

# SUPREME COURT OF APPEALS OF WEST VIRGINIA

## Carl T. Sr. v. David Ballard, Warden

Carl T. Sr. · No. No. 15-0649 · Decided June 3, 2016

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### SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the denial of Carl T. Sr.'s petition for a writ of habeas corpus. The court rejected his arguments concerning ineffective assistance of counsel, involuntary guilty pleas, disproportionality of his sentence, and the sufficiency of the indictment, adopting the circuit court's findings on the remaining issues.

### OPINION

#### PER CURIAM.

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS Carl T. Sr., FILED Petitioner Below, Petitioner June 3, 2016 RORY L. PERRY II, CLERK SUPREME COURT OF APPEALS vs) No. 15-0649 (Mercer County 13-C-230) OF WEST VIRGINIA David Ballard, Warden, Mount Olive Correctional Complex, Respondent Below, Respondent MEMORANDUM DECISION Petitioner Carl T. Sr.,<sup>1</sup> by counsel Paul R. Cassell, appeals the order of the Circuit Court of Jackson County, entered on June 2, 2015, denying his petition for a writ of habeas corpus.

David Ballard, Warden, Mount Olive Correctional Complex, by counsel Lara Kay Omps-Botteicher, filed a response, and petitioner filed a reply. The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error.

For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure. On October 12, 2006, petitioner was indicted on thirteen counts, as follows: one count of sexual assault in the second degree and one count of sexual abuse by a guardian with regard to his son's girlfriend; three counts of sexual assault in the first degree, three counts of sexual abuse by a guardian, and three counts of incest with regard to his stepdaughter/niece; and one count of sexual abuse in the first degree and one count of sexual abuse by a guardian with regard to his stepson/ 1 Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case.

See *In re K.H.*, 235 W.Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W.Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W.Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990). 1 nephew.2 According to the indictment, all the offenses were committed from November of 2001 to February 20, 2006.

At a April 20, 2007, plea hearing, petitioner entered a “best interest plea”<sup>3</sup> to six counts of the indictment and the State dismissed the other seven counts in accordance with a binding plea agreement pursuant to Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure.

To support petitioner’s guilty pleas, the State proffered what the evidence would have shown had the case proceeded to trial. Thereafter, the circuit court accepted petitioner’s guilty pleas, and ordered a presentence investigation report and a sex offender evaluation.

On June 7, 2007, Dr. Ralph S. Smith Jr. reported that “a treatment plan cannot be developed or recommended” because “[petitioner] denied committing any of the criminal sexual acts[.]” Subsequently, on June 27, 2007, the circuit court sentenced petitioner consistent with the binding plea agreement <sup>4</sup> and imposed an aggregate term of twenty-five to fifty-five years of incarceration.<sup>5</sup> Petitioner did not appeal his convictions or sentence.

On June 10, 2013, petitioner filed a petition for a writ of habeas corpus. Petitioner was appointed counsel who filed an amended petition on August 5, 2014, alleging the following grounds for relief: (1) ineffective assistance of trial counsel; (2) involuntary guilty pleas; (3) disproportionate sentence; and (4) insufficient indictment.

The circuit court held an omnibus habeas corpus hearing on August 13, 2014, at which both petitioner and his trial counsel testified. Thereafter, on June 2, 2015, the circuit court entered a comprehensive 125-page order which rejected petitioner’s claims and denied his habeas petition. Petitioner now appeals the circuit court’s June 2, 2015, order denying his habeas petition.

We apply the following standard of review in habeas appeals: In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review 2 At the time of the reporting of the incidents, the victims were fourteen, thirteen, and twelve years old, respectively. 3 We have found that “best interest plea” is a local term of art used in Mercer County for a plea entered pursuant to Syllabus Point 1 of *Kennedy v. Frazier*, 178 W.Va.

10, 357 S.E.2d 43 (1987), in which we held that a defendant who does not admit guilt may enter a guilty plea if he determines that it is in his best interest to do so. *State v. Shrader*, 234 W.Va. 381, 384 n.5, 765 S.E.2d 270, 273 n.5 (2014). 4 The plea agreement gave the circuit court a certain amount of discretion whether to impose concurrent or consecutive sentences.

5 At certain places in its June 2, 2015, order denying petitioner's habeas petition, the circuit court states petitioner's aggregate sentence as twenty-five to sixty years of incarceration. However, that is an error. 2 the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006). We find that the circuit court's order adequately resolves all issues raised by petitioner in his habeas petition. However, we briefly address petitioner's allegations of a disproportionate sentence and an insufficient indictment to the extent that petitioner contends that the circuit court either refused to consider or misconstrued certain of his arguments.

First, petitioner asserts that the circuit court erred in refusing to consider his argument that his aggregate sentence was disproportionate to his crimes in reliance on *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

In Syllabus Point 4 of *Goodnight*, we held that "[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." 169 W.Va. at 366, 287 S.E.2d at 505. Petitioner notes that in *State v. David D.W.*, 214 W.Va. 167, 588 S.E.2d 156 (2003), and *State v. Richardson*, 214 W.Va. 410, 589 S.E.2d 552 (2003), we deviated from the law established in *Goodnight* to find that sentences within statutory limits could be unconstitutional pursuant to a disproportionality analysis. "While our constitutional proportionality standards theoretically can apply to any criminal sentence, they 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, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981). Accordingly, in *State v. Slater*, 222 W.Va. 499, 507-08 and n.11 665 S.E.2d 674, 682-83 and n.11 (2008), we disapproved of *David D.W.* and *Richardson* because each "[was] a deviation from our established law." In disapproving of those decisions, we noted that each was a per curiam opinion which, during their usage,<sup>6</sup> were not meant to change established law.

*Id.*; see Syl. Pt. 2, *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001) (holding that signed opinions will be used to announce new points of law). Therefore, as petitioner's case involves neither a life recidivist sentence nor a statute with no fixed maximum sentence, we conclude that the circuit court did not err in refusing to consider his disproportionality argument.

Second, petitioner contends that the circuit court erred in concluding that the indictment was sufficient, in part, by finding that his double jeopardy concerns were addressed by the fact that "[a] conviction under an indictment charged, though the proof was at variance regarding

immaterial dates, precludes a subsequent indictment on the exact same material facts contained in the original indictment.” State ex rel.

State v. Reed, 204 W.Va. 520, 524, 514 S.E.2d 171, 175 (1999) (citing State v. Sears, 196 W.Va. 71, 468 S.E.2d 324 (1996)). Petitioner states that his objection is not to the indictment’s use of approximate dates, but that its paucity of factual allegations would prevent him from determining whether the same material facts were contained in a subsequent indictment.

Respondent counters that each count of the indictment was sufficiently 6 In State v. McKinley, 234 W.Va. 143, 148, 764 S.E.2d 303, 308 (2014), we discontinued the use of per curiam opinions. 3 specific as to the victim involved, and the approximate time and place, to permit petitioner to invoke the double jeopardy bar to a subsequent prosecution. Upon our own review of the indictment,<sup>7</sup> we agree with respondent.

We note that pursuant to Syllabus Point 2 of Sears, a defendant needs only to present a prima facie case in order to invoke double jeopardy because “[o]nce the defendant proffers proof to support a non[-]frivolous claim, the burden shifts to the State to show by a preponderance of the evidence that double jeopardy principles do not bar the imposition of [a second] prosecution[.]” 196 W.Va. at 73, 468 S.E.2d at 326.

We conclude that the indictment in this case would allow petitioner to invoke the double jeopardy bar and that the circuit court did not err in finding that the indictment was sufficient. Having reviewed the circuit court’s June 2, 2015, “Order Denying The Petitioner’s Petition for Writ of Habeas Corpus Ad Subjiciendum And Removing It From The Court’s Active Docket,” we hereby adopt and incorporate the circuit court’s well-reasoned findings and conclusions as to all other issues raised by petitioner in this appeal.

The Clerk is directed to attach a copy of the circuit court’s order to this memorandum decision.<sup>8</sup> We conclude that the circuit court did not abuse its discretion in denying petitioner’s petition for a writ of habeas corpus. Affirmed. ISSUED: June 3, 2016 CONCURRED IN BY: Chief Justice Menis E. Ketchum Justice Robin Jean Davis Justice Brent D. Benjamin Justice Margaret L. Workman Justice Allen H. Loughry II <sup>7</sup> The sufficiency of an indictment is reviewed de novo.

Syl. Pt. 2, in part, State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996). <sup>8</sup> Certain names in the circuit court’s order have been redacted. See fn.1, supra. <sup>4</sup>