

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

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

vs) **No. 11-0432** (Braxton County 08-F-88)

**Mark Wilson, Defendant Below,
Petitioner**

FILED

**March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Braxton County, wherein the petitioner was convicted of recidivism and consequently, sentenced to life imprisonment with eligibility for parole after fifteen years. The appeal was timely perfected by Petitioner Wilson's counsel Daniel Grindo, with Petitioner Wilson's appendix accompanying the petition. The State, by its attorney Benjamin Yancey III, responds confessing error.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix presented, the Court finds prejudicial error. A memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

As more fully explained herein, the Court is of the opinion that the circuit court erred in sentencing Petitioner Conner to life imprisonment following his recidivist conviction. Because the Court agrees with the State's confession of error, the decision of the Court is set forth in a memorandum decision rather than an opinion. In accordance with the Syllabus of *State v. Barker*, 186 W.Va. 73, 410 S.E.2d 712 (1991), life imprisonment for a recidivist conviction under West Virginia Code § 61-11-18(c) is inappropriate where the convictions were non-violent in nature. Accordingly, this case satisfies the "limited circumstances" requirement of Rule 21(d) and it is appropriate for the Court to issue a memorandum decision rather than an opinion.

Petitioner was initially sentenced to one to five years for his conspiracy conviction and an additional five years following a recidivist conviction. The petitioner appealed this decision to the Court in 2009, arguing that under West Virginia Code § 61-11-18(a), his recidivist sentence should have been for two to five years, rather than an additional five years, because his original sentence for the conspiracy conviction was for an indeterminate term of one to five years. The Court affirmed the petitioner's conviction, but reversed and remanded the case to circuit court for re-sentencing. On remand, the circuit court maintained the petitioner's sentence of one to five years for his conspiracy conviction, but re-sentenced him to life imprisonment, with eligibility for parole, for the

recidivist conviction. It is from this order upon which the petitioner seeks reversal and a remand of proceedings.

The petitioner argues that the circuit court erred in sentencing the petitioner to life imprisonment under West Virginia Code § 61-11-18(c) because the petitioner's prior criminal convictions were of a non-violent nature, the instant conviction was of a non-violent nature, and therefore, the sentence violates the proportionality clause in Article III, Section 5 of the West Virginia Constitution. In support, the petitioner argues that under the Syllabus in *State v. Barker*, 186 W.Va. 73, 410 S.E.2d 712 (1991), this Court directed as follows:

The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute. Syl. Pt. 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

Here, the petitioner had two prior felony convictions for grand larceny and possession of a firearm, in which the charge did not allege the possession of the firearm for a nefarious purpose. The petitioner's third conviction that triggered the recidivist proceeding was for conspiracy in relation to a drug sale, in which the petitioner was driving a vehicle to meet a confidential informant and handed the drugs from the person seated in the passenger seat to the informant, and then handed the money from the informant to the passenger. Because none of the petitioner's three felony convictions were of any actual or threatened violence, pursuant to *Barker*, the life sentence imposed by the circuit court was disproportionate to the crimes the petitioner committed.

In response, the State confesses error. "[T]he Attorney General has the power and discretion to confess reversible error in criminal appeals before this Court." *Manchin v. Browning*, 170 W.Va. 779, 789, 296 S.E.2d 909, 919 (1982). In the instant matter, the State concedes that none of the petitioner's three felony convictions include any actual or threatened violence and accordingly, it asserts that the "[circuit] court's imposition of a life sentence in this case is excessive and in violation of the proportionality clause of Article III, Section 5 of our Constitution." The State notes that the *Barker, supra*, decision highlights that the "primary analysis . . . is to determine if they [the felony convictions] involve actual or threatened violence to the person . . ." Consequently, the State submits that this Court should grant the petitioner's request for a reversal of his life sentence and remand this case for further proceedings.

For the foregoing reasons, we reverse the February 8, 2011, decision of the circuit court imposing a life sentence, and remand for further proceedings consistent with this memorandum decision.

Reversed and Remanded.

ISSUED: March 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh