

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

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

vs) No. 11-1010 (Berkeley County 10-F-172)

**Lee R. M.,
Defendant Below, Petitioner**

FILED

October 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel B. Craig Manford on behalf of petitioner, Lee R. M.¹, arises from the Circuit Court of Berkeley County, wherein petitioner was sentenced to seven to twenty-five years incarceration following his convictions for incest, third degree sexual assault, and first degree sexual abuse. This sentencing order was entered by the circuit court on May 26, 2011. The State filed its response, by counsel Cheryl Saville, in support of the circuit court's sentencing order.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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.

In the fall of 2009, petitioner was indicted for nineteen sexual offenses committed against his daughter, who was then fourteen years old. In May of 2011, petitioner pled guilty to one count of incest under West Virginia Code § 61-8-12 and one count of third degree sexual assault under West Virginia Code § 61-8B-5. He pled no contest to one count of first degree sexual abuse under West Virginia Code § 61-8B-7. At sentencing, petitioner requested probation, home confinement, concurrent sentencing, or any combination of the three that would be less than consecutive sentences. After consideration of petitioner's pre-sentence investigation report, psychological reports, testimony and remarks at sentencing, and the circumstances of the case, the circuit court sentenced petitioner to consecutive sentences of five to fifteen years incarceration for incest, one to five years incarceration for third degree sexual assault, and one to five years incarceration for first degree sexual abuse, for a cumulative sentence of seven to

¹ Because the victim in this matter is petitioner's daughter and was a minor at the time of the offenses, we follow our traditional practice in cases involving sensitive facts and use only petitioner's last initial. See *State v. Edward Charles L.*, 183 W.Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

twenty-five years incarceration. In addition, the circuit court ordered that upon release from incarceration petitioner serve ten years of supervised release and register as a sex offender for life. Petitioner appeals this sentencing order.

The Court reviews sentencing orders under “‘a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.’ Syllabus point 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). Moreover, “‘[s]entences 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. 6, *State v. Slater*, 222 W.Va. 499, 665 S.E.2d 674 (2008). Further, “‘[t]he 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). Syl. Pt. 2, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). With these standards in mind, we turn to discuss the issues before us.

Petitioner first argues that the circuit court abused its discretion in denying his motions for sentences alternative to consecutive penitentiary incarceration. Petitioner recognizes that the sentences he received were within statutory limits. He argues, however, that the circuit court did not give adequate consideration to alternative sentencing, given the testimony of forensic psychologist Dr. Bernard Lewis that petitioner presented the lowest possible risk of re-offending, has little prior criminal history, is willing to receive treatment, has accepted responsibility, and has expressed genuine remorse. Petitioner argues he should have received probation under West Virginia Code § 62-12-2. Second, petitioner argues that the circuit court committed error by imposing disproportionate and unconstitutional sentences. Petitioner argues that, given his mitigating circumstances, his consecutive sentences shock the conscience and society and accordingly, the circuit court should have, at the very least, ordered concurrent sentences.

The State responds in support of the circuit court’s order, arguing that under West Virginia Code § 61-11-21, anyone convicted of two or more offenses shall be confined to consecutive terms of incarceration unless the circuit court finds in its discretion to order concurrent sentences. Further, a defendant does not have an absolute right to probation and the circuit court has the discretion to grant or deny probation. *State v. Duke*, 200 W.Va. 356, 364, 489 S.E.2d 738, 746 (1997). The circuit court considered petitioner’s psychological reports and mitigating factors, but also considered the severity of the offenses and the emotional harm caused to the victim. The State further argues that petitioner’s sentences are not so disproportionate to shock the conscience, nor are they unconstitutional. His sentences satisfy the two tests reiterated in *State v. Glover*, 177 W.Va. 650, 658, 355 S.E.2d 631, 639 (1987), as originally set forth by *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), which also references Syllabus Point 5 of *Wanstreet v. Bordenkricher*, 166 W.Va. 523, 276 S.E.2d 205 (1981). The State summarizes the victim’s reports of petitioner’s crimes against her and the statements by the victim and her mother concerning the impact the crimes have had on the family and on the victim’s health. Given the circumstances of the case, including petitioner’s position of trust to the victim and the victim’s young age, petitioner’s sentence is neither shocking to the conscience nor unconstitutional.

The Court finds no abuse of discretion by the circuit court in sentencing petitioner to consecutive terms of incarceration for his three convictions. Nor do we find that petitioner's sentences are disproportionate or unconstitutional.

Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.

Syl. Pt. 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983).

Further, we have discussed the proportionality principle as follows:

“In determining whether a given sentence violates the proportionality principle . . ., consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.” Syl. Pt. 5, in part, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Syl. Pt. 5, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). Here, a review of the record on appeal supports the circuit court's sentencing order. The circuit court remained within the statutory limits of the crimes for which petitioner was convicted and it used its discretion in ordering consecutive sentencing, rather than concurrent sentencing or other alternative sentences. Moreover, the circuit court's sentence neither shocks the conscience of society nor was it disproportionate to petitioner's crimes. In light of this review and the circumstances of this case, nothing in the record suggests that the circuit court abused its discretion or committed error at petitioner's sentencing.

For the foregoing reasons, we affirm the circuit court's decision.

Affirmed.

ISSUED: October 22, 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