

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**State of West Virginia,**  
**Plaintiff Below, Respondent**

v.) **No. 22-935** (Raleigh County CC-41-1985-F-138)

**Samuel Ellison,**  
**Defendant Below, Petitioner**

**MEMORANDUM DECISION**

Petitioner Samuel Ellison appeals the Circuit Court of Raleigh County’s November 23, 2022, order denying his motion for relief under Rule 35 of the West Virginia Rules of Criminal Procedure.<sup>1</sup> The petitioner alleges that the circuit court erred in denying his motion for relief under both Rule 35(a), by refusing to correct his miscalculated aggregate sentence, and Rule 35(b), for rejecting his request for leniency. 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 1986, the petitioner was convicted of various crimes related to the kidnapping and sexual assault of a twenty-three-year-old woman. Of relevance to the instant appeal, the circuit court imposed a sentence of not less than one nor more than ten years of incarceration for conspiracy to commit first-degree sexual assault, one of the crimes of which he was convicted. In 2018, pursuant to the petitioner’s motion under Rule 35(a) and (b), the circuit court corrected the petitioner’s conspiracy sentence to correspond to the statutorily prescribed term of not less than one nor more than five years of incarceration. *See* W. Va. Code § 61-10-31 (specifying a one-to-five-year term of incarceration for conspiring to commit a felony). In the circuit court’s order correcting the petitioner’s sentence, the court recounted the procedural history of the petitioner’s case and stated that the petitioner had been sentenced “to an aggregate term of not less than fifty-nine (59) nor more than one hundred twenty (120) years in the penitentiary.” The court ordered, however, that the petitioner be “remanded to the custody of the Department of Corrections to serve the sentence previously imposed by the trial court except as expressly modified regarding” his conspiracy conviction.

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<sup>1</sup> The petitioner is self-represented. The respondent appears by Attorney General Patrick Morrissey and Deputy Attorney General Andrea Nease Proper.

The petitioner subsequently filed another Rule 35 motion in July 2018,<sup>2</sup> which alleged, among other issues not relevant here, that the circuit court's calculation of his aggregate sentence range was incorrect and that his circumstances warranted a reduction in his sentence. The petitioner requested leniency concerning the length of his sentence based on his youth at the time the crimes were committed and the number of years he had already served. In an order entered November 23, 2022, the circuit court found that, save for the correction of the sentence imposed for conspiracy, the petitioner's sentence remained unaffected, and the sentencing order included no calculation of the aggregate minimum and maximum term, so it was unnecessary to recalculate any aggregate sentence. The court noted that, to the extent the petitioner's desire for a recalculation was "associated with his interest in the determination of his parole eligibility," the issue

does not become ripe for judicial consideration until the parole board determines whether he is or is not eligible for parole consideration. If at that time the movant is dissatisfied with a decision of the parole board he may then seek relief by such procedure as is appropriate to that issue.

The court also denied the petitioner's request for a reduction in his sentence under Rule 35(b), finding that the severity of his crimes "cannot support a general plea for leniency." The petitioner now appeals the November 23, 2022, circuit court order denying his request for relief under Rule 35(a) and (b) of the West Virginia Rules of Criminal Procedure.

Our review is guided by the following standard:

In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review.

Syl. Pt. 1, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996).

The petitioner asserts two assignments of error before this Court. In his first, he claims that the circuit court abused its discretion by failing to recalculate his aggregate sentence under Rule 35(a). The petitioner contends that his corrected sentence inaccurately "calculates his parole eligibility at fifty-nine years" and, therefore, adds an additional twelve years to his minimum parole eligibility date.

Rule 35(a) of the West Virginia Rules of Criminal Procedure provides that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence." The petitioner, however, does not point this Court to any portion of his sentence that is illegal. The only illegal sentence

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<sup>2</sup> The circuit court record contains documents indicating that the petitioner addressed and mailed his Rule 35 motion directly to the circuit judge on July 9, 2018. The circuit court record does not contain an entry of the petitioner's filed motion, but a notation of "Filed July 9, 2018," is handwritten on, what appears to be, an appendix to the petitioner's Rule 35 motion.

imposed was previously corrected, and in correcting that lone illegal sentence, the circuit court explicitly ordered that the petitioner “serve the sentence previously imposed by the trial court except as expressly modified.” So, because the court corrected the lone illegal sentence and ordered that the petitioner serve the other (lawful) sentences previously imposed, any potential inaccuracy in the court’s recitation of the procedural history of this matter is of no moment. In any event, parole eligibility dates are to be calculated by the Division of Corrections and Rehabilitation. *See* W. Va. Code R. § 92-1-4.1.d (“Parole Eligibility Dates shall be calculated by the Division . . .”). Accordingly, we find no error or abuse of discretion in the circuit court’s denial of the petitioner’s request to recalculate his sentence under Rule 35(a).

In his second and final assignment of error, the petitioner asserts that the circuit court erred in denying his request for relief pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure, which provides that “[a] motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed . . . .” The petitioner’s Rule 35(b) motion was filed years outside of the 120-day deadline prescribed by the rule. We have stated “[a] circuit court does not have jurisdiction to rule upon the merits of a motion for reduction of a sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure when the motion is filed outside the 120-day filing period set out under the rule.” Syl. Pt. 2, *State ex rel. State v. Sims*, 239 W. Va. 764, 806 S.E.2d 420 (2017); Syl. Pt. 3, *State v. Keefer*, 247 W. Va. 384, 880 S.E.2d 106 (2022). Accordingly, there was no abuse of discretion in the circuit court’s denial of the petitioner’s Rule 35(b) motion for a sentence reduction as it was time barred and, therefore, outside the circuit court’s jurisdiction.

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** November 26, 2024

**CONCURRED IN BY:**

Chief Justice Tim Armstead  
Justice Elizabeth D. Walker  
Justice William R. Wooten  
Justice C. Haley Bunn

Justice John A. Hutchison not participating