

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

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

vs.) No. 101625 (McDowell County 09-F-92-M)

FILED

**October 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**Timothy Jared Austin,
Defendant Below, Petitioner**

MEMORANDUM DECISION

Petitioner appeals, pro se, the entry of an amended sentencing order by the Circuit Court of McDowell County, sentencing petitioner to a one to three year term of incarceration for attempt to commit escape from the custody of the Division of Corrections. The appeal was timely perfected by counsel, with a portion of the record from the circuit court accompanying the petition. The state has filed a response.

This Court has considered the petition and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the petition and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The petitioner challenges the circuit court's entry of the amended sentencing order, arguing that it impermissibly increased his sentence by thirty-three months over the prior sentencing order. According to the petitioner's argument, the original sentencing order did not dictate that his new sentence for attempted escape should run consecutive to the one to fifteen year sentence for burglary that he was already serving. Following the entry of the original sentencing order, petitioner attempted to correct what he thought were deficiencies in that order concerning credit for his time served through writs of mandamus and habeas corpus. However, those writs were rendered moot by the circuit court's entry of the amended sentencing order. Petitioner now alleges a presumption of vindictiveness against him for his invocation of lawful remedies to correct his allegedly illegal sentence, as evidenced by this supposed increase which he argues is a violation of his due process rights. "The Supreme

Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, in part, *State of West Virginia v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997).

It is clear from the amended sentencing order that some confusion arose from the language of the original sentencing order. In clarifying its intention, the circuit court stated in the amended sentencing order that “[i]t was the intent of the sentencing court that the sentence imposed on November 12, 2009[,] be served consecutively with the unrelated sentence that the [petitioner] was already serving on November 12, 2009.” The circuit court went on to add that it intended to give petitioner credit for the time he served on the attempted escape charge from his arraignment to the date of sentencing, and that the balance would then be served consecutively to this other unrelated sentence. It is from the resulting confusion that petitioner finds the basis for his argument that his sentence was impermissibly increased by thirty-three months upon entry of the amended sentencing order. However, this Court finds no merit in petitioner’s argument. Had the circuit court originally intended for these two sentences to run concurrently, it is hard to imagine how the subsequent sentence would have punished the petitioner or served to deter him from future escapes. It is clear from the record that the circuit court intended for the sentences to run consecutively, and that the sentence was not impermissibly increased. As such, the petitioner’s due process rights were not violated by the entry of the amended sentencing order.

For the foregoing reasons, we find no error in the decision of the circuit court and the sentence is hereby affirmed.

Affirmed.

ISSUED: October 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh