknowledged below that, in fact, it was defense counsel's colleague who approached the court and proposed the agreement. App. 433. Petitioner's cited authorities do not improve his argument because in those cases, there was a *promise* made by the trial court. *See* Pet'r's Br. 11-12. As discussed above and as made clear by the record, there was no *promise* made by the circuit court here. There was only what the court "thought" it "might" do at sentencing. App. 289-91. Again, no binding plea agreement resulted from that informal discussion.

3. *There was no manifest injustice or other prejudice that would necessitate specific performance or justify the withdrawal of the plea.*

When she did not receive the sentence she had hoped to receive, Petitioner sought to withdraw her plea. App. 295, 445-54. "In a case where the defendant seeks to withdraw [her] guilty plea before sentence is imposed, [s]he is generally accorded the right if [s]he can show any

[7] Respondent would note that Petitioner makes clear that she is not assigning judicial overreach as a separate error in this case.

fair and just reason." Syl. Pt. 1, *State v. Olish*, 164 W. Va. 712, 266 S.E.2d 134 (1980); *see also* W. Va. R. Crim. P. 32(e). There is no dispute that that did not happen in this case. Instead, Petitioner did not seek to withdraw her *Kennedy* plea until after she heard what her sentence would be. *See* App. 293-94. In such cases, "[w]here the guilty plea is sought to be withdrawn by the defendant *after* sentence is imposed, the withdrawal should be granted *only to avoid manifest injustice*." Syl. Pt. 2, *Olish,* 164 W. Va. 712, 266 S.E.2d 134 (emphasis added). The *Olish* Court noted that the reasons for the difference in the treatment of a motion to withdraw made pre-sentencing versus post-sentencing are these: (1) once a defendant knows her fate, she is "more likely to view the plea bargain as a tactical mistake" and want to set it aside; (2) the actions that the State performs in agreement for a plea may be difficult to undo if the plea is later withdrawn; and (3) "settled policy" favors giving finality to a criminal action through sentencing following a voluntary and properly-counseled plea. *Id.* at 716, 266 S.E.2d at 136.

Petitioner asks for specific performance of the plea agreement, arguing that "[a]fter all, the agreement's only breach was that it wasn't performed in the first place." Pet'r's Br. 11-12. Again, though, there was no binding agreement in the first instance. Secondly, Petitioner's plea was voluntary.[8] The plea agreement was laid out on the record—with no mention of a binding sentencing component—and, after an extensive *Call* colloquy, Petitioner acknowledged that that was the agreement as she understood it. App. 254, 258. She signed a written acknowledgment to that effect as well. App. 409-14. The only agreement that was ever placed on the record was performed as it was proposed: Petitioner pled guilty to DUI causing death, and the defense argued

[8] Petitioner does not allege that she was not properly counseled. Respondent will not address that question, but would note that there is nothing in the record to support that she was not properly counseled.

passionately at sentencing. *See* App. 254. Thus, there was no breach of Petitioner's voluntarily-entered plea agreement.

Moreover, there was no manifest injustice or other prejudice because Petitioner received the benefit of her bargain. Again, Petitioner made clear on the record that she understood the bargain to be exactly what she received: that she would plead guilty to just one of the five charges she faced with the remaining four counts to be dismissed at sentencing, App. 254; that she would have the opportunity to allocute at sentencing, App. 254; but that sentencing remained in the discretion of the court and included the possibility of imprisonment, App. 261-263. Assuming for a moment that this Court were inclined to vacate the plea and reset the parties to their original positions, Petitioner would go back to facing *five* charges—one felony and four misdemeanors. App. 331-32; *see also* W. Va. Code § 17C-5-2 (2010). The evidence proffered by the State and the evidence contained in the record herein is certainly strong enough to support a conviction if Petitioner faced a jury. She would face an aggregate sentence of up to six years to ten years of incarceration, in jail and in prison, if convicted of all charges. *See* W. Va. Code § 17C-5-2 (2010). No one could argue that the sentence Petitioner received following her plea puts her in a far better position than that.

Because there was no binding plea agreement and no manifest injustice in any case, this Court should affirm Petitioner's conviction by plea.

II. The lower court's sentence is well within statutory limits and is not subject to review.

This Court has repeatedly stated 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). Furthermore, the Court gives great deference and discretion to the trial court in matters of sentencing:

> Moreover, in *State v. Sugg*, 193 W. Va. 388, 406, 456 S.E.2d 469, 487 (1995), we held that "[a]s a general proposition, we will not disturb a sentence following a criminal conviction if it falls within the range of what is permitted under the statute." It is not the proper prerogative of this Court to substitute its judgment for that of the trial court on sentencing matters, so long as the appellant's sentence was within the statutory limits, was not based upon any impermissible factors, and did not violate constitutional principles.

State v. Georgius, 225 W. Va. 716, 722, 696 S.E.2d 18, 24 (2010). Regarding matters of probation and home confinement, this Court has "recognized that [alternative sentencing] is a privilege of conditional liberty bestowed upon a criminal defendant through the grace of the circuit court." *State v. Duke*, 200 W. Va. 356, 364, 489 S.E.2d 738, 746 (1997).

Petitioner does not even dispute that her sentence is well within statutory limits, nor does she allege that the court relied upon any impermissible factor. To the contrary, the circuit court relied on Petitioner's poor performance while on home confinement awaiting trial, including her multiple protestations that she did not want to be on home confinement anymore, App. 287-88; multiple citations for driving-related charges (including driving on an invalid license after her DUI arrest), which she failed to show up in court to contest, App. 290-91; multiple failed drugs screens and failed attempts at rehabilitation, App. 288-89; her prior criminal history, which she deceived the court about at the time she entered her plea, App. 264, 288, 303; and the fact that Petitioner's crime is so serious that the Legislature has since increased the penalty for it, App. 288. In consideration of all of that, the circuit court did not abuse its discretion in declining to extend its grace to Petitioner through home confinement. In any case, the sentence is not subject to review.

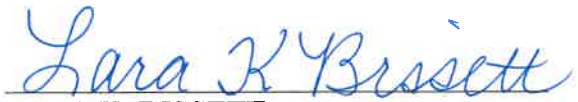
CONCLUSION

For the foregoing reasons, this Court should affirm the July 22, 2022, Order of the Circuit Court of Cabell County.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent, by Counsel.

PATRICK MORRISEY
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-672

STATE OF WEST VIRGINIA,

Respondent,

v.

RACHEL ADKINS,

Petitioner.

CERTIFICATE OF SERVICE

I, Lara K. Bissett, counsel for Respondent, the State of West Virginia, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, Matthew Brummond, Esq., by filing the same with the West Virginia Supreme Court through its e-filing system and designating counsel for Petitioner as a recipient thereof on this day, February 2, 2023.

Lara K. Bissett

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Assistant Attorney General