

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

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

vs) **No. 11-0534** (Ohio County 09-F-109)

**Sherri Wukeson, Defendant
Below, Petitioner**

FILED
February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Sherri Wukeson appeals the circuit court's sentencing order following her guilty plea to one count of attempt to obtain a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed a response brief, to which petitioner filed a reply.

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 no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On September 14, 2009, petitioner was indicted by an Ohio County Grand Jury on one count of attempting to obtain a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge, and one count of fraudulent schemes. After being sentenced to incarceration for crimes in the State of Ohio, petitioner was allowed to return to West Virginia, whereupon she entered a plea agreement with the State. Pursuant to this agreement, petitioner pled guilty to one count of attempting to obtain a controlled substance by fraud, forgery, deception or subterfuge, and the fraudulent schemes charge was dropped. Following entry of the guilty plea, petitioner was sentenced to a one to three year term of incarceration, to run consecutive to her Ohio sentence.

On appeal, petitioner argues that, given the circumstances of the case, the circuit court abused its discretion in sentencing. She alleges that there was no evidence of prior criminal acts on her part, and that her crime was non-violent. Additionally, petitioner was employed

prior to her incarceration, and would be able to retain that employment if released in a reasonable amount of time. Citing *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), petitioner argues that sentences disproportionate to the crime are constitutionally impermissible as a violation of Article III, Section 5 of the West Virginia Constitution, and that her sentence is unduly harsh because it “clearly shocks the conscience of both the Court and society.”

The State responded by arguing that this Court has repeatedly stated that trial courts have virtually unfettered discretion in matters of sentencing, and there is no evidence that the circuit court abused this discretion. Further, there is no evidence that the circuit court based its sentence on some impermissible factor, nor does petitioner allege the same. Additionally, because it is consistent with this Court’s holding in *State v. Goodnight*, the sentence is not amenable to a proportionality analysis, and therefore not reviewable on appeal. 169 W.Va. 366, 367, 287 S.E.2d 504, 505 (1982). The State also argues that petitioner waived any appeal as part of her plea agreement. The Court, however, declines to address this second argument because it is clear, on the merits, that petitioner is not entitled to the relief sought.

“‘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).” Syl. Pt. 1, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). “[S]entences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.’ Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).” Syl. Pt. 1, *State v. Eilola*, 226 W.Va. 698, 704 S.E.2d 698 (2010). West Virginia Code § 61-11-8(2) makes the attempted commission of any offense that itself is punishable by less than a life sentence of incarceration a felony, and allows for a punishment of imprisonment in the penitentiary for a term of one to three years. Petitioner was charged with attempt to commit the crime defined in West Virginia Code § 60A-4-403, which is punishable by imprisonment in the penitentiary for a term less than life. Upon a review of the record and arguments of the parties, we find that the circuit court did not abuse its discretion or rely on an impermissible factor when imposing sentence. Because petitioner’s sentence is within the statutory guidelines for the crime in question, and because the circuit court did not abuse its discretion or rely on an impermissible factor, petitioner’s sentence is not subject to appellate review.

For the foregoing reasons, we find no error in the decision of the circuit court and the circuit court’s sentencing order is hereby affirmed.

Affirmed.

ISSUED: February 13, 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