

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

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

vs.) **No. 11-0781** (Wood County 10-MAP-5)

**Betty Beck, Defendant Below,
Petitioner**

FILED
April 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Wood County, wherein the circuit court, by order entered September 29, 2010, denied petitioner's motion to reconsider her sentence from the Wood County Magistrate Court's order convicting petitioner of one misdemeanor count of stalking following a jury trial. The appeal was timely perfected by petitioner, pro se, with a portion of the record from the magistrate court and the circuit court accompanying the petition. No response to the petition has been filed.

This Court has considered the petitioner's brief and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, the 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 petitioner's written brief 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 of Appellate Procedure.

Following a jury trial in Wood County Magistrate Court, petitioner was convicted of one count of stalking, and was originally sentenced to six months of incarceration. However, that sentence was suspended in favor of two years of unsupervised probation. Following imposition of that sentence, petitioner was later found to be in violation of the terms of her probation on November 28, 2011. The terms of petitioner's suspended sentence were revoked, and petitioner was ordered to serve the original sentence of six months of incarceration, less seventy-one days time served. Prior to her probation violation, petitioner appealed her magistrate court conviction to the Circuit Court of Wood County. However, a review of the limited record in this matter indicates that petitioner voluntarily withdrew this appeal. On September 10, 2010, petitioner appeared before the circuit court, withdrew her appeal, and requested modification of her original sentence. A hearing was set for September 20, 2010, to hear petitioner's motion to reconsider sentence. However, on September 13, 2010, petitioner filed a motion titled Motion to Reinstate Appeal in Conjunction with Bond Reinstatement of September 10, 2010, and then filed a second motion on September 17, 2010, titled Motion to Reverse Conviction or Reinstate Appeal and Defendant's Response to State's August 30,

2010 Argument. On September 29, 2010, the circuit court entered two orders. One order stated that “[i]t appearing to the Court that the [petitioner] has withdrawn her appeal of the judgment of the Magistrate Court of Wood County, West Virginia, it is, hereby ORDERED that jurisdiction of this case is returned to the Magistrate of Wood County, West Virginia.” This order, however, does not make clear if it was issued in response to any particular motion of the petitioner. The second order clearly states that the circuit court denied the petitioner’s motion to reconsider sentence. Finally, by order entered March 22, 2010, the circuit court reiterated that the petitioner had withdrawn her appeal and again ordered the matter remanded to the magistrate court.

On appeal, petitioner alleges a total of twenty-seven assignments of error. Twenty-five of these errors relate to the petitioner’s jury trial in magistrate court, and cover a wide range of issues, including allegations that the magistrate court erred in failing to grant petitioner’s motion to dismiss, erred in granting the State’s motion to amend the complaint, and erred in making multiple improper evidentiary rulings. Additionally, petitioner raises two assignments of error related to her direct criminal appeal in the circuit court. Specifically those assignments of error are that (1) the circuit court erred in denying petitioner’s motion to reverse the conviction or reinstate the appeal filed September 13, 2010, and to respond to correspondence and requests for bond reconsideration, and (2) that irregularities exist regarding the circuit court’s requirement for written transcripts to accompany petitioner’s appeal, as opposed to audio transcripts. It is important to note that petitioner alleges that the circuit court erred in denying her Motion to Reverse Conviction or Reinstate Appeal, but as noted above, the applicable order petitioner designated in the record is an order denying her motion to reconsider her sentence as argued on September 20, 2010.

“In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review.’ Syllabus Point 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).” Syl. Pt. 1, *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010). Upon review of the record and petitioner’s brief, the Court finds no error in the circuit court’s denial of petitioner’s motion, and further declines to address the circuit court’s requirements for transcripts accompanying such appeals. “Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible 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. 4, *State v. Manley*, 212 W.Va. 509, 575 S.E.2d 119 (2002). As reflected in the record, petitioner was eventually sentenced to six months of incarceration for stalking, which is the maximum period of incarceration allowable for this crime under West Virginia Code § 61-2-9a(b). As such, we find no error in the circuit court’s decision to deny reconsideration of the petitioner’s sentence.

Further, it appears that the issues petitioner raises in regard to the magistrate court proceeding are not subject to review by this Court, due to petitioner’s withdraw of her appeal in the circuit court. This Court has held that “[i]n the exercise of its appellate jurisdiction, this Court will not decide

nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.’ Syl. Pt. 1, *Mowery v. Hitt*, 155 W.Va. 103, 181 S.E.2d 334 (1971).” Syl. Pt. 4, *In re Richard P.*, 227 W.Va. 285, 708 S.E.2d 479 (2010). Upon review of the record, the Court finds that the circuit court never reached a decision regarding the assignments of error related to the magistrate court proceedings. As such, those assignments of error are not subject to review on appeal to this Court. Additionally, petitioner filed correspondence with this Court on December 29, 2011, seeking release from incarceration pending this appeal. The court hereby finds this issue moot as petitioner has discharged her sentence.

For the foregoing reasons, we affirm the circuit court’s order.

Affirmed.

ISSUED: April 16, 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