

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

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

vs) **No. 11-0825** (Morgan County 05-F-70)

**John Payne, Defendant Below,
Petitioner**

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

MEMORANDUM DECISION

Petitioner John Payne appeals the circuit court's order sentencing him to serve five years, with extended parole supervision pursuant to West Virginia Code § 62-12-26, following revocation of his probation due to several violations. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response.

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.

Petitioner pled no contest to one felony count of sexual assault in the third degree against a minor who at the time was thirteen-years-old. He was sentenced to one to five years in prison and then given thirty years of post-release extended supervision with a list of requirements for said supervision. Initially petitioner was not allowed contact with any minor children, but his probation officer later altered this provision to allow contact with minor children only if petitioner was supervised by his father. The State filed a petition to revoke petitioner's supervised release after several violations of the provisions of said release. Petitioner was alleged to have violated his release by having multiple weapons in his home (a hunting knife, a compound bow and a club), by driving on a suspended license in violation of the law, by lying to his probation officer regarding being in possession of a vehicle without a license, and by having multiple contacts with minor children without the proper supervision. Petitioner admitted to these violations, and asked for no more than one

year of incarceration, as he was diagnosed with cancer and needed treatment. The State argued that there was evidence that petitioner may have been living with the minor children, and that petitioner planned to move to avoid his probation officers. The State asked for two years of incarceration and the remainder of petitioner's supervised release.

The circuit court noted the multiple violations of petitioner's release, and expressed concern for the safety of the minor children, as testimony showed that although petitioner had been convicted of a sexual act against a minor, petitioner's father and petitioner's girlfriend regularly allowed petitioner to be around minor children without the proper supervision. Petitioner was sentenced to five years of incarceration and the remainder of his thirty years of supervised release pursuant to West Virginia Code § 62-12-26.

On appeal, petitioner first argues that he received an excessive sentence because the circuit court relied on sentencing factors not placed in evidence. Although petitioner admits violations of his supervised release, he argues that his violations were not egregious, as the weapons belonged to his grandfather, there is no evidence that he drove a vehicle without a license more than once, and no harm occurred from his contact with the minor children without proper supervision. Moreover, the State only requested a two year sentence and the circuit court more than doubled that by giving him a five year sentence. The State responds, arguing that petitioner's sentence is not reviewable as it was within the statutory limit, was not based on an impermissible factor, and does not violate any proportionality principles. The State further argues that the circuit court found multiple violations of petitioner's release, and chose to sentence him accordingly.

“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, 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)“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. 3, *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010). A review of the present case shows that the sentence in question was not based upon an impermissible factor, and does not violate any statute or constitutional provision. Petitioner clearly violated several terms of his supervised release, most importantly having repeated contact with minors without the proper supervision. Thus, this Court finds no error in the sentences imposed in this matter.

Petitioner next argues that West Virginia Code § 62-12-26 as it pertains to supervised release for sexual offenders is unconstitutional in that it violates due process and the prohibition against cruel and unusual punishment, and in that it violates Article III, Section 14 of the West Virginia Constitution and is at odds with other mandatory provisions of the

West Virginia Code. Petitioner notes the prior rulings of this Court have found West Virginia Code § 62-12-26 constitutional, but argues that none of the prior cases have considered the validity of this statute as imposed via the revocation of supervised release, as has occurred in this matter. Specifically, petitioner argues that this code provision violates due process in that the statute fails to allow credit for time served while on supervised release, and serves to sentence petitioner to “an extraordinary period of incarceration, greater than the maximum penalty for the actual felony offense, by a finding of only clear and convincing evidence.”

The State responds, arguing that this statute does not violate due process, double jeopardy, or the prohibition against cruel and unusual punishment as per *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). The State also argues that petitioner was not sentenced to a greater sentence than allowed by the statute, as he was originally sentenced to one to five years, and is now sentenced to five years. Moreover, the State argues that this provision does not violate any *ex post facto* laws nor Article III, Section 14 of the West Virginia Constitution. *Ex post facto* principles do not apply because the intent of the statute is not punishment, but rather supervision and regulation. Article III, Section 14 deals with the right to trial by jury, which this Court has determined is not violated by application of this statute, and this does not apply to petitioner, as he pled to the underlying charge. The State further argues that this statute does not conflict with the “good time served” statute found at West Virginia Code § 28-5-27 as the petitioner is only denied credit for the time he spends on supervised release, and the extended parole supervision statute is silent as to credit for time served while incarcerated. Finally, the State argues that the standard of proof applicable to revocation has been found constitutional by the Supreme Court of the United States.

“The constitutionality of a statute is a question of law which this Court reviews *de novo*.” Syl. pt. 1, *State v. Rutherford*, 223 W.Va. 1, 672 S.E.2d 137 (2008). Additionally,

““When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.’ Point 3, Syllabus, *Willis v. O’Brien*, 151 W.Va. 628[, 153 S.E.2d 178 (1967)].’ Syllabus Point 1, *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W.Va. 524, 170 S.E.2d 362 (1969).” Syllabus point 1, *U.S. Steel Mining Co., LLC v. Helton*, 219 W.Va. 1, 631 S.E.2d 559 (2005), *cert. denied*, 547 U.S. 1179, 126 S.Ct. 2355, 165 L.Ed.2d 279 (2006).

Syl. Pt. 2, *Bayer MaterialScience, LLC v. State Tax Comm'r*, 223 W.Va. 38, 672 S.E.2d 174 (2008).

With regard to West Virginia Code § 62-12-26, this Court has specifically found that the statute “does not facially violate due process principles [t]he terms of the statute neither infringe upon a criminal defendant’s right to jury determination of relevant factual matters, nor are the provisions of the statute regarding conditions of unsupervised release unconstitutionally vague.” Syl. Pt. 9, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). Moreover, this Court indicated in *James* that this provision “does not on its face violate the double jeopardy provisions contained in either the United States Constitution or the West Virginia Constitution.” Syl. Pt. 11, *James*, 227 W.Va. 407, 710 S.E.2d 98. Finally, this Court has found that this code provision does not violate the prohibition against cruel and unusual punishment. Syl. Pt. 6, *James*, 227 W.Va. 407, 710 S.E.2d 98.

It is clear from a reading of this Court’s opinion in *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011) that petitioner’s arguments regarding the constitutionality of West Virginia Code § 62-12-26 are without merit. As to the petitioner’s argument that this statute conflicts with the “good time served” statute found at West Virginia Code § 28-5-27, this Court finds that the petitioner was only denied credit for the time he spends on supervised release under the statute, and extended supervised release the statute is silent as to credit for time served while incarcerated. Finally, the State argues that the standard of proof applicable to revocation has been found constitutional by the Supreme Court of the United States in *Johnson v. U.S.*, 529 U.S. 694, 120 S.Ct. 1795 (2000).

For the foregoing reasons, we affirm.

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