

FILED
March 19, 2025

C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) **No. 23-379** (Clay County CC-08-2022-F-29)

Adam Lee Deare,
Defendant Below, Petitioner

MEMORANDUM DECISION

The petitioner, Adam Lee Deare, appeals the May 2, 2023, order of the Circuit Court of Clay County that denied his motion to reduce his sentence.¹ On appeal, the petitioner claims that his sentence is unconstitutionally disproportionate to the character and degree of his offense, and that his circumstances justify an alternate sentence. Upon our review, we determine oral argument is unnecessary and that a memorandum decision affirming the circuit court is appropriate. *See W. Va. R. App. P. 21(c)*.

In November 2022, the petitioner was indicted for two counts of possession of a firearm by a prohibited person. The indictment alleged that he possessed two different firearms despite having been convicted in 1996 of a “felony controlled substance offense involving a Schedule I Controlled Substance, other than marijuana, a Schedule II or a Schedule II Controlled Substance . . .” In January 2023, the petitioner pled guilty to one of the counts.²

In April 2023, the circuit court sentenced the petitioner to five years of imprisonment. In rejecting the petitioner’s request for probation or home confinement, the court found that “alternative sentencing would depreciate the seriousness of the crime,” and the petitioner had “not accepted responsibility for his actions.” The court also found that the petitioner was “likely to reoffend due to the nature of the crime,” had “violated the terms and conditions of his bond twice in this matter,” had a “significant” criminal history, and had “failed to benefit from his prior unsuccessful attempts at probation.”

¹ The petitioner appears by counsel Andrew Chattin. The respondent appears by counsel John B. McCuskey, Attorney General, and Andrea Nease Proper, Deputy Attorney General. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel.

² Pursuant to West Virginia Code § 61-7-7(b)(2), the sentence for the petitioner’s crime is no more than five years of imprisonment, or a fine of no more than \$5,000, or both.

In May 2023, the petitioner filed a motion for a sentence reduction pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure, arguing that he had already served nearly five months of incarceration, had provided “key testimony” that refuted a false allegation of sexual assault against correctional officers at the Central Regional Jail, and had been accepted to a long-term inpatient drug rehabilitation program. The court denied this motion, finding that

the sentence imposed in this case is appropriate, and that reducing the [petitioner’s] sentence would diminish the serious nature of the [petitioner’s] crime. Moreover, the [petitioner] has a significant prior criminal record and a history of substance abuse, and the Court does not believe that the [petitioner] is a suitable candidate for alternative sentencing.

The petitioner appeals from the court’s order denying his motion. We generally apply a three-part test when reviewing a circuit court’s decision on a Rule 35(b) motion for reduction of sentence.

“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).

Syl. Pt. 1, *State v. Marcum*, 238 W. Va. 26, 792 S.E.2d 37 (2016).

The petitioner first alleges that the circuit court abused its discretion in imposing a disproportionate sentence in his case. This allegation challenges the validity of his underlying sentence. However, the issues that may be raised in an appeal from a Rule 35(b) order are limited. “Rule 35(b) of the West Virginia Rules of Criminal Procedure only authorizes a reduction in sentence. Rule 35(b) is not a mechanism by which defendants may challenge their convictions and/or the validity of their sentencing.” *Marcum*, 238 W. Va. at 27, 792 S.E.2d at 38, Syl. Pt. 2. The *Marcum* Court elaborated that

it is abundantly clear that Rule 35(b) cannot be used as a vehicle to challenge a conviction or the validity of the sentence imposed by the circuit court, whether raised in the Rule 35(b) motion or in the appeal of the denial of the Rule 35(b) motion. In other words, challenges to convictions or the validity of sentences should be made through a timely, direct criminal appeal before this Court will have jurisdiction to consider the matter. *See* Syl. Pt. 2, *State ex rel. Davis v. Boles*, 151 W. Va. 221, 151 S.E.2d 110 (1966) (“An appellate court is without jurisdiction to entertain an appeal after the statutory appeal period has expired.”).

238 W. Va. at 31, 792 S.E.2d at 42. Whether the petitioner’s sentence was unconstitutionally disproportionate to his crime is beyond the scope of the circuit court’s ruling on his Rule 35(b) motion. As such, the petitioner is not entitled to relief on this ground. *See State v. Collins*, 238 W.

Va. 123, 128, 792 S.E.2d 622, 627 (2016) (declining to address a challenge to the proportionality of a sentence because “the [p]etitioner did not and could not have raised these arguments in the Rule 35(b) motion filed with the circuit court.”).

Turning to the substance of the petitioner’s Rule 35(b) motion, the petitioner argues that “he should have been given probation or at least the chance to attend inpatient drug rehabilitation” because of the time he had served in jail and the assistance he provided in the investigation at the jail. But “[p]robation is a matter of grace and not a matter of right.” Syl. Pt. 2, *State v. Hosby*, 220 W. Va. 560, 648 S.E.2d 66 (2007) (citation omitted).³ In the order denying his Rule 35(b) motion, the circuit court stated that it had considered the petitioner’s history, as well as the nature of his convictions, when it determined that he was not a suitable candidate for alternative sentencing. These reasonable considerations support the court’s denial of the petitioner’s Rule 35(b) motion for sentence reduction, and we find no abuse of discretion.

For the foregoing reasons, we affirm.

Affirmed.

DATE: 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

³ See W. Va. Code § 62-12-3 (providing that if it “appear[s] 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,” the court may suspend sentence and release the offender on probation).