FILED
June 26, 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. 23-455 (Nicholas County CC-34-2020-F-56)

Christopher McDonald,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Christopher McDonald appeals the June 23, 2023, resentencing order of the Circuit Court of Nicholas County.[1] On appeal, the petitioner argues that his sentence is constitutionally disproportionate, and the circuit court erred in denying his motion to withdraw his guilty plea. 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 February 2020, the petitioner entered a Subway restaurant, instructed the cashier to give him the money out of the cash register, and showed the cashier a gun.[2] The cashier gave the petitioner $183, and the petitioner left the Subway in a vehicle with two other people. The petitioner was later arrested and indicted along with his two codefendants for first-degree robbery and conspiracy to commit robbery. In August 2020, the petitioner pled guilty to first-degree robbery in exchange for dismissal of the conspiracy charge. At the sentencing hearing, the circuit court ordered the petitioner to serve eighty years of imprisonment. The petitioner appealed his sentence and argued that it was constitutionally disproportionate. This Court did not rule upon the proportionality issue and instead concluded that "the sentencing court plainly erred when it failed to follow the procedure set forth in Rule 32(b)(1) of the West Virginia Rules of Criminal Procedure when sentencing [the petitioner]." *State v. McDonald*, 250 W. Va. 532, 537, 906 S.E.2d 185, 190 (2023) ("*McDonald I*").[3] To remedy this error, we vacated the petitioner's sentencing order and

[1] The petitioner appears by counsel Jason T. Gain. The State 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.

[2] The petitioner now asserts that he showed the cashier a BB gun, but he did not raise this issue before pleading guilty to first-degree robbery.

[3] In *McDonald I*, this Court issued a new syllabus point holding that "West Virginia Rule of Criminal Procedure 32(b)(1) requires that the sentencing court receive and consider a

remanded with directions to conduct a new sentencing hearing "consistent with the mandatory requirements of Rule 32[.]" *McDonald I*, 250 W. Va. at 541, 906 S.E.2d at 194.

After remand, the circuit court ordered the production of a presentence report (PSR), which was filed. The petitioner objected to the PSR, disputing the statement that he had not accepted responsibility or expressed remorse for his crimes. The petitioner also filed a motion to withdraw his guilty plea, arguing that his previous attorney failed to advise him that he could not be lawfully convicted of first-degree robbery with a BB gun, because it was not "a firearm or other deadly weapon." *See* W. Va. Code § 61-2-12(a)(2) (providing that a person is guilty of first-degree robbery if he "uses the threat of deadly force by the presenting of a firearm or other deadly weapon . . . ."). The petitioner further argued that a BB gun expels a projectile "by the compression of air[,]" and it was not a deadly weapon. *See* W. Va. Code § 61-7-2(7)[4] (defining a "firearm" as "any weapon which will expel a projectile by action of an explosion . . . .").

At the resentencing hearing, the circuit court denied the petitioner's motion to withdraw his guilty plea and found that the petitioner voluntarily entered into the plea agreement with the advice of counsel.[5] After considering the PSR, the court again ordered the petitioner to serve eighty years of imprisonment for his first-degree robbery conviction in an order entered June 23, 2023. The court relied on the following factors to arrive at the sentence: the petitioner's confession to police, "the extent to which the robbery was premeditated[,]" the way the robbery was conducted, the petitioner's "efforts to hide his identity by changing clothing," and the petitioner's "efforts to escape and avoid capture." Aside from the petitioner's confession, the court stated that it was "unaware" of these factors at the first sentencing hearing and found that "the facts of this case would support a sentence greater than eighty years as previously imposed," but concluded that "it would not be equitable to impose a greater sentence" than it previously ordered. The petitioner now appeals.

First, the petitioner argues that he had a "fair and just reason" to withdraw his guilty plea to first-degree robbery after his case was remanded for resentencing because he used a BB gun, not a real firearm, in the commission of the robbery. *See* W. Va. R. Crim. P. 32(e) (providing that "[i]f a motion for withdrawal of a plea of guilty . . . is made before sentence is imposed, the court may permit withdrawal of the plea if the defendant shows any fair and just reason."); W. Va. Code § 61-2-12(a)(2) (providing that a robbery by using "the threat of deadly force by the presenting of a firearm or other deadly weapon" is robbery in the first-degree). We have held that "a defendant has no absolute right to withdraw a guilty plea before sentencing[,]" Syl. Pt. 2, in part, *Duncil v. Kaufman*, 183 W. Va. 175, 394 S.E.2d 870 (1990), and we review a circuit court's decision on a motion to withdraw a guilty plea under an abuse of discretion standard. *Id.*

---

presentence report before sentencing unless all conditions in (A), (B), and (C) are met." *McDonald I.*, 250 W. Va. at 533, 906 S.E.2d at 187, Syl. Pt. 4, in part.

[4] The 2012 version of this statute was in effect when the robbery occurred, and we are citing the current version because the definition remains unchanged. *See* W. Va. Code § 61-7-2(11) (2012).

[5] The court declined to rule on the underlying legal issue relating to whether the petitioner's alleged use of a BB gun could support a guilty plea to first-degree robbery.

We have further held that when a case is remanded by this Court, "a special aspect of the law of the case doctrine is implicated—the mandate rule." *Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 808, 591 S.E.2d 728, 734 (2003).[6] Under the mandate rule,

> [a] circuit court has no power, in a cause decided by the Appellate Court, to re-hear it as to any matter so decided, and, though it must interpret the decree or mandate of the Appellate Court, in entering orders and decrees to carry it into effect, any decree it may enter that is inconsistent with the mandate is erroneous and will be reversed.

Id. (quoting Syl. Pt. 1, *Johnson v. Gould*, 62 W. Va. 599, 59 S.E. 611 (1907)). We have further ruled that

> [t]he mandate rule is not limited to matters we decide either explicitly or implicitly on appeal. Rather, when this Court's decision of a matter results in the case being remanded to the circuit court for additional proceedings, our mandate controls the framework that the circuit court must use in effecting the remand.

Id. at 809, 591 S.E.2d at 735. Accordingly,

> [w]hen this Court remands a case to the circuit court, the remand can be either general or limited in scope. Limited remands explicitly outline the issues to be addressed by the circuit court and create a narrow framework within which the circuit court must operate. General remands, in contrast, give circuit courts authority to address all matters as long as remaining consistent with the remand.

Id. at 805, 591 S.E.2d at 731, Syl. Pt. 2.

In *McDonald I*, this Court ordered a limited remand with directions to conduct a new sentencing hearing after preparation of a PSR in compliance with Rule 32 of the West Virginia Rules of Criminal Procedure. *McDonald I*, 250 W. Va. at 541, 906 S.E.2d at 194. The petitioner did not raise an issue with his plea agreement in *McDonald I*, and consequently, the validity of his guilty plea was not implicated in this Court's limited remand. Given the circumstances of this case, we rule that the circuit court did not err in denying the petitioner's motion to withdraw his guilty plea because that motion exceeded the scope of this Court's limited remand in *McDonald I*.[7]

---

[6] "The law of the case doctrine 'generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case, provided that there has been no material changes in the facts since the prior appeal, such issues may not be relitigated in the trial court or re-examined in a second appeal.'" *Cummings*, 214 W. Va. at 808, 591 S.E.2d at 734 (quoting 5 Am. Jur. 2d *Appellate Review* § 605 at 300 (1995) (footnotes omitted)).

[7] *See United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993) (explaining that the mandate rule applies "when this court remands for resentencing").

Finally, the petitioner argues that, under the circumstances of this case, an eighty-year sentence for first-degree robbery is constitutionally disproportionate under article III, section 5 of the West Virginia Constitution. We have stated that this Court "reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). "Where the issue involves the application of constitutional protections, our review is de novo." *State v. Patrick C.*, 243 W. Va. 258, 261, 843 S.E.2d 510, 513 (2020). Furthermore, "Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offence.'" Syl. Pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980). We ordinarily limit proportionality reviews to sentences "where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syl. Pt. 4, in part, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). West Virginia Code § 61-2-12(a)(2) sets forth no fixed maximum term for first-degree robbery; accordingly, we turn to the petitioner's argument on appeal.

We apply two tests to evaluate the proportionality of a sentence. "The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further." *State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983). Considering that the petitioner threatened a Subway employee with a gun, thereby placing the employee in fear of death or serious bodily injury, and demanded money, which the petitioner allegedly planned to use to buy drugs, we conclude that the petitioner's sentence does not shock the conscience.[8]

The second test is an objective inquiry, requiring us to give consideration "to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." *Id.* (quoting *Wanstreet*, 166 W. Va. at 523-24, 276 S.E.2d at 207, Syl. Pt. 5, in part). In another robbery case, this Court explained that

> [t]he first consideration of the objective test is the nature of the offense for which the appellant was convicted and the legislative purpose behind the statutory punishment. As we just noted, the crime for which the appellant was convicted was certainly of a violent nature. In addition, we have previously observed that "[a]ggravated robbery in West Virginia has been recognized as a crime that involves a high potentiality for violence and injury to the victim involved." *State v*[.] *Ross*, 184 W.Va. 579, 582, 402 S.E.2d 248, 251 (1990). As a result, the

[8] The petitioner also argues the disparate sentences imposed on his codefendants should factor into the proportionality analysis. But "where the co-defendants differ in their criminal backgrounds or in their role or participation in the offense, disparate sentences are justified." *Smoot v. McKenzie*, 166 W. Va. 790, 792, 277 S.E.2d 624, 625 (1981). Here, the petitioner and his codefendants were not similarly situated because the codefendants pled guilty to conspiracy only, not first-degree robbery, and they stayed in the car while the petitioner entered the restaurant and committed the robbery.

> Legislature has provided circuit courts with broad discretion in sentencing individuals convicted of aggravated robbery or attempted aggravated robbery. In fact, "'[t]he Legislature chose not to deprive trial courts of discretion to determine the appropriate specific number of years of punishment for armed robbery, beyond ten.'" *State v. Woods*, 194 W.Va. 250, 254, 460 S.E.2d 65, 69 (1995), *quoting State ex rel. Faircloth v. Catlett*, 165 W.Va. 179, 181, 267 S.E.2d 736, 737 (1980).

State v. Williams, 205 W. Va. 552, 555, 519 S.E.2d 835, 838 (1999) (footnote omitted).

In *Williams*, this Court considered sentences for robbery that were upheld in numerous jurisdictions and found that "[g]iven the offenses involved in the cases cited above, and in light of the respective sentences imposed, we believe that the appellant's sentence in the case *sub judice* is constitutionally proportionate to the character and degree of the offense for which she was convicted." *Id.* at 558, 519 S.E.2d at 841. We agree with the circuit court that the petitioner's sentence is supported by his confession to police, the deliberate nature of the robbery, the way the robbery was conducted, and his efforts to avoid capture. Thus, we conclude that petitioner's sentence was constitutionally proportionate to the character and degree of the offense for which he was convicted.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 26, 2025

CONCURRED IN BY:

Justice Elizabeth D. Walker
Justice Tim Armstead
Justice C. Haley Bunn
Justice Charles S. Trump IV

DISSENTING:

Chief Justice William R. Wooton

WOOTON, Chief Justice, dissenting:

I respectfully dissent from the majority's application of the "mandate rule," *see State ex rel. Frazier & Oxley, L.C. v. Cummings [Cummings II]*, 214 W. Va. 802, 808, 591 S.E.2d 728, 734 (2003), to foreclose consideration of the petitioner's claim that the circuit court erred in denying his motion to withdraw his guilty plea, a motion which was based on the petitioner's assertion that the BB gun used in the commission of the crime was not a "firearm or other deadly weapon" within the meaning of West Virginia Code section 61-2-12(a)(2).

I have no quarrel with the mandate rule when it is applied to a case in which the circuit court, on remand, has exceeded what was clearly a limited mandate from this Court. *See, e.g.*, *Cummings II*, 214 W. Va. at 811, 591 S.E.2d at 737 (holding that the mandate in that case "was a limited one encompassing only 'a factual determination of whether a surrender of the prime lease occurred.' The circuit court's decision to allow St. James to amend its complaint to add a new theory of recovery based on the recording act exceeded the limited remand in *[State ex rel. Frazier & Osley, L.C. v. Cummings*, 212 W. Va. 275, 569 S.E.2d 796 (2002)*]*."). In the instant case, however, it is at best debatable whether this Court's mandate to resentence the petitioner in accordance with Rule 32 of the West Virginia Rules of Criminal Procedure was limited or general. The majority finds that the mandate was limited, i.e., that the circuit court was instructed to do one and only one thing: to order the production of a presentence report, hold a new sentencing hearing, and resentence the petitioner accordingly. In contrast, I believe that the mandate was general, because its *effect*, under the facts and circumstances of the instant case, was to put the petitioner in the position of any criminal defendant who has entered a plea but not yet been sentenced: he was entitled to move to withdraw his plea if he could show "any fair and just reason" for the relief he sought, *see* W. Va. R. Crim. P. 32(e),[1] and if resolution of the legal issue underlying the motion was not foreclosed by the law of the case doctrine.[2]

I acknowledge that this case presents not only issues regarding the scope of this Court's earlier remand, but also possible issues of waiver, as the petitioner did not raise the question of whether a BB gun was a "firearm or other deadly weapon" in his initial appeal. *See State v. McDonald [McDonald I]*, 250 W. Va. 532, 535 n.2, 906 S.E.2d 185, 188 n.2 (2023) ("Mr. McDonald asserts that he showed the cashier a BB gun. *He does not challenge his conviction*.").[3] Nonetheless, because I believe that the majority's application of the mandate rule to the facts of this case was hyper-technical, at best, and because the petitioner's arguments on the merits of the

---

[1] In his motion to withdraw his plea, the petitioner asserted that

> he was told by his prior counsel that it did not matter if the item he used was a real firearm or a BB gun. This advice was mistaken, or at the very, very least arguable. The [petitioner] asserts that would not have subjected himself to an infinite level of punishment had he known of the plain text of the statute and the strong argument made here.

The circuit court made no determination as to whether these facts, if established, constituted "fair and just reason[s] for withdrawing his plea.

[2] In *Cummings II*, we explained that the law of the case doctrine would apply on remand to issues that were either explicitly or implicitly decided by this Court in the initial appeal. 214 W. Va. at 808, 591 S.E.2d at 734.

[3] Emphasis added.

BB gun issue merit closer consideration by this Court and resolution in an authored opinion, I would put this case on the Rule 19 argument docket.

For the foregoing reasons, I respectfully dissent.