

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

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

vs) **No. 11-1047** (Harrison County 10-F-23-2)

**William Echard II,
Defendant Below, Petitioner**

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner William Echard II appeals the Circuit Court of Harrison County's order dated June 9, 2011, denying his motion for resentencing so that he may perfect an appeal. Petitioner is represented on appeal by counsel, Robert Catlett. The State, by its attorney Laura Young, responds confessing error.

This Court has considered the parties' briefs and the appendix 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 appendix presented, the Court finds prejudicial error. A memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

As more fully explained herein, the Court is of the opinion that the circuit court erred in denying petitioner's motion for resentencing. Because the Court agrees with the State's argument conceding that the circuit court does in fact have jurisdiction to resentence the petitioner, the decision of the Court is set forth in a memorandum decision rather than an opinion. Accordingly, this case satisfies the "limited circumstances" requirement of Rule 21(d) and it is appropriate for the Court to issue a memorandum decision rather than an opinion.

On August 25, 2010, petitioner was sentenced to a total of twenty-one to eighty-nine years in the penitentiary for his convictions on one count of death of a child by parent, guardian or custodian (forty years); four counts of child abuse resulting in injury (two to ten years each); and three counts of child neglect resulting in injury (one to three years each), all to be served consecutively. Petitioner filed a timely notice of intent to appeal on September 24, 2010. He later filed for an extension of time because the court reporter had not provided transcripts. The circuit court entered an order granting petitioner an extension of time and ordered him to file his appeal on or before February 17, 2011. Appellate counsel was appointed for petitioner on January 6, 2011. No appeal was perfected by the petitioner, and appellate counsel filed a motion to resentence for purposes of appeal on May 18, 2011. Counsel indicated that because he was appointed only one month prior to the February 17, 2011, deadline, he was unable to complete the appeal in time.

However, the circuit court denied the motion for resentencing, finding that it lacked jurisdiction to resentence petitioner for the purposes of appeal.

On appeal, petitioner argues that the right to appeal cannot be destroyed by counsel's failure to perfect an appeal. *See* Syl. Pt. 8, *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977). Petitioner argues that there is no evidence that he knowingly and voluntarily waived his right to an appeal; thus, he has the right to be resentenced. Petitioner also argues that there is no procedural barrier limiting resentencing.

In response, the State admits that there is no language in the Revised Rules of Appellate Procedure "prohibit[ing] the previous practice of permitting the circuit court to resentence an individual for the purpose of restarting the time limits for prosecuting an appeal." "[T]he Attorney General has the power and discretion to confess reversible error in criminal appeals before this Court." *Manchin v. Browning*, 170 W.Va. 779, 789, 296 S.E.2d 909, 919 (1982). The State notes that there appears to be no change from the prior practice that allowed courts to resentence a criminal defendant for purposes of appeal.

For the foregoing reasons, we reverse the decision of the circuit court dated June 9, 2011, and remand for resentencing so that petitioner may pursue a direct appeal to this Court.

Reversed and Remanded.

ISSUED: May 29, 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