

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) **No. 23-347** (Calhoun County CC-07-2022-F-40)

Rickie S.,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Rickie S. appeals the order of the Circuit Court of Calhoun County entered on May 5, 2023, denying his motion for reduction of sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure following his convictions for two counts of first-degree sexual abuse.¹ The petitioner argues that the circuit court erred and imposed an excessive sentence because it failed to give appropriate consideration to factors supporting a sentence of probation or community corrections and imposed consecutive, rather than concurrent, sentences. 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).

The petitioner pled guilty to two counts of first-degree sexual abuse. At the sentencing hearing, counsel for the parties presented argument, and the petitioner addressed the circuit court. In addition, the circuit court noted receipt of a forensic psychological evaluation for sex offenders under West Virginia Code § 62-12-2(e) (the “evaluation”) and a pre-sentence investigation report. In the pre-sentence investigation report, the probation officer opined that the petitioner had not accepted responsibility or expressed remorse for his crimes. In the evaluation, the psychologist concluded that, although some factors considered suggested a “relatively low” level of risk, the predatory nature and circumstances of the petitioner’s crimes and his “distorted acknowledgement of responsibility” substantially offset those factors. The circuit court then entered a sentencing order on March 10, 2023. Relevant to this appeal, the circuit court imposed a sentence of not less than one nor more than five years of imprisonment for each count, the sentence specified by West Virginia Code § 61-8B-7(b), and ordered the sentences to run consecutively. After completion of the terms of imprisonment, the circuit court ordered the petitioner to serve a period of fifty years

¹ The petitioner is represented by counsel David B. Richardson. The respondent appears by Attorney General John B. McCuskey and Deputy Attorney General Andrea Nease Proper. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel. We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. Civ. P. 40(e).

of extended supervision and to register as a sexual offender for the remainder of his lifetime. In addition, the circuit court found that the petitioner was not eligible for an alternative sentence under West Virginia Code § 62-12-3² because an alternative sentence would marginalize the severity of the crime; the nature and severity of the petitioner’s conduct required incarceration; and the petitioner only superficially accepted responsibility while minimizing the extent of his conduct.

The petitioner then timely filed a motion to reconsider his sentence, which the circuit court considered as a request for a sentence reduction under West Virginia Rule of Criminal Procedure 35(b).³ The petitioner argued that he had accepted responsibility for his conduct, expressed remorse, reconciled with his family, had no criminal history, and presented a low risk to reoffend as set out in the evaluation. The circuit court denied the motion without argument in an order entered May 5, 2023, finding that the sentence imposed was within statutory guidelines and no impermissible factors were considered. In addition, the circuit court found that the petitioner did not assert new grounds for an alternative or reduced sentence and, for the same reasons that the court denied the initial request for alternative sentencing, denied the motion.

On appeal of the May 5, 2023, order to this Court, the petitioner argues that the circuit court abused its discretion and imposed an excessively punitive sentence because it denied him probation and failed to appropriately consider the factors favoring an alternative sentence, including his acceptance of responsibility, lack of criminal history, and low risk to reoffend. He further asserts error in the circuit court’s ordering his periods of incarceration to run consecutively. We review the circuit court’s decision on the Rule 35(b) motion for an abuse of discretion, the underlying facts under a clearly erroneous standard, and questions of law de novo. Syl. Pt. 1, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996). We note that it is well-established that Rule 35(b) is not a mechanism to challenge the petitioner’s conviction or the validity of his sentence. Syl. Pt. 2, *State v. Marcum*, 238 W. Va. 26, 792 S.E.2d 37 (2016). Further, in evaluating a Rule 35(b) motion, circuit courts should generally consider “only those events that occur within the 120-day filing period[.]” *Head*, 198 W. Va. at 299, 480 S.E.2d at 508, Syl. Pt. 5, in part. We also note that, by statute, sentences for two or more offenses run consecutively, unless a circuit court

² West Virginia Code § 62-12-3 provides, in relevant part, that a court may suspend a sentence in favor of probation if it appears “to the satisfaction of the court that 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[.]”

³ West Virginia Rule of Criminal Procedure 35(b) 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 or probation is revoked, or within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

in its discretion provides that the sentences run concurrently. W. Va. Code § 61-11-21. In this case, the circuit court found that the petitioner failed to raise any issues in his motion that were not considered at the time of sentencing. Based on our review of the record on appeal, we agree. Before this Court, the petitioner likewise failed to argue or cite to any portion of the record on appeal showing a change in circumstances or remedial efforts made by him following his sentencing. To the extent that the petitioner attempts to challenge the validity of his sentence, he improperly exceeds the scope of Rule 35(b), and we will not consider those arguments. Accordingly, we conclude that the circuit court did not abuse its discretion by denying the petitioner's Rule 35(b) motion.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 19, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice C. Haley Bunn
Justice Charles S. Trump IV