FILED
July 30, 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. 23-276 (Berkeley County CC-02-2021-F-56)

Grant S.,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Grant S. appeals the Circuit Court of Berkeley County's April 11, 2023, order revoking his home incarceration.[1] The petitioner argues that the circuit court erred in revoking his home incarceration and imposing his underlying sentence when the State failed to present sufficient evidence of any violation of the terms of his home incarceration and when imposition of a prison sentence is constitutionally disproportionate given the petitioner's disabilities. 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 March 2020, the mother of twelve-year-old A.F. contacted police after the child's grandmother reported that she had witnessed a video depicting A.F. sitting on the petitioner's lap, facing him, while she thrusted her pelvic region against the petitioner's pelvic region.[2] The petitioner was arrested and, in March 2021, was indicted on one count of sexual abuse by a parent, guardian, custodian, or person in a position of trust, and one count of first-degree sexual abuse.

In December 2021, the petitioner entered into a plea agreement in which he agreed to enter an *Alford/Kennedy* plea[3] of guilty to one count of sexual abuse by a parent, guardian, custodian, or

[1] The petitioner appears by counsel B. Craig Manford. The State of West Virginia 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 to protect the identity of a juvenile involved in this case. *See* W. Va. R. App. P. 40(e).

[2] The grandmother and the petitioner were married, and the petitioner was A.F.'s step-grandfather.

[3] *See* Syl. Pt. 1, *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987) ("An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that

person in a position of trust in exchange for the State's agreement to dismiss the count of first-degree sexual abuse and to stand silent at sentencing. The circuit court provisionally accepted the petitioner's plea in January 2022.

Due to several continuances, the sentencing hearing was not held until July 2022. After discussion of the petitioner's objections to certain information contained within the presentence investigation report, the circuit court formally accepted the petitioner's *Alford/Kennedy* plea. In support of alternative sentencing, the petitioner presented the testimony of Paul Kradel, Ed.D., a licensed psychologist, who testified regarding the psychosexual evaluation he performed on the petitioner and opined that the petitioner was very low risk for reoffending and was not a threat to public safety. Dr. Kradel also discussed the petitioner's significant physical disabilities.[4] The petitioner exercised his right to allocution, apologized for his actions, and expressed remorse. The victim's mother also read a victim impact statement to the court. Further, a letter from the petitioner's caretaker along with photographs and videos depicting the petitioner's disabilities were submitted to the court. Given his disabilities and his need for help to do basic activities such as getting dressed, the petitioner argued that imprisonment would essentially amount to cruel and unusual punishment. The petitioner argued that his disabilities, coupled with Dr. Kradel's opinion, warranted an alternative sentence.

The circuit court addressed the petitioner and stated that he had watched all of the submitted videos depicting the extent of the petitioner's injuries. The court acknowledged that the petitioner had no criminal history and had profound disabilities and, ultimately, sentenced the petitioner to ten to twenty years of imprisonment, to be served on home incarceration. The sentencing order was entered on July 18, 2022. Several amended orders were subsequently entered, identifying the effective sentence date as July 25, 2022.

On December 16, 2022, a new criminal complaint was filed charging the petitioner with possession of child erotica. The State filed a motion to revoke the petitioner's home incarceration, and the court held a revocation hearing on April 6, 2023. The State presented the testimony of Sergeant Zachary Nine, who testified that he was informed an arrest warrant had been issued for the petitioner, and he proceeded to the petitioner's home to effectuate an arrest. Sgt. Nine testified that upon entering the home, he observed the petitioner to have a cellphone in his possession. He further stated that after the petitioner was arrested, the petitioner's tenant informed Sgt. Nine that the petitioner possessed two other cellphones and that she believed they contained nude or partially nude pictures of questionably-aged females.[5] Based on this information, Sgt. Nine obtained the appropriate search warrants, located two additional cellphones, and submitted the phones to be forensically searched. According to Sgt. Nine, several pictures of girls who appeared to be

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his interests require a guilty plea and the record supports the conclusion that a jury could convict him."); *see also North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (same).

[4] Specifically, as a result of an accident in 1975, the petitioner's right arm was amputated, his left elbow was crushed, his left wrist was fused, his left thumb was amputated and replaced with a piece of his hip bone, and his penis was amputated. The petitioner also had multiple surgeries to remove and replace skin.

[5] The petitioner's tenant acted as a caretaker and helped the petitioner with daily tasks.

underage with exposed breasts and vaginas were discovered on the phones. Sgt. Nine believed that one of the pictures depicted a prepubescent girl with her vagina or buttocks exposed.

Sergeant Jeanette See testified regarding her involvement in the forensic downloads of the petitioner's cellphones. Sgt. See also described the pictures discovered on the cellphones, stating that there were several girls of questionable ages with their breasts and vaginas exposed. Sgt. See stated that one picture included a child's buttocks, which she opined was "definitely of a prepubescent." Sgt. See testified that she sent the pictures to the National Center for Missing and Exploited Children but had not yet received results on either the identities or ages of the girls in the pictures.

The petitioner presented the testimony of Michelle Michon, a friend and caretaker of the petitioner, who spoke to the various tasks she assisted him with, including basic hygiene tasks, cleaning his hearing aids, grocery shopping, laundry, household chores, and transportation. Ms. Michon stated that while the petitioner was in jail, she attempted to take his arm brace to him but was told that because the brace contained a screw, it would not be permitted inside the jail. Ms. Michon opined that without proper care, the petitioner's health would deteriorate.

The petitioner testified regarding his disabilities and submitted pictures of his left arm and hand. The petitioner stated that because of his disabilities, actions such as going to the bathroom and maintaining proper hygiene were difficult, especially while incarcerated pending the revocation hearing. For example, the petitioner claimed that he was not able to properly maintain his hygiene after going to the bathroom and had not been permitted to have the appropriate tools to clean his hearing aids. As such, the petitioner argued against revoking his home incarceration and stated that he would comply with its terms and conditions.

Ultimately, the circuit court found that it was "satisfied by the description given by the State Police that there is a clear cause to believe—or a reasonable cause to believe that [the petitioner] was in possession of images depicting a prepubescent [female]." The court further found that pursuant to the evidence presented during the hearing that the petitioner was " not going to change or modify his conduct if permitted that measure of liberty" and, as such, the court revoked the petitioner's home incarceration and ordered him to serve his sentence in prison. The petitioner now appeals the revocation of his home incarceration.

We review the revocation of home incarceration in the same manner we would review the revocation of probation:

> 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.

Syl. Pt. 1, *State v. Duke*, 200 W. Va. 356, 489 S.E.2d 738 (1997).

On appeal, the petitioner first argues that the State failed to present sufficient evidence that he violated the terms and conditions of his home incarceration. Specifically, the petitioner points out that the circuit court was not shown the pictures from the petitioner's cell phone allegedly depicting child erotica. Rather, the State presented only the testimony of Sgt. Nine and Sgt. See, who testified that the subjects in the photos were of "questionable age" but were unable to state for certain that they were, in fact, minors. The petitioner further states that the officers' testimony was unreliable and unsupported by any verification from the National Center for Missing and Exploited Children. In sum, the petitioner claims that without the photos having been submitted into evidence, the court could not have found that the petitioner violated the terms and conditions of his home incarceration.

West Virginia Code § 62-11B-9(a) provides that when a defendant has violated the conditions of his or her home incarceration, he or she is subject to the procedures and penalties set forth in West Virginia Code § 62-12-10. West Virginia Code § 62-12-10(a)(1)(B) & (C) expressly provides that "the court or judge may revoke the suspension of imposition or execution of sentence, impose sentence if none has been imposed and order that sentence be executed" where a defendant has "[e]ngaged in new criminal conduct other than a minor traffic violation or simple possession of a controlled substance[.]"[6]

Here, we find no merit to the petitioner's arguments that the circuit court was presented with insufficient evidence to support the revocation of his home incarceration. The State presented Sgt. Nine and Sgt. See, both of whom testified in detail regarding several pictures of girls who appeared to be underage with exposed breasts and vaginas and one picture of a prepubescent girl with her buttocks and vagina exposed which were located on the petitioner's phone. Regarding the latter, Sgt. Nine stated that his training and experience led him to believe that the girl in the photo appeared to be prepubescent because the two hands wrapped around the girl's buttocks were "extremely larger than the exposed vagina." Likewise, Sgt. See testified that based on her knowledge, some of the girls in the pictures could have been as young as eight or nine years old and that at least one picture "was definitely of a prepubescent [female]." While the petitioner challenges the officers' reliability and contends that the pictures were required for the circuit court to make a finding regarding his possession of child erotica, the detailed factual descriptions provided by Sgt. Nine and Sgt. See were sufficient evidence upon which the court could find that the petitioner possessed child erotica. Based upon the forgoing, we are unable to conclude that the circuit court abused its discretion in revoking the petitioner's home incarceration.

The petitioner next argues that given his disabilities and the inability of the Division of Corrections and Rehabilitation to make reasonable accommodations for his needs, the circuit court's revocation of his home incarceration and imposition of his underlying sentence amounts to cruel and unusual punishment and is unconstitutionally disproportionate to the offense committed.

Our analysis of this issue is guided by Syllabus Point 4 of *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982), which provides that "[s]entences imposed by the trial court, if within

[6] Recently, we held that "[t]he standard required for a final parole or probation revocation hearing under West Virginia Code § 62-12-10(a)(1) (2013) is proof by a preponderance of the evidence." Syl. Pt. 5, *State v. Foye*, 2025 WL 1442923, -- W. Va. --, -- S.E.2d -- (2025).

statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Impermissible factors include "race, sex, national origin, creed, religion, and socioeconomic status . . . ." *State v. Moles*, No. 18-0903, 2019 WL 5092415, at *2 (W. Va. Oct. 11, 2019) (memorandum decision) (citation omitted). Here, the petitioner does not contend that his sentence was outside the statutory limits, nor does he contend that the court considered an impermissible factor. As such, the petitioner's sentence is not subject to appellate review. Although the petitioner argues that the imposition of his underlying sentence following the revocation of his home incarceration is unconstitutionally disproportionate to the crime he committed, our constitutional proportionality standards are "basically applicable to those 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). Because this case involves neither, we need not apply proportionality principles. *See State v. Allen*, 208 W. Va. 144, 156, 539 S.E.2d 87, 99 (1999). Lastly, we find no merit to the petitioner's claims that his specific needs cannot be adequately met in a prison setting and that his incarceration would amount to cruel and unusual punishment. We have recognized that "[c]ertain conditions of . . . confinement may be so lacking in the area of adequate food, clothing, shelter, sanitation, medical care and personal safety as to constitute cruel and unusual punishment[.]" Syl. Pt. 2, in part, *Hickson v. Kellison*, 170 W. Va. 732, 296 S.E.2d 855 (1982). However, the petitioner provides only a speculative assertion that the facility in which he would be housed would be unable to adequately accommodate his disabilities and that the "only manner in which [he] could be accommodated" is through home incarceration. Such a bare assertion does not preserve this claim. *See State v. Harris*, 226 W. Va. 471, 476, 702 S.E.2d 603, 608 (2010) ("[A] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim." (quoting *State v. Day*, 225 W. Va. 794, 806 n.21, 696 S.E.2d 310, 322 n.21 (2010))).

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: July 30, 2025

CONCURRED IN BY:

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