
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-938

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STATE OF WEST VIRGINIA,
Respondent,

v.

CODY BRAUTIGAM,
Petitioner.

RESPONDENT'S BRIEF

Appeal from the
Magistrate Court of Ohio County
Case No. 13-F-31

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INTRODUCTION

Respondent, State of West Virginia, respectfully responds to the supplemental appellate brief filed by Cody Brautigam (“Petitioner”), self-represented, and filed pursuant to Rule 10(c)(10)(b) of the West Virginia Rules of Appellate Procedure. Petitioner challenges the Circuit Court of Ohio County’s imposition of a twenty-five year term of imprisonment following the revocation of his twenty-five year period of supervised release pursuant to the circuit court’s prior sentencing order in the same case. Petitioner has failed to demonstrate that the circuit court abused its discretion by revoking his period of supervised release; by requiring him to serve the full twenty-five year term as a result of his revocation; or by imposing an additional twenty-five year period of supervised release upon discharging his period of imprisonment. This Court should affirm the judgment of the Circuit Court of Ohio County, as contained in Criminal Action Number 2013-F-31.

ASSIGNMENTS OF ERROR

Petitioner asserts in his brief: “I feel that 25 year extension to my supervised release is excessive and outside the bounds of W.V. Code 62-12-26.” (Suppl. Br. 1.)¹

STATEMENT OF THE CASE²

Petitioner was convicted of two counts of Sexual Assault in the Third Degree, and sentenced to one to five years in prison, to run consecutively, for a total sentence of two to ten years in prison. App. 10. Additionally, Petitioner was ordered to serve twenty-five years of

¹ Petitioner does not paginate his self-represented brief. Therefore, Respondent refers to the first page of the handwritten document as page 1, and the second page of the handwritten document as page 2.

² Petitioner’s self-represented brief filed pursuant to the Rules of Appellate Procedure Rule 10(c) 10(b) does not contain a supplemental appendix; therefore, Respondent cites to the Appendix accompanying counsel for Petitioner’s Rule 10(c)10(b) brief.

supervised release following the discharge of his sentence. App. 10. Petitioner discharged his underlying sentence after serving five years, App. 16, and was placed on his period of supervised release as set forth in his prior sentencing order, App. 10. For the first violation of supervised release, Petitioner was sanctioned to sixty-days of imprisonment and placed back on release. App. 6. The circuit court sanctioned Petitioner to an additional two years of imprisonment for his second violation, however, he was released early and placed back on extended supervised release. App. 7. For his third violation, the circuit court sanctioned Petitioner to one year, but he was released after six months and placed back on supervision. App. 7.

Regarding Petitioner's fourth violation, the court conducted a revocation hearing on June 27, 2022. App. 1. At the hearing Petitioner admitted to violating Rule 8 by using methamphetamine; Rule 12 by placing money in inmate jail accounts and communicating with them by smart phone; violating curfew at the Roark-Sullivan Lifeway Center; violating the computer use conditions by sending pictures, texts, and emails from a cell phone; and Rule 16 by failing to disclose two sexual relationships to the probation officer. App. 5-6.

The probation officer testified at the revocation hearing that Petitioner "is dangerous. . . he has attractions to minors. . . . He's been convicted of having sex with minors. . . he hides relationships. . . . [N]ow he's using methamphetamine which, in itself, causes hypersexuality." App. 11. The probation officer further opined that these factors "make [Petitioner] a very dangerous person. I think to protect society, there is no other option than to impose his prison sentence. . . the full 25 years." App. 12. In comparing other probationers to Petitioner, the probation officer stated that Petitioner was the worst one he has had to supervise. App. 12.

The State recommended a twenty-five year prison sentence for the fourth violation. App. 15. In support, the State pointed to Petitioner's four previous violations over the course of four

years, and to his behavior “becoming an unfortunate and frightening pattern of conduct.” App. 15. The court ordered Petitioner to serve twenty-five years, with credit for time served, and an additional twenty-five years of supervised release. App. 16. The court also gave Petitioner “credit for the original sentence he served; the five years. . . not the sanctionable conduct,” App. 16, and credit for his imprisonment from the date of his arrest on April 14, 2023, for the current violations, to the date of the hearing conducted on June 27, 2022. App. 17. The Order Revoking Supervised Release was entered on July 1, 2022. App. 20. It is from this order that Petitioner appeals.

SUMMARY OF THE ARGUMENT

The court’s decision to impose a twenty-five year term of imprisonment for violation of supervised release, followed by an additional term of twenty-five years of extended supervised release upon his release from imprisonment, does not violate West Virginia Code § 62-12-26 because both the imprisonment term and additional supervised release term fall squarely within the statute. The imprisonment ordered by the court for Petitioner’s violation of his supervised release was in compliance with West Virginia Code § 62-12-26(h)(3), and the court gave him appropriate credit for time served as a result of his violations. The additional twenty-five year term of supervision upon his release from imprisonment does not exceed the limit of fifty years as referenced in West Virgin Code §62-12-26(j). Thus, Petitioner’s claim is without merit.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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).

ARGUMENT

A. Standard of Review

This Court in *State v. Hargus*, 232 W. Va. 735, 742, 753 S.E.2d 893, 900 (2013) recognized that a revocation hearing under the extended supervised release statute “is not a separate criminal prosecution,” and is construed as a continuation of the underlying prosecution. Thus, revocations under the statute may be revoked and “additional incarceration imposed based on the circuit court’s finding by clear and convincing evidence that a defendant violated the terms of his supervised release.” *Id.* West Virginia Code § 62-12-26(h)(3) authorizes the court to:

[r]evoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on supervised release. . . pursuant to the [rules] applicable to revocation of probation. . . . except that a defendant whose term is revoked under this subdivision may not be required to serve more than the period of supervised release.”

In *State v. Hosby*, 220 W.Va. 560, 648 S.E.2d 66 (2007) the Court established the standard for probation revocations.

When reviewing the findings of fact and conclusions of law of a circuit court sentencing a defendant following a revocation of probation, we apply a three-pronged standard of review. We review the decision on the probation revocation 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. Syllabus Point 1, *State v. Duke*, 200 W.Va. 356, 489 S.E.2d 738 (1997).

Syl. Pt. 1, *Hosby*, 220 W.Va. 560, 648 S.E.2d 66. “The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011) (quoting Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)). Importantly, however, “[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).

B. West Virginia Code § 62-12-26(j) was correctly applied, and Petitioner’s imprisonment and extended supervised release does not exceed the proscribed term limitations provided in West Virginia § 62-12-26(a).

Petitioner’s specific allegation centers on the court’s decision to impose an additional twenty-five year term of supervised release following revocation of his original period of supervised release and resulting imprisonment. App. 16, 22. Petitioner alleges the additional twenty-five year term of supervised release exceeds the statutory maximum set forth in West Virginia Code § 62-11-26. Suppl. Br. 1. The record clearly reveals that no such violation occurred, and that Petitioner’s argument amounts to a misapplication of the provisions contained in the statute.

West Virginia Code § 62-12-26(d) provides for a period of supervised release which “shall begin upon the expiration of any period of probation, the expiration of any sentence of incarceration or the expiration of any period of parole supervision imposed or required of the person so convicted, whichever expires later.” This period of supervised release shall be up to fifty years. W. Va. Code § 62-12-26(a). Further, if a court revokes the term of supervised release the court can,

require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on supervised release if the court, pursuant to the West Virginia Rules of Criminal Procedure applicable to revocation of probation, finds by clear and convincing evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this subdivision may not be required to serve more than the period of supervised release.

W.Va. Code § 62-12-26(h)(3). In addition to the imposition of a prison sentence not to exceed the original period of supervised release, the court may “include a requirement that the defendant be

placed on a term of supervised release after imprisonment. The length of the term of supervised release shall not exceed the term of supervised release authorized by this section less any term of imprisonment that was imposed upon revocation of supervised release.” W. Va. Code § 62-12-26(j).

In the present matter, Petitioner does not contest the court’s authority to revoke his supervised release and impose a term of imprisonment. Rather, he only complains that by his calculation of the original twenty-five years of supervision, followed by an additional twenty-five years of supervision, the court’s ruling exceeds the maximum term of authorized release provided in West Virginia Code § 62-12-26(a). Supp. Br. 2. Petitioner is incorrect. Petitioner’s supervision release was revoked three previous times. App. 10. The first time the court imposed a sanction of sixty days, the second time a two year sanction was ordered, and the third time a one-year sanction was imposed. App. 6-7. For the current fourth revocation, the court imposed the full twenty-five year sentence, which does not exceed the original period of twenty-five years of supervised release as provided in West Virginia Code § 62-12-26(h)(3) - minus five years of time served for the underlying sentence, and the time of imprisonment from arrest to the hearing pursuant to the current violation. App. 16-17.

By the court doing so, Petitioner was actually given more credit than he was entitled to receive toward imprisonment following his most recent violation of the terms of his supervised release. The amount of imprisonment he previously served pursuant to his three revocations was sixty days, two years, and one year; for a total of three years and sixty days. Although Petitioner did not actually serve all of this time due to early release, App. 7, and the record does not show how much time he actually served, it is clear from the record it was less than the three years and sixty days ordered by the court, App. 7. The court, however, gave Petitioner credit for the five

years served *prior* to his supervised release, and seventy-five days for the time spent in jail since his arrest on his fourth violation. App. 22. Petitioner was not entitled to credit for his five-year underlying prison term. “The length of the term of supervised release shall not exceed the term of supervised release authorized by this section *less any term of imprisonment that was imposed upon revocation of supervised release.*” W. Va. Code § 62-12-26(j) (emphasis added). Petitioner should only have been given, at most, three years and sixty days credit for the term of imprisonment that was *imposed upon revocation of supervised release*, toward his twenty-five year imprisonment term. Petitioner received an additional two years of credit taken off his twenty-five year term that he was not entitled to receive by incorrectly being given credit *twice* for the greater amount of his underlying sentence. The court miscalculated in Petitioner’s *favor*, not his detriment. Thus, his actual imprisonment will be twenty-three years, far less than the original twenty-five year term of supervised release, and wholly within the statute limitations of West Virginia Code § 62-12-26.

As referenced in *State v. Parker-Bowling*, No. 14-1015, 2015 WL 6143403 (W. Va. Supreme Court, Oct. 16, 2015) (memorandum decision), West Virginia Code § 62-12-16(a):

reflects the legislative intent to impose a new and additional penalty to the sentence of a person convicted of certain enumerated offenses. . . . *[A]s part of the sentence imposed at final disposition*, [a defendant shall] be required to serve, *in addition to any other penalty or condition* imposed by the court, a period of supervised release.

Parker-Bowling, 2015 WL 6143403, at *5 (emphasis added). “[T]he existing sentences in the statutes defining the elements of the listed felony offenses [shall] be combined with the supervised release statute to form the statutory maximum sentence for each of these crimes.” *Id.*

Petitioner’s underlying sentence of two to ten years for two counts of Sexual Assault in the Third degree, imposed a maximum sentence of ten years which he discharged in five years. App. 16. The supervised period under § 62-12-26, is *in addition to* the underlying maximum sentence. The maximum supervised release period provided in West Virginia Code § 62-12-26(a) is fifty

years, and both Petitioner's original term of twenty-five years of supervised release, as well as the additional twenty-five years of supervised release, does not exceed the fifty years authorized by this section.

Because Petitioner's sentence was within statutory limits, and the lower court had the authority to enact this sentence, this Court should affirm the lower court's judgment. *See State v. Winning*, No. 17-0921, 2018 WL 4944416, at *6 (W. Va. Supreme Court, Oct. 12, 2018) (memorandum decision). Similarly to the current Petitioner, Mr. Winning completed his incarceration and began serving his 50-year sentence of supervised release. *Id.* at *1. He violated the provisions and, at some point, was required to serve at least one year in a correctional facility for said violations. *Id.* Like Petitioner, Mr. Winning continued to violate his supervised release; he then agreed to admit his violations in exchange for a recommendation from the State for a 20-year sentence. *Id.* at *1-2. This Court upheld his sentence. *Id.* at *6. More recently, this Court, upheld a 15-year prison sentence for supervised release violations, which was followed by an additional 25-year period of supervised release. *State v. Raymond B.*, No. 20-0605, 2021 WL 2580715, at *5 (W. Va. Supreme Court, June 23, 2021) (memorandum decision). Given these considerations, Petitioner's sentence is not an abuse of discretion nor error by the court.

Petitioner alleges in his brief that his punishment is "excessive." Supp. Br. 1. Petitioner never states how the court's imposition of imprisonment and additional term of supervised release is excessive, other than to give his opinion that it is more than Petitioner believes he should have received under the statute after expressly remorse for his "wrongs." Supp. Br. 1. This argument cannot be recognized by the Court. Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure provides that "the Supreme Court may disregard errors that are not adequately supported by specific references to the record on appeal. *Id.* "[T]his Court has made clear that '[a] skeletal

“argument,” really nothing more than an assertion, does not preserve a claim. . . Judges are not like pigs, hunting for truffles buried in the briefs.” *State v Gilbert*, No. 20-0174, 2021 WL 653224, at *3 (W. Va. Supreme Court, Feb. 19, 2021) (memorandum decision). “An appellant must carry the burden of showing error in judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.” Syl. Pt. 4, *State v. Myers*, 229 W. Va. 238, 728 S.E.2d 122 (2012) (internal quotations and citations omitted). Petitioner must show how the lower court erred in its ruling, and Petitioner has failed to make a basic argument to that end. As such, no error or abuse of discretion was committed by the lower court.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to affirm the circuit court’s sentencing order.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

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CERTIFICATE OF SERVICE

I, Gail V. Lipscomb, do hereby certify that on the 9th day of June, 2023, I served a true and accurate copy of the foregoing **Notice of Appearance** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure, and further, a courtesy copy was mailed to said individuals at the addresses below:

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