STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 11-1017 (Berkeley County 10-F-17)

Phyllis B. Vallejo,
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 Berkeley County, where the circuit court, by order entered November 29, 2010, sentenced petitioner to a $100 fine, court costs, and twenty-four hours in jail which was suspended in lieu of eight hours of community service, pursuant to petitioner's plea of no contest to one count of embezzlement. The appeal was timely perfected by petitioner, pro se, with the entire record from the circuit court accompanying the petition. The State, by counsel Christopher C. Quasebarth, has filed its response.

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

In the criminal proceeding below, petitioner pled no contest to one count of embezzlement, had a fine of $100 plus court costs imposed, and was sentenced to twenty-four hours in jail, which was suspended in lieu of eight hours of community service. Originally, petitioner had been represented by counsel in the criminal proceedings, but counsel withdrew close to trial and petitioner's request to have counsel appointed was denied due to financial ineligibility. Ultimately, petitioner accepted the State's plea agreement, and it is from this sentencing order that she appeals. On appeal, petitioner asserts the following assignments of error: (1) that it was reversible and prejudicial error to deny her the right to assistance of counsel, which resulted in the acceptance of a plea questionable to the petitioner; (2) that it was reversible and prejudicial error to not move forward with the pre-trial conference which denied her an opportunity to address outstanding discovery issues; (3) that it was reversible and prejudicial error not to move forward with the pre-trial conference which denied her an opportunity to have the court conduct an in camera review of documents requested in subpoenas that were either quashed or had an outstanding motion to quash;

(4) that it was reversible and prejudicial error not to move forward with the pre-trial conference which denied her an opportunity to address the circuit court and advise that the plea agreement before it was not the plea offered to her by the State on Saturday, November 13, 2010, by telephone; (5) that it was reversible and prejudicial error for the State to provide the circuit court with an incorrect plea and have the plea modified by the circuit court without the petitioner having assistance of counsel; and, (6) that it was reversible and prejudicial error for the circuit court to advise the petitioner that if she could not be responsive to its question then it was not going to take the plea and that the matter would go to trial and the petitioner would live with those consequences. These issues, as well as the State's responses thereto, are addressed in turn below.

"'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). Petitioner first argues that the circuit court erred in denying her the right to assistance of counsel, and that the denial caused her to accept a questionable plea agreement. Simply put, petitioner argues that she has a constitutional right to counsel, and that the circuit court violated that right in denying her request for appointment of counsel. In response, the State argues that while all criminal defendants have a right to counsel, only indigent defendants have a right to appointed counsel. According to the State, petitioner did not qualify as indigent, and had in fact been represented by counsel during the majority of the proceedings below. However, after petitioner's counsel withdrew, the State argues that the record is devoid of any action on petitioner's part to obtain new counsel. Upon review of the record, the Court finds no error in regard to the circuit court's denial of petitioner's request for appointed counsel. A review of the record indicates that petitioner was found to be ineligible for appointed counsel after review of her affidavit requesting the same. As such, the Court finds that the circuit court did not violate petitioner's right to counsel by denying her request to appoint counsel.

As to petitioner's remaining assignments of error, the Court declines to address the same as they have been waived by the entry of petitioner's knowing and voluntary plea of no contest. This Court has previously held that "[a] knowing and voluntary guilty plea waives all antecedent, nonjurisdictional defects." *State v. Proctor*, 227 W.Va. 352, 364, 702 S.E.2d 549, 561 (2011) (quoting *State v. Greene*, 196 W.Va. 500, 507 n. 1, 473 S.E.2d 921, 928 (1996)). Based upon this holding, we find that petitioner's remaining assignments of error have been waived because they are nonjurisdictional in nature. Further, a review of the record shows that the petitioner's plea was knowing and voluntary, and that the circuit court held the appropriate plea colloquy during which petitioner indicated that she was not being forced into accepting the plea agreement. Additionally, a review of the record indicates that the parties agreed to modify the plea agreement because the original agreement called for petitioner's sentence to be satisfied by time served, but it became apparent that petitioner had never spent any time in jail in relation to these charges. As such, the agreement was modified to recommend eight hours of community service in lieu of a suspended sentence of twenty-four hours in jail. For these reasons, the Court finds that the plea agreement, subject to which petitioner was sentenced to the minimum punishment allowable for the felony offense of embezzlement, is valid, and we decline to disturb the same on appeal.

For the foregoing reasons, we affirm the circuit court's sentencing 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