

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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State of West Virginia,
Respondent,

v.

Case No. 23-344

James Carroll DePreist,
Petitioner.

Petition for Appeal

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James Carroll DePreist,
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I, James Carroll DePriest, via undersigned counsel of record doth hereby certify and verify that I performed a review of the case that is reasonable under the circumstances, and I have a good faith that a petition for appeal is warranted by and through my undersigned counsel in this case in the state's low and high tribunals.

09/09/2023
Date

/s/Robert P. Dunlap, II
Counsel of Record

I, James Carroll Depriest, via undersigned counsel hereby certify and verify that on the date below, a copy of this Petition for Appeal and Appendix was served on the Respondent by electronically filing via File & Serve Xpress, the original was provided to the Clerk of the Supreme Court of Appeals of West Virginia with a designated record in support of the petition for appeal via appendix. Petitioner, through counsel, certifies the contents of the appendix are true and accurate and Petitioner, through counsel, has conferred in good faith with all parties to the appeal in order to determine the contents of the appendix.

09/09/2023
Date

/s/Robert P. Dunlap, II
Counsel of Record

P E T I T I O N

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ASSIGNMENTS OF ERROR

1) The lower court abused its discretion when it determined that Petition waived his right to a presentence investigation and refused to allow Petitioner a continuance to obtain a pre-sentencing investigation report prior to sentencing in violation of his due process rights pursuant to the Fifth Amendment and Fourteenth Amendment of the United States Constitution and Article III, Section 10 of the West Virginia Constitution.

STATEMENT OF THE CASE

On March 2, 2021, Mr. DePriest was indicted for Failure to Provide Notice of Registration Changes 3rd of Subsequent Offense. A 010. The State asserted that on August 12, 2020, Mr. DePriest failed to report a change in employment that occurred on June 18, 2020. A 031. On September 14, 2022, a jury found Mr. DePriest guilty of the felony offense of Failure to Provide Notice of Sex Offender Registration Changes. A 072. On September 21, 2022, the court held a bifurcated trial regarding Mr. DePriest's previous felony convictions. A 077. Mr. DePriest stipulated the prior felony convictions and waived his right to a jury trial on that issue. *Id.* The court referred Mr. DePriest to the Probation Department for preparation of a presentencing investigation. *Id.* at 78.

Prior to the sentencing hearing, Mr. Depriest removed the GPS monitoring equipment and absconded from confinement in violation of his bond and terms of home confinement. A 080, 085. On April 25, 2023, Mr. DePriest was apprehended by law enforcement. A 097. Subsequently, on May 5, 2023, a sentencing hearing was held. A 095, 102. The court determined that Mr. DePriest

waived his right to a presentence investigation because he removed the GPS monitoring equipment and violated the terms of home confinement. A 105-06. Counsel for Mr. DePriest strongly objected to proceeding to sentencing without a presentencing investigation. A 106-07. The court made its findings based solely on the Indictment before the court, the prior convictions resulting in the Indictment, and violation of home confinement. A 108-09. The court stated that home confinement is the most restrictive form of community supervision and because Mr. DePriest violated the terms of home confinement the court had no other alternative to prison. A 109.

The Sentencing Order reflects that the court was prepared to proceed with sentencing without a presentence report based on the following:

[T]he Court had prior hearings and cases with this Defendant for numerous years, knew the Defendant's criminal, mental health, and work history, the Defendant's intentional fleeing from supervision, the Defendant's family involvement and community connections, and understood the nature of the offense and facts from the trial in the case.

A 098. However, the sentencing hearing transcript does not reflect that the court informed Mr. DePriest that it had any information other than what had been presented at trial and the bifurcated hearing on the prior convictions. The court did not comment on Mr. DePriest's mental health, work history or his family's involvement and community connections.

SUMMARY OF ARGUMENT

Mr. DePriest asserts that the lower court erred when it failed to allow a continuance of the sentencing hearing to obtain a presentence investigation report. Mr. DePriest did not waive his right to a presentence investigation based on home confinement violations. Petitioner seeks to remand to the lower court to obtain a present sentence investigation report and resentencing based on violations of his Constitutional rights of due process.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument unless it is determined to be necessary by the Court for full adjudication of the issues.

ARGUMENT AND DISCUSSION OF LAW

Claim 1: The lower court abused its discretion when it determined that Petition waived his right to a presentence investigation and refused to allow Petitioner a continuance to obtain a pre-sentencing investigation report prior to sentencing in violation of his due process rights pursuant to the Fifth Amendment and Fourteenth Amendment of the United States Constitution and Article III, Section 10 of the West Virginia Constitution.

A presentencing report is required prior to sentencing unless all the conditions in West Virginia Rule of Criminal Procedure 32(b)(1) are met. *State v. McDonald*, No. 21-0796, WL 2945044 at *1 (S.C.W.Va., April 14, 2023). West Virginia Rule of Criminal Procedure 32(b)(1) requires a presentence investigation and report unless the defendant waives the report, the court has information in the record that enables it to make a meaningful exercise in its sentencing authority, and the court explains its findings on the record that enables it make a meaningful exercise in its sentencing authority.

In *State v. McDonald*, the defendant waived his right to a presentence report; however, the court ordered that a presentence report be completed. *McDonald* at *2. The probation department filed a one-page report recommending an eighty-year sentence for robbery. *Id.* The defendant objected to the report because it failed to provide any supporting data or information upon which the court could base its sentence. *Id.* Although the defendant allocated to a very troubled life, he again waived the right to a presentence investigation and report. *Id.* at *3. The court did not have information pertaining to “the defendant’s history and characteristics” including “criminal history,

‘occupation, family background, education, habits and associations, mental and physical condition,’” and information that may be helpful in imposing sentence. *Id.* at *4. This Court held that the plain language of West Virginia Rule of Criminal Procedure 32(b)(1) requires a presentence investigation and report prior to sentencing unless all three conditions are met overruling the prior holding with respect to the conditions in *State v. Bruffey. McDonald* at *5. The Court reasoned that the plain language of the rule with the conjunction “and” between conditions (A), (B), and (C) means that all the listed conditions must be met. *Id.* Furthermore, the Court reasoned that the sentencing court did not make sufficient findings to enable it to meaningfully exercise its sentencing authority. *Id.* at *6. The Court determined that the plain error in the case affected the defendant’s substantial rights. *Id.* at *6.

Mr. Depriest’s substantial rights were affected by the lower court’s refusal to allow a continuance to obtain a presentencing investigation report. First, unlike the defendant in *McDonald*, Mr. DePriest did not waive his right to a presentence investigation. The counsel for Mr. Depriest strongly objected to proceeding to sentencing without a presentence investigation and report. A 106-07. Second, like the court in *McDonald*, here, the court did not have sufficient information to exercise its sentencing authority. The court merely recited the information gathered from proceedings before the court in this matter. A 108. The record does not reflect the court’s knowledge with respect to Mr. DePriest’s occupation, family background, education, habits and associations, mental and physical condition or additional information that may be helpful in imposing sentence pursuant to West Virginia Rule of Criminal Procedure 32(b)(4)(A)-(C). However, the Sentencing Order reflects that the court had this information. A 098. The lower court failed to meet the conditions required pursuant to West Virginia Rule of Criminal Procedure Rule 32(b)(1) to proceed to sentencing without a presentencing investigation report.

The lower court violated Mr. DePriest's substantial due process rights by abusing its discretion in finding that Mr. DePriest waived his right to a presentence investigation and report prior to sentencing. Furthermore, the lower court violated Mr. DePriest's substantial due process rights by failing to make sufficient findings to enable it to exercise its sentencing authority. Therefore, Mr. DePriest respectfully requests this Court remand this case to the lower court for a presentence investigation and resentencing.

/s/Robert P. Dunlap, II

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**STATE OF WEST VIRGINIA,
Plaintiff Below/Respondent**

v.

Case No. 23-344

**JAMES CARROLL DEPRIEST
Defendant Below/Petitioner**

CERTIFICATE OF SERVICE

I, Robert P. Dunlap II, do hereby certify that I have served the attached Petition and Appendix by electronically filing a true copy thereof via the File & Serve Xpress this 9th day of September 2023 to the following parties:

Gail V. Lipscomb, Assistant Attorney General
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