

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

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

vs) **No. 11-0177** (Raleigh County No. 09-F-36-H)

**Robert Lee Fitzwater,
Defendant Below, Petitioner**

FILED
October 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Robert Fitzwater pled guilty to one count of Sexual Abuse in the First Degree, West Virginia Code § 61-8B-7. He was sentenced to the statutory term of one to five years in prison and to fifty years of extended sex offender supervision pursuant to West Virginia Code § 62-12-26. He appeals his prison sentence and the period of post-release supervision.

This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on March 24, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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 is appropriate under Rule 21 of the Revised Rules.

Petitioner asserts that West Virginia Code § 62-12-26, providing for extended supervision for certain sex offenders, is unconstitutional under both the West Virginia and United States Constitutions. Shortly after petitioner filed this appeal, we released our opinion in *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011), wherein we upheld the constitutionality of this act. In accordance with our holding in *James*, we reject petitioner's arguments that the act is facially unconstitutional.

Petitioner also argues that fifty years of extended supervision is disproportionate to the facts of his crime and is different treatment than what another person who is convicted of a similar crime would receive. Furthermore, petitioner argues that the circuit court considered an impermissible factor when imposing the sentence of incarceration and the extended supervision.

Prior to imposing sentence, the court was made aware of the facts of the crime and had the benefit of reports from two different mental health professionals who evaluated petitioner. The adult female victim told police that she was sitting in her truck with the door open when petitioner appeared, asked if she had a boyfriend, and attempted to kiss her. The victim told police that she resisted, but petitioner touched her breast and reached under her skirt and touched her pubic area. When pleading guilty to one count of Sexual Abuse in the First Degree, petitioner admitted that he touched the victim's breast and attempted to kiss her, but he denied reaching up her skirt. When interviewed by an evaluating psychiatrist, Dr. Bobby Miller, petitioner denied that he had done anything wrong and indicated that his conduct was not dissimilar to the manner in which he has approached other women. Dr. Miller concluded, *inter alia*, that while petitioner was competent to stand trial and be held criminally responsible, he has a brain injury and resultant personality disorder that impair his ability to interpret social clues and express himself appropriately. Dr. Miller opined that petitioner is at a high risk for sexual re-offense and needs treatment.

Petitioner argues that the circuit court erroneously considered a portion of a report submitted by the other evaluator, psychologist Kimberly Parsons, MA. Ms. Parsons referred to a police report of an incident that occurred three months prior to the instant crime, during which petitioner allegedly sexually propositioned a fourteen-year-old girl. Petitioner denied misconduct toward the girl and no criminal charges were filed. However, the circuit court stated during the sentencing hearing that the current crime represents an escalation over the alleged prior conduct.

"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 v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). Upon a review of the record and argument of the parties, we find that the circuit court did not abuse its discretion when imposing sentence. The period of prison incarceration and the period of extended supervision are both within the provisions of the respective statutes. Both evaluating mental health professionals recommended that petitioner be incapacitated – Dr. Miller recommended incapacity in the form of home confinement, while Ms. Parsons recommended incarceration. Dr. Miller opined that petitioner is at a high risk for sexual re-offending, while Ms. Parsons found a moderate to high risk. During the sentencing hearing, the circuit court indicated the belief that petitioner knew what he was doing when he committed this crime, and by petitioner's own admission, he had done it a number of times before.

We need not decide whether the circuit court erred in considering the police report about the fourteen-year-old girl. Even assuming *arguendo* that the information about the

fourteen-year-old girl should not have been considered, there was more than sufficient basis for the circuit court to impose this prison sentence and period of extended supervision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 11, 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