

**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. 24-251 (Jackson County CC-18-2022-F-39)

**Brian Keith Morrison,
Defendant Below, Petitioner**

MEMORANDUM DECISION

Petitioner Brian Keith Morrison appeals the Circuit Court of Jackson County’s April 12, 2024, order revoking his probation.¹ The petitioner argues that the circuit court erred in revoking his probation and imposing the underlying sentence rather than imposing a shorter sixty-day term of imprisonment for first time violations. Upon our review, we determine that oral argument is unnecessary and that this case satisfies the “limited circumstances” requirement of Rule 21(d) of the Rules of Appellate Procedure for reversal in a memorandum decision rather than an opinion. *See W. Va. R. App. P. 21(d)*.

In November 2023, the petitioner pled guilty to one count of grand larceny and one count of petit larceny and was sentenced to a term of imprisonment. Subsequently, the petitioner filed a motion for reconsideration, requesting to be placed on probation, which the circuit court granted in February 2024. As part of the terms and conditions of his probation, the petitioner was required to reside with his ex-wife, abstain from drugs and alcohol, and report any change of residence to his probation officer within twenty-four hours.

On March 13, 2024, the petitioner’s probation officer conducted a home visit, at which the petitioner screened positive for alcohol. The petitioner admitted to consuming alcohol and further stated that he had smoked methamphetamine. The petitioner then submitted to a drug screen, and the instant results were positive for methamphetamine. Thereafter, the petitioner’s ex-wife contacted the petitioner’s probation officer on March 19, 2024, and advised that she had kicked the petitioner out of the residence due to his drug use and had not seen him since March 15, 2024.

The probation officer contacted the petitioner and directed him to report to the probation office the following morning. The petitioner complied and advised the probation officer that he had been “staying where he can” within the area. The petitioner also submitted to a drug screen,

¹ The petitioner appears by counsel Edward L. Bullman. The respondent appears by Attorney General John B. McCuskey and Assistant Attorney General Holly M. Mestemacher. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel. *See W. Va. R. App. P. 41(c)*.

which was positive for methamphetamine. The probation officer filed a motion to revoke the petitioner's probation on March 21, 2024, alleging that the petitioner had violated the terms and conditions of his probation by (1) failing to reside in his approved residence; (2) failing to notify his probation officer within twenty-four hours of any change of residence; (3) using methamphetamine on March 13, 2024; and (4) using methamphetamine on March 20, 2024.

On March 22, 2024, the circuit court held a hearing on the motion to revoke the petitioner's probation. The petitioner admitted to the violations as alleged in the motion and requested that the court impose "a 60-day shocker period of incarceration" and then return the petitioner to probation given that he had not absconded or violated a material term and condition of his probation. The State opposed the petitioner's request and asked the court to impose the petitioner's underlying sentence. Ultimately, the court revoked the petitioner's probation and imposed the petitioner's underlying sentence,² citing "specifically to West Virginia Code Section 62-12-10(a)(1)(A)," which pertains to absconding supervision. The petitioner now appeals the circuit court's order revoking his probation and imposing his underlying sentence.

We have held that

[w]hen 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).

West Virginia Code § 62-12-10(a)(1) and (2) address the violation of probation and provide that

[i]f at any time during the period of probation there shall be reasonable cause to believe that the probationer has violated any of the conditions of his or her probation, the probation officer may arrest him or her with or without an order or warrant, or the court which placed him or her on probation, or the judge thereof in vacation, may issue an order for his or her arrest, whereupon he or she shall be brought before the court, or the judge thereof in vacation, for a prompt and summary hearing.

- (1) If the court or judge finds reasonable cause exists to believe that the probationer: (A) Absconded supervision; (B) Engaged in new criminal conduct other than a minor traffic violation or simple possession of a controlled substance; or (C) violated a special condition of probation

² According to the parties, the court sentenced the petitioner to one to ten years for his conviction of grand larceny and one year for his conviction of petit larceny.

designed either to protect the public or a victim; 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.

- (2) If the judge finds that reasonable cause exists to believe that the probationer violated any condition of supervision other than the conditions of probation set forth in subdivision (1) of this subsection then, for the first violation, the judge shall impose a period of confinement up to sixty days or, for the second violation, a period of confinement up to one hundred twenty days. For the third violation, the judge may revoke the suspension of imposition or execution of sentence, impose sentence if none has been imposed and order that sentence be executed, with credit for time spent in confinement under this section.

Here, the circuit court specifically noted that it was revoking the petitioner's probation under West Virginia Code § 62-12-10(a)(1)(A) for absconding supervision. On appeal, the petitioner argues that the court was required to impose a sixty-day period of confinement, as provided in West Virginia Code § 62-12-10(a)(2), because this was his first violation. The petitioner argues that, contrary to the circuit court's finding, he did not abscond from supervision and that, rather, his admitted violations amounted to simple possession of a controlled substance and failing to reside in an approved residence, as evidenced by the fact that he immediately reported to the office when directed by his probation officer, advised that he had been kicked out of his residence, and explained that he was trying to find alternative housing. The petitioner acknowledges that a court may depart from the sentencing limitations set forth in West Virginia Code § 62-12-10(a)(2), but argues that the court was required to make findings of fact justifying the departure, which did not occur in this instance.³ In sum, the petitioner contends that the court erred in ignoring the language mandating a sixty-day term of incarceration for first time violators, revoking his probation, and imposing the underlying sentence, when his violations did not amount to absconding under West Virginia Code § 62-12-10(a)(1)(A).

We agree. While the circuit court found that the petitioner absconded supervision, it made no factual findings in support; to the contrary, the record demonstrates that the petitioner remained in the community, reported to the probation office when directed, and advised the probation officer as to where he had stayed the prior night. Under these particular facts, we cannot conclude that the petitioner's actions amounted to absconding, as he did not leave the area to avoid arrest. *See Abscond, Black's Law Dictionary* (12th ed. 2024) ("To depart secretly or suddenly, esp. to avoid arrest, prosecution, or service of process."). Accordingly, without any findings to justify departure from the sentencing limitations set forth in West Virginia Code § 62-12-10(a)(2), the circuit court abused its discretion in refusing to impose the sixty-day term of incarceration for first time violations and, instead, revoking the petitioner's probation and imposing the underlying sentence.

³ See W. Va. Code § 62-12-10(c), in part (providing that "a judge may otherwise depart from the sentence limitations set forth in subdivision (2), subsection (a) of this section upon making specific written findings of fact supporting the basis for the departure").

For the foregoing reasons, we reverse the circuit court’s April 12, 2024, order revoking the petitioner’s probation and remand the matter for further proceedings consistent with this decision.

Reversed and remanded.

ISSUED: September 29, 2026

CONCURRED IN BY:

Justice William R. Wooton
Justice Charles S. Trump IV
Justice H. L. Kirkpatrick

DISSENTING:

Chief Justice C. Haley Bunn
Justice James W. Flanigan

BUNN, Chief Justice, dissenting:

I dissent to the majority’s resolution of this case reversing the circuit court’s revocation of petitioner Brian Morrison’s probation. The majority (1) abandons the appropriate deference we must afford to a circuit court when it considers facts and determines whether to revoke a term of probation; and (2) applies a narrow and inflexible definition for “abscond.”

I would have affirmed the circuit court’s revocation of Mr. Morrison’s probation, as the facts in the record support the court’s conclusion that Mr. Morrison absconded supervision. West Virginia Code § 62-12-10(a)(1)(A) gives the circuit court discretion to revoke probation if a probationer absconds supervision, providing, in relevant part, that “(1) If the court or judge finds reasonable cause exists to believe that the probationer: (A) Absconded supervision; . . . 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.” The petition to revoke Mr. Morrison’s probation included four violations: failure to reside in an approved residence, failure to notify his probation officer within twenty-four hours of any change of residence, and two violations of use of a controlled substance. The probation officer’s report to the court included information that on March 13, 2024, Mr. Morrison tested positive for methamphetamine. Two days later, Mr. Morrison left his court-ordered residence when his ex-wife “kicked him out” and he failed to notify the probation office that he left. His ex-wife contacted the probation officer on March 19, 2024, to alert the officer of Mr. Morrison’s absence. The probation officer then contacted Mr. Morrison and told him to report to the probation office the next day, March 20, 2024, which he did, and again tested positive for methamphetamine. At the hearing on the petition, the circuit court advised Mr. Morrison of his rights, including that if he made an admission the court would “find as a matter of law there’s a violation” and probation “will stand revoked at that point.” The court also informed Mr. Morrison that whether probation would be reinstated “is completely up to the [c]ourt’s discretion.” The court reiterated that if he wished to have probation reinstated, the court would

hear arguments from counsel, but “ultimately” the court would make the decision. Mr. Morrison admitted the four allegations in the petition, including that he failed to reside at the approved residence and failed to notify his probation officer within twenty-four hours of any change in residence. The circuit court revoked Mr. Morrison’s probation and denied his motion to reinstate probation, stating that “[u]nder the particular facts and circumstances presented, the [c]ourt does find to deny the reinstatement and does impose the underlying sentence.”

The Court recently affirmed a circuit court’s revocation of a defendant’s probation after he “absconded supervision” when he left substance abuse treatment and did not inform the probation officer that he had left the facility for over a week, then later “ceased all required contact” with the officer. *State v. Hill*, No. 23-368, 2025 WL 1513487, at *3 (W. Va. May 28, 2025) (memorandum decision). This case presents similar circumstances, as Mr. Morrison left his approved residence—a residence ordered by the circuit court—yet he failed to inform the officer of his location for days. Rather than Mr. Morrison initiating contact, the probation officer reached out to Mr. Morrison. The circuit court’s conclusion that Mr. Morrison absconded supervision was not an abuse of discretion, but instead an application of the facts of the case to the relevant statutory requirement that this Court should not second guess. *See* Syl. Pt. 1, *State v. Duke*, 200 W. Va. 356, 489 S.E.2d 738 (1997).¹

In addition to failing to provide the circuit court with the required deference, the majority has also created a new and limiting standard for courts to determine whether a probationer absconded supervision. While the relevant statute contains no definition of the term “abscond” or the phrase “absconded supervision,” the majority casually fashions its own factors to determine whether a probationer has absconded supervision, stating, “the record demonstrates that the petitioner remained in the community, reported to the probation office when directed, and advised the probation officer as to where he had stayed the prior night.” Under the majority’s application of the law, a circuit court may not find that a probationer absconded supervision pursuant to West Virginia Code § 62-12-10(a)(1)(A) if the probationer leaves his required residence and fails to inform probation for days, so long as that probationer “remain[s] in the community” and at some point reports to probation when called, with no consideration of the time frame that the probationer’s whereabouts were unknown.

The majority also fails to grapple with the State’s argument that Mr. Morrison’s admitted conduct encompasses four violations of probation, not merely one, thus allowing the circuit court to revoke his probation pursuant to West Virginia Code § 62-12-10(a)(2). This statute provides for an increasing period of confinement for first and second probation violations (under certain circumstances), with revocation permitted on a third violation:

¹ Syllabus Point 1 of *State v. Duke*, 200 W. Va. 356, 489 S.E.2d 738 (1997), provides the relevant standard of review:

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.

If the judge finds that reasonable cause exists to believe that the probationer violated any condition of supervision other than the conditions of probation set forth in subdivision (1) of this subsection then, for the first violation, the judge shall impose a period of confinement up to sixty days or, for the second violation, a period of confinement up to one hundred twenty days. For the third violation, the judge may revoke the suspension of imposition or execution of sentence, impose sentence if none has been imposed and order that sentence be executed, with credit for time spent in confinement under this section.

W. Va. Code § 62-12-10(a)(2). The majority determined that the circuit court should have imposed only a sixty-day period of confinement for a first violation of probation pursuant West Virginia Code § 62-12-10(a)(2). However, in making this finding, the majority specifically recognized Mr. Morrison’s multiple admitted violations in its decision, concluding that “the circuit court abused its discretion in refusing to impose the sixty-day term of incarceration for first time violations[.]” The Court has previously recognized that each separate probation violation may considered when applying § 62-12-10(a)(2). *See State v. Krystal M.*, No. 14-0737, 2015 WL 1740302, at *2 (W. Va. Apr. 13, 2015) (memorandum decision) (recognizing that the probationer admitted to numerous “separate probation violations”). The majority failed to adequately address its conclusion and application of § 62-12-10(a)(2) in light of the language of the statute, our prior decisions, and the facts of this case. *See State v. Massey*, No. 20-0641, 2022 WL 122998, at *3 (W. Va. Jan. 12, 2022) (memorandum decision) (affirming the circuit court’s probation revocation when the defendant admitted to eighteen separate violations of probation described in two petitions for revocation pursuant to West Virginia Code § 62-12-10(a)(2)). In sum, the majority’s reversal of the circuit court’s decision not only improperly ignores the deference due to the court and this Court’s prior precedent, but in doing so, it also confuses the standard to be applied when determining whether a probationer has absconded supervision.

For these reasons, I respectfully dissent. I am authorized to state that Justice Flanigan joins me in this dissent.