

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

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

**State of West Virginia,
Plaintiff Below, Respondent**

v.) No. 23-489 (Jefferson County CC-19-2018-F-15)

**Kevin Costello,
Defendant Below, Petitioner**

MEMORANDUM DECISION

Petitioner Kevin Costello appeals the December 8, 2022, order entered by the Circuit Court of Jefferson County that denied his motion to correct sentence pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure.¹ On appeal, the petitioner argues that the circuit court erred in dismissing his claim of an illegal sentence. Upon our review, finding no substantial question of law and no prejudicial error, we determine 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 July 2017, the petitioner was involved in a vehicle crash in which a two-year-old child was seriously and permanently injured. The petitioner was indicted for driving under the influence (DUI) causing serious bodily injury, and after a trial, the jury convicted him of that offense. *See* W. Va. Code § 17C-5-2(c) (providing that DUI with serious bodily injury is a felony punishable by two to ten years of imprisonment).² Then, the State filed a recidivist information alleging that he had two prior felony convictions: first, he was convicted of distribution of crack cocaine in the United States District Court for the Northern District of West Virginia in 2000; second, he was convicted of possession of heroin with intent to deliver in Frederick County, Maryland in 2012. The circuit court held a recidivist trial in February 2019, and the jury found that these were qualifying offenses under the recidivist statute and sentenced him to life in prison, with mercy. *See* W. Va. Code § 61-11-18(c) (2000) (providing a sentence of life imprisonment for persons with three felony convictions).³ The petitioner appealed, and this Court affirmed his conviction and recidivist life sentence in *State v. Costello*, 245 W. Va. 19, 33, 857 S.E.2d 51, 65 (2021) ("*Costello*

¹ The petitioner is self-represented. 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 was charged under the 2016 version of this statute, but we cite the current version because the penalty remains unchanged.

³ We cite to the 2000 version of the statute because it was in effect at the time of the petitioner's sentencing. This statute was amended in 2020.

I”) (ruling that the petitioner’s recidivist life sentence was constitutionally proportionate because both of the petitioner’s predicate drug convictions “involved an inherent threat of violence”); Syl. Pt. 12, in part, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019) (holding that a recidivist life conviction is constitutionally proportionate if “two of the three felony convictions considered . . . involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results”).

Then, the petitioner filed a motion to correct sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure, arguing that his recidivist life sentence is illegal because *Borden v. United States*, 593 U.S. 420 (2021), stands for the proposition that DUI causing serious bodily injury “is not a qualifying offense for recidivist purposes.” The circuit court denied this motion, ruling that his recidivist life sentence was neither illegal nor imposed in an illegal manner. The court found that *Borden* is inapplicable to this case because it does not apply to West Virginia Code § 61-11-18. Rather, the court noted that *Borden* interprets the meaning of “violent felony” as it is applied in the federal Armed Career Criminal Act (“ACCA”), which the court found to be irrelevant to the petitioner’s recidivist life sentence. See 18 U.S.C. § 924(e)(2)(B) (defining “violent felony” for the purposes of the Armed Career Criminal Act). The court also noted that, in *Costello I*, this Court rejected the petitioner’s claim that his recidivist life sentence was constitutionally disproportionate. The petitioner appeals the court’s denial of his motion to correct sentence.

First, the petitioner argues that the circuit court erred in denying his Rule 35(a) motion because DUI causing serious bodily injury is not a qualifying third felony that justifies a recidivist life sentence under West Virginia Code § 61-11-18(c) (2000).⁴ When this Court reviews an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we review the circuit court’s decision under an abuse of discretion standard; facts are reviewed for clear error; and questions of law are considered de novo. See Syl. Pt. 1, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996).

Relying upon *Borden*’s interpretation of the ACCA, the petitioner argues that DUI causing bodily injury is not a “violent felony” and this conviction should not trigger a recidivist life sentence because it does not require the State to prove that he intended to cause bodily injury. See *Borden*, 593 U.S. at 445 (ruling that “[o]ffenses with a *mens rea* of recklessness do not qualify as violent felonies under the ACCA”); *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 (2004) (holding that a state conviction for DUI causing serious injury was not a “crime of violence” that warranted deportation under the Immigration and Nationalization Act because the state statute in question did not require evidence of “a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense”). But the petitioner’s reliance on *Borden* is misplaced because we have already defined DUI causing serious bodily injury as a “crime of violence supporting imposition of a recidivist sentence.” *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 516, 583 S.E.2d 800, 813 (2002); see Syl. Pt. 3, *State v. Williams*, 196 W. Va. 639, 474 S.E.2d 569 (1996) (same); *Costello I*, 245 W. Va. at 32-33, 857 S.E.2d at 64-65 (ruling that “it is unquestionable that Mr. Costello’s triggering offense – DUI causing serious bodily injury – involved actual violence and had a

⁴ To the extent that the petitioner argues his recidivist life sentence is constitutionally disproportionate, we rejected this claim in *Costello I*, and we decline to address it further. 245 W. Va. at 33, 857 S.E.2d at 65.

substantial impact on the child victim who sustained permanent injuries as a result of the crash”). Because DUI causing injury is a crime of violence under W. Va. Code § 61-11-18(c) (2000), the circuit court did not err in denying the Rule 35(a) motion.

Second, the petitioner argues that West Virginia Code § 61-11-18(c) (2000) is void for vagueness because it does not include “the elements of violence or intent to commit violence against a person” and requires litigants to refer to case law to determine whether a crime is a qualifying offense under the recidivist statute. We have previously recognized that West Virginia Code § 61-11-18 is “plain and unambiguous.” *State ex rel. Chadwell v. Duncil*, 196 W. Va. 643, 647, 474 S.E.2d 573, 577 (1996). And if a defendant has two felony convictions, “he falls within the ambit of West Virginia Code § 61-11-18.” *Appleby*, 213 W. Va. at 519, 583 S.E.2d at 816. Here, the petitioner was convicted of DUI causing serious injury, which is a felony that carries with it a possible sentence of two to ten years of imprisonment, and he had two prior violent felony convictions for possession with intent to distribute heroin in 2012 and distribution of crack cocaine in 2000. Because the petitioner has three prior felony convictions, two of which “involved an inherent threat of violence,” *Costello I*, 245 W. Va. at 33, 857 S.E.2d at 65, “he clearly falls within the parameters of West Virginia Code § 61-11-18(c) and lacks standing to raise a facial challenge to the statute.” *Appleby*, 213 W. Va. at 519, 583 S.E.2d at 816 (citations omitted). Thus, we conclude that the circuit court did not err when it rejected the petitioner’s claim that the recidivist statute was void for vagueness.⁵

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: September 10, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice C. Haley Bunn
Justice Charles S. Trump IV
Justice Thomas H. Ewing
Senior Status Justice John A. Hutchison

⁵ The petitioner also argues that the circuit court erred in ruling that his Rule 35(a) motion was untimely filed because the court may correct an illegal sentence at any time. *See* W. Va. R. Crim. P. 35(a). But the circuit court addressed the merits of the petitioner’s motion irrespective of its finding that the motion was untimely, and most importantly, the petitioner has not demonstrated that his recidivist life sentence is either an illegal sentence or that it was imposed in an illegal manner. Thus, the court’s discussion of the timeliness of his motion “does not affect [his] substantial rights,” and any error in this regard is harmless. *See* W. Va. R. Crim. P. 52(a).