No. 31326 State of West Virginia v. Tony Dean Arbaugh, Jr.

FILED
March 2, 2004
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting, joined by Chief Justice Maynard:

The majority finds that the circuit court abused its discretion in denying Mr. Arbaugh's Rule 35(b) motion for another probation period. To do so, the majority eviscerates the law to effectuate its own personal view of a proper outcome in this case. This is a dangerous precedent. I dissent because "[i]t is the unpopular or beleaguered individual--not the [individual] in power--who has the greatest stake in the integrity of the law." *Florida Dep't of Health and Rehab. Serv. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 154, 101 S. Ct. 1032, 1036-37, 67 L. Ed. 2d 132, 139 (per curiam) (footnotes omitted) (Stevens, J., concurring).

A. The Youthful Offender Act and Rule 35(b).

In this case, the State asserts that the Youthful Offender Act's probation section, W. Va. Code § 25-4-6, denies a circuit court the discretion to reduce a sentence by awarding a second period of probation if the original probation under the Act has been revoked.[1] In

[1]This issue was not raised below. However, "courts cannot set punishments that are inconsistent with statutory penalties." *Spencer v. White*, 167 W. Va. 772, 775, 280 S.E.2d 591, 593 (1981), *superseded by statute on other grounds as stated in State v. White*, 188 W. Va. 534, 425 S.E.2d 210 (1992). If a circuit court exceeds its statutory authority in sentencing, it perforce exceeds its jurisdiction. Subject-matter jurisdiction is never waived, *State ex rel. Barden and Robeson Corp. v. Hill*, 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (continued...)

this regard the State is absolutely right for we have held:

> Where a criminal defendant has been placed on probation after successfully completing a program of rehabilitation under the Youthful Offenders Act, W. Va. Code §§ 25-4-1 to -12, and such probation is subsequently revoked, the circuit court has no discretion under W. Va. Code § 25-4-6 to impose anything other than the sentence that the defendant would have originally received had he or she not been committed to a youthful offender center and subsequently placed on probation.

Syl. pt. 4, *State v. Richards*, 206 W. Va. 573, 526 S.E.2d 539 (1999). *Accord* Syl., *State v. Patterson*, 170 W. Va. 721, 296 S.E.2d 684 (1982) ("W. Va. Code, 25-4-6, does not allow a trial court discretion to impose any less than the original sentence when a male defendant, who has served at a youth correctional facility, violates his probation agreement."); *see also* Syl., *State v. Martin*, 196 W. Va. 376, 472 S.E.2d 822 (1996) (per curiam) (same). However, the majority finds its way around both the plain language of the Youthful Offender Act, as well as our interpretation of it, by concluding that Rule 35(b)'s probation provision trumps the Youthful Offender Act by virtue of our constitutional rule-making power. This finding is unsupported by the plain language of our Constitution and by case law. Thus, the majority usurps the legislature's power to determine the conditions upon which probation may and may not be awarded.

The majority finds that our constitutional rule making authority gives us the power

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[1](...continued)
(2000), and, like here, may be raised for the first time on appeal. *Easterling v. American Optical Corp.*, 207 W. Va. 123, 132, 529 S.E.2d 588, 597 (2000).

to trump the Youthful Offender Act. Our Constitution does not bear such a reading. Article VIII, § 3 of the West Virginia Constitution grants us the power to promulgate rules "for all cases and proceedings, civil and criminal, for all the courts of the State relating to writs, warrants, process, practice, and procedure, which shall have the force and effect of law." Article VIII, § 3 prohibits the legislature from interfering with our procedural rules, it does not authorize us to make substantive law–that power still residing in the legislature under W. Va. Const. Art. VI, § 1. *See United States v. Sherwood*, 312 U.S. 584, 589-90, 61 S. Ct. 767, 771, 85 L. Ed. 1058, 1063 (1941) ("An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction[.]")

This recognition leads to the conclusion that "a statute governing *procedural* matters in criminal cases which conflicts with a rule promulgated by the Supreme Court would be a legislative invasion of the court's rule-making powers. Conversely, in *substantive* matters, a statutory enactment of the legislative branch prevails over a conflicting Supreme Court rule." *People v. Hollis*, 670 P.2d 441, 442 (Colo. Ct. App. 1983) (citations omitted). *See also In re Daniel H.*, 133 N.M. 630, 634, 68 P.3d 176, 180 (Ct. App. 2003) (recognizing "the established notion that the separation of powers doctrine precludes the legislature from stepping into the judiciary's exclusive domain of prescribing the rules of judicial practice and procedure and similarly precludes the judiciary from overturning or contradicting a constitutional legislative declaration of substantive law.") In other words,

> [i]n order to ascertain whether there is an infringement on this Court's rulemaking authority, we must first determine whether the statute is substantive or procedural. If we find that the statute is 'substantive and that it operates in an area of legitimate legislative concern,' then we are precluded from finding it unconstitutional.

Caple v. Tuttle's Design-Build, Inc., 753 So.2d 49, 53 (Fla. 2000).

The distinction between substantive and procedural law may sometimes be subtle. However, it may generally be said that

> "Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated."

State v. Templeton, 148 Wash. 2d 193, 213, 59 P.3d 632, 642 (2002) (quoting *State v. Smith*, 84 Wash. 2d 498, 501, 527 P.2d 674, 677 (1974)). *See also Opinion of the Justices*, 141 N.H. 542, 572, 688 A.2d 1006, 1012-13 (1997); *State ex rel. Higginson v. United States* (*In re SRBA Case No. 39576*), 128 Idaho 246, 255, 912 P.2d 614, 623 (1995); *Haven Fed. Savings & Loan, Inc. v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991). An analysis of West Virginia law shows that statutes defining the conditions of probation are substantive and not procedural.

We have consistently held that "the substantive power to prescribe crimes and determine punishments is vested with the legislature[.]" *State v. Gill*, 187 W. Va. 136, 141, 416 S.E.2d 253, 258 (1992) (citations omitted). Because we recognize the legislature's

power to define crimes and determine punishments, we have likewise held that "we consider the right to determine the conditions under which a sentence can be suspended and a person placed on probation to be a legislative prerogative. Probation is inextricably tied to the setting of punishment, which is the legislature's domain." *Spencer v. White*, 167 W. Va. 772, 775, 280 S.E.2d 591, 593 (1981), *superseded by statute on other grounds as stated in State v. White*, 188 W. Va. 534, 425 S.E.2d 210 (1992). *Accord id*., Syl. pt. 1 ("The right to probation was a legislative prerogative since courts did not possess the inherent power to grant probation."); *State ex rel. Atkinson v. Wilson*, 175 W. Va. 352, 354, 332 S.E.2d 807, 809 (1984) (similar). *See also State ex rel. Goff v. Merrifield*, 191 W. Va. 473, 480, 446 S.E.2d 695, 702 (1994) (footnote omitted) ("[P]robation . . . is a legislative prerogative").

Clearly, the legislature's substantive constitutional power to define crimes and enact punishments includes the substantive power to determine the conditions under which probation will not be permitted–and this is exactly what the legislature did in W. Va. Code § 25-4-6, and this is exactly what we have previously held the legislature did in W. Va. Code § 25-4-6. *See* Syl. pt. 4, *Richards*; Syl., *Patterson*; Syl. *Martin*. If a grant of probation under Rule 35(b) is a "reduction in sentence," then W. Va. Code § 25-4-6 renders such a reduction/probation impermissible.[2]

[2]There is also a non-constitutional reason to find that Rule 35(b) does not alter the legislature's substantive power to enact conditions justifying or denying probation. The West Virginia Rules of Criminal Procedure are "are almost identical to the Federal Rules of (continued...)

Through today's decision, the majority has arrogated to itself the substantive power to define under what conditions probation may be awarded, even if the awarding of such probation violates the plain language of a statute. The majority would do well to remember that "accumulation of power in the same departments, . . . is the 'very definition of tyranny[.]'" *In re Dailey*, 195 W. Va. 330, 332, 465 S.E.2d 601, 603 (1995) (quoting *The Federalist* No. 47, at 329 (James Madison) (1917)).

B. The majority has ignored important facts.

I must also point out that even if Rule 35(b) controls this case, the majority has reached an insupportable conclusion under this Rule. I begin this issue by acknowledging that the majority's facts are, as far as they go, accurate. However, to paraphrase Mark Twain, "'[o]ften, the surest way to convey misinformation is to tell the strict truth[.]'" *Quoted in United States v. Dean*, 55 F.3d 640, 662 (D.C. Cir. 1995).

Mr. Arbaugh not only repeatedly raped his younger half-brother from August 1, 1995, through April 22, 1996, but he also sexually assaulted a number of other victims ranging in age from four to thirteen, including two brothers, two sisters, two peers, two nephews and

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[2](...continued)
Criminal Procedure[.]" *State v. Simmons*, 172 W. Va. 590, 594 n.1, 309 S.E.2d 89, 93 n.1 (1983). Being patterned on the federal rules, our state rules have imported the limitation of the federal rules, found in the Federal Rules Enabling Act, that the rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2000).

two cousins. Mr. Arbaugh would ask his victims to participate and lull them into a false sense of security that he would not harm them. He at times used bribes and force to commit his sexual offenses. He offended both when he was sober and intoxicated. When confronted with his actions, Mr. Arbaugh stated "'that's what people [do].'" Chestnut Ridge identified that Mr. Arbaugh has several high risk factors for re-offending, including substance abuse. While at Chestnut Ridge, Mr. Arbaugh was allowed to take a home visit and upon return tested positive for marijuana and cocaine.

Mr. Arbaugh's troubles did not end at Chestnut Ridge. On August 20, 1998, the court placed Mr. Arbaugh in a group home run by Stepping Stones, Inc. While starting out positively, he became "very non-compliant and overtly disobedient" around April and May of 1999. He sought money from other residents to buy "a supply of roaches," a term the staff thought referred to marijuana. He became "extremely enraged" during a search of his room to locate possible contraband. He was verbally aggressive toward staff, and slammed his hand on a table several times. After an empty pack of cigarettes was discovered in his room, he was grounded for three days. He refused to obey the rules of this sanction. He also refused a drug and alcohol test, but admitted to frequent marijuana use. He resisted information about the negative consequences of such drug use, indicating that he saw nothing wrong with it. Mr. Arbaugh incited other residents to misbehave, and physically defaced Stepping Stones' property. Stepping Stones admitted it could no longer handle him. Even in light of all of this, the circuit court yet again afforded Mr. Arbaugh an opportunity to avoid

prison, by transferring him to Anthony Center.

After he successfully completed the youthful offender program, the court placed Mr. Arbaugh on five years probation in August 2000. The probation required him to, *inter alia*, adhere to all the probation officer's rules and regulations, abstain from alcohol and drugs, and obtain counseling at least once a month. On December 11, 2000, the State petitioned to revoke probation. At the revocation hearing, Mr. Arbaugh admitted to having used marijuana and alcohol, failing to obtain on-going counseling, and failing to pay his probation fee. The circuit court also found that Mr. Arbaugh violated almost all the remaining probation requirements. The court only then revoked probation. Having now recited the factual backdrop, I turn to the flaws in the majority's application of Rule 35(b).

C. The circuit court did not abuse its discretion by declining Mr. Arbaugh another opportunity to participate in rehabilitation.

The majority properly cites syllabus point 1 of *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996), as governing this case and properly cites the abuse of discretion prong as being the controlling aspect for our decision. The majority then, however, completely ignores the limited nature of our review under an abuse of discretion standard. Abuse of discretion review does not allow us to "substitute our judgment for the circuit court's." *See State v. Taylor*, No. 31405, dissenting op. at 3, ___ W. Va. ___, ___, ___S.E.2d ___, ___ (Feb. 3, 2004) (citations omitted). More specifically "[s]ince the Rule 35 motion is directed

to the sound discretion of the court, the denial of the motion is to be reviewed so as to determine whether the denial was an abuse of discretion. The appellate court cannot replace its judgment of the facts for that of the circuit court." 5 Mark S. Rhodes, *Criminal Procedure under the Federal Rules* § 35:38 at 480 (1987) (footnote omitted).

Replacing its judgment for that of the circuit court, however, is exactly what the majority has done. As Justice Cleckley elaborated:

> It is not our role to undermine the valid exercise of constrained discretionary authority by circuit courts, when they have imposed sentences that fall that fall [sic] legitimately within the four corners of our federal and state constitutions, applicable statutory provisions and our criminal procedure rules. Circuit court judges have a right to believe that so long as they have not violated a law or acted in a nefariously discriminatory way in imposing sentences, this Court will not sift through the nooks and crannies of their decisions determined on finding that which is not there.

198 W. Va. at 306, 480 S.E.2d at 515.[3]

[3]I also point out that *United States v. Juvenile*, 347 F.3d 778 (9th Cir. 2003) is inapposite since *Juvenile* was not a Rule 35(b) case, but a case under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031 to 5042 (2000). Indeed, *Juvenile* itself specifically observed that it was not dealing with probation. 347 F.3d at 786 n.6 (citation omitted) ("The case that the government relies upon is inapposite [because] although it involved a juvenile, [it] dealt solely with the imposition of probation conditions[.]") Finally, *Juvenile* notes the defendant there had poor performance within the first month or two while in rehabilitation, but then showed sustained improvement. *Id*. at 788. Here, Mr. Arbaugh did not show sustained improvement. I hardly think that expecting improvement after Chestnut Ridge, Stepping Stones, and Anthony Center constitutes "the implicit expectation that he would respond instantly to treatment[.]" *Id.* at 789.

The majority correctly observes "'that the only way a circuit court can abuse his discretion on a Rule 35(b) motion is to commit a legal error, or that its ruling was marred by a fundamental defect which inherently results in a miscarriage of justice.'" *Head*, 198 W. Va. at 306, 480 S.E.2d at 515 (citation omitted). However, the majority then proceeds to distort the second arm of this test by concluding "[w]e can conceive of no greater miscarriage of justice than subjecting Mr. Arbaugh to a term of imprisonment without affording him every opportunity to rehabilitate himself."

The miscarriage of justice language the majority invokes cannot be divorced from the language preceding it--that there must be a "*fundamental defect* which inherently results in a miscarriage of justice." In other words, if there is a fundamental defect *in the process* which has resulted in a circuit court decision causing a miscarriage of justice, then we may intervene. The focus under an abuse of discretion review is not on the outcome, but on the process that led to the outcome. *Levinger v. Mercy Med. Center*, 139 Idaho 192, ___, 75 P.3d 1202, 1206 (2003); *Schultz v. Darlington Mut. Ins. Co.*, 181 Wis. 2d 646, 656, 511 N.W.2d 879, 883 (1994). The majority has failed to identify any fundamental defect in the *process* used by the circuit court because there simply was none.

Moreover, I disagree that a miscarriage of justice occurred. The majority finds that a miscarriage of justice occurred since Mr. Arbaugh lost his original probation due to "minor mistakes" that can be excused due to his age at the time of his crimes, the history of his own

sexual abuse, and his fifteen to thirty-five year term of incarceration. None of these rationales are even remotely justifiable.

To begin, I disagree with the majority's decision to treat Mr. Arbaugh as a juvenile. His probation violations occurred when he was over eighteen. The fact that he was a juvenile when he committed his crimes is a "red-herring." We have observed in the past that a "term of probation has no correlation to the underlying criminal sentence . . . . In effect, there is a probation sentence which operates independently of the criminal sentence." Syl. pt. 1, in part, *Jett v. Leverette*, 162 W. Va. 140, 247 S.E.2d 469 (1978). Thus, the majority cannot relate probation violations back to the original offense to determine if the probation violations warrant revocation. Further, even if we could relate the probation violations back to his sexual offenses, Mr. Arbaugh never appealed his transfer to adult jurisdiction. By failing to appeal, he cannot now argue that his legal claims should be reviewed as if he were a juvenile when he committed his crimes. *See State v. Russell*, 791 P.2d 188, 190 (Utah 1990) ("The juvenile court certified defendant to stand trial as an adult. That certification was not challenged, and defendant must accept exposure to adult punishment."); *State v. Ross*, 166 Ariz. 589, 582, 804 P.2d 112, 115 (Ct. App. 1990) (similar).

Moreover, what Mr. Arbaugh characterizes as "minor mistakes" included violating almost every probation requirement within four months after receiving probation, including marijuana and alcohol use, the failure to obtain counseling, the failure to report to his

probation officer or alert his probation officer that he had moved, and job abandonment. I also find Mr. Arbaugh's claim that his marijuana use is comparable to a first offense mandating probation disingenuous. Mr. Arbaugh's drug use played a role in some of his sexual crimes and continued during his treatment at Chestnut Ridge and Stepping Stones.[4] Indeed, Mr. Arbaugh still does not have his drug habit under control. As shown by a supplement to the record in this case granted on November 21, 2003, while incarcerated at the Northern Regional Jail and Correctional Facility in Moundsville, he pled guilty in October 2003 to the felony of transporting marijuana into a correctional facility. W. Va. Code § 61-5-8(c) (1990) (2000 Repl. Vol.).[5]

Additionally, upon awarding probation, the circuit court made clear to Mr. Arbaugh that "we had problems before with controlled substances and . . . the bottom line is that if you violate the terms of probation in any respect and particularly in regard to the use of controlled substances, you know what's going to happen." The court asked Mr. Arbaugh, "You know what the sentence is that's already been imposed?" Mr. Arbaugh responded, "Fifteen to thirty-five, Your Honor." After all the opportunities that the circuit court afforded Mr.

[4]In fact, the significance of Mr. Arbaugh's drug problem is evident from his statements at Stepping Stones (where he admitted frequent marijuana use) that the use of marijuana was not dangerous and that there is no problem in smoking marijuana.

[5]I point out that if part of the YSS plan was to move Mr. Arbaugh away from the Eastern Panhandle to the Northern Panhandle to get him away from drugs, that this conviction shows the futility of this view.

Arbaugh, as well as the explicit admonishment that drug use meant probation revocation, the circuit court was well within its discretion in denying Mr. Arbaugh yet another opportunity to flout the court's authority.

In fact, we have previously upheld a Rule 35(b) denial in circumstances less compelling than those here. In *State v. Redman*, 213 W. Va. 175, 578 S.E.2d 369 (2003) (per curiam) we upheld Rule 35(b) probation denial by a defendant convicted of burglary and grand larceny who used drugs while on probation. We found that the circuit court did not abuse its discretion in denying the Rule 35(b) motion based upon the defendant's drug use as such use showed a disregard for the law. The circuit court's rationale which we affirmed in *Redman* (where only one probation term was violated, rather than the numerous violations occurring here) is practically identical to the rationale the circuit court applied below and which the majority reverses. *Compare*, maj. op. at 5 (quoting circuit court's ruling below) *with Redman*, 213 W. Va. at 179, 578 S.E.2d at 373 (quoting circuit court's order) ("'The Court finds that Mr. Redman has not learned his lesson from his earlier period of incarceration. He continues to break the law by using these illegal controlled substances. The Court further finds Mr. Redman is a detriment to society and that it is in the best interest of the public that he be kept out of society.'")

In this case, the majority minimizes the seriousness of Mr. Arbaugh's drug and alcohol use by saying that it was unrelated to his sexual crimes and did not create a risk of

re-offending. This assertion is flawed on almost every level. First, it is legally wrong. The revocation of probation in a sex crimes case (or, as here, the failure to re-award probation after a revocation) because of drug and alcohol use is permissible--not because drug use necessarily indicates a relapse to sexual behavior--but because the drug use shows a disregard for the obligations of probation. *See State v. Rogers*, 779 P.2d 927, 929 (Mont. 1989) (finding that no terms of probation are minor and that defendant who plead guilty to sexual offenses properly had his probation revoked for smoking marijuana and drinking alcohol). *Cf. Collins v. State*, 712 P.2d 368, 371-72 (Wyo. 1986) ("The court made it clear at sentencing that its concerns were to educate appellant and to keep him away from alcohol and drugs. These were the very conditions appellant violated. Appellant argues that 'individually the violations could be characterized as "nit-picky".' We do not agree, but, in any event, the violations taken together establish without question the fact that appellant was not serious about complying with the conditions of his probation.")[6]

Second, the factual premise of the majority's assertion is simply not substantiated by the record. The record shows that Mr. Arbaugh conducted some of his attacks on his

[6]I am aware that in *State v. Minor*, 176 W. Va. 92, 95, 341 S.E.2d 838, 841 (1986) (per curiam), we found that probation should not be revoked for minor technical violations. In *Minor*, however, we found such minor technical violations to include a non-contumacious failure to pay restitution and efforts on the part of the probationer to inform her probation officer of the circumstances of the non-payment. Here, Mr. Arbaugh's conduct, including drug use, failure to report to his probation officer, job abandonment, and failure to pay his probation fee, falls well beyond minor technical violations.

numerous victims while intoxicated. Moreover, Chestnut Ridge found that "[h]e has identified high risk factors for re-offending that include substance abuse[.]"

Finally, assuming it is appropriate to apply probation violations to the underlying crimes, several of Mr. Arbaugh's probation violations did indeed relate to his sex crimes. Mr. Arbaugh's probation required that he attend monthly counseling. Mr. Arbaugh attended one session and never returned. Another requirement prohibited him from violating any laws. As a convicted sexual offender, Mr. Arbaugh was subject to the West Virginia Sexual Offender Registration Act ("SORA"), W. Va. Code §§ 15-12 -1 to -9 (2000 Rep. Vol.) (2003 Supp.). Under SORA, Mr. Arbaugh was required to inform the registry within ten days when, among other things, he "changes his . . . residence [or], address[.]" By moving from his probation address without permission and not notifying the SORA registry, Mr. Arbaugh not only violated the term of his probation requiring him to apprize his probation officer of his location, but also violated the term requiring him not to violate any laws. In light of Mr. Arbaugh's drug use (an indicator of his re-offending), and his failure to adhere to the circuit court's emphatic admonishment that he would lose his probation if he violated the probation terms (especially drug use), I cannot find that the circuit court in anyway abused his discretion in denying Mr. Arbaugh yet another rehabilitation program.[7] Rather than

[7]I also have to question the majority's reliance on the YSS program in this case. First, at the Rule 35(b) hearing, Mr. Arbaugh's own counsel stated that YSS "doesn't usually take offenders of this nature . . . ." Second, even in light of the YSS program, the majority feels (continued...)

reversing, we should affirm the decision below with commendations to both the circuit court and the Prosecuting Attorney for their efforts to assist this young man by "provid[ing] everything the Court was aware of [.]"[8]

Given my review of the record in this case, "I think that the circuit judge probably had a good handle on this situation." *State ex rel. Nelson v. Grimmett*, 199 W. Va. 604, 608, 486 S.E.2d 588, 592 (1997) (Starcher, J., concurring). Mr. Arbaugh's behavior shows a recurring theme–at any point when Mr. Arbaugh was not under the strictest supervision, he was unable to handle his freedom and he resorted to unacceptable behaviors such as drinking, drug use, failing to attend counseling (all of which are related directly to his sexual crimes), and job abandonment. We are not doing Mr. Arbaugh any favors by reinforcing a belief that life has no consequences or that unacceptable actions can be excused based upon unfortunate circumstances. *See Juvenile*, 347 F.3d at 791 (Gould, J., dissenting in part) ("There is no question but that abuse of [the appellant] by others when he was a young child may have

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[7](...continued)
it necessary to add additional terms to the YSS probation plan. I hardly think that in light of these observations that the majority's reliance on YSS to find the circuit court erred below is justifiable.

[8]Finally, to the extent that the majority implies the DHHR was somehow responsible because they allowed Mr. Arbaugh and his brother to run away from its custody, I note that the record on this point is less than clear. In any event, we have held that actions of the DHHR *qua* State are not imputed to the State *qua* State when the State invokes its criminal law authority through the Office of a Prosecuting Attorney. *State v. Miller*, 194 W. Va. 3, 13, 459 S.E.2d 114, 124 (1995).

contributed to [his] becoming, in turn, a repeat abuser of younger children. The majority's approach to this is to give him a pass at an earlier age, but this approach ignores that [appellant's] predatory abuse of other children, if not restrained, can continue a cycle of abuse and corruption of youth.")

Indeed, I see a significant practical problem with the majority opinion. What if Mr. Arbaugh chooses yet again to ignore the requirements of his probation? What consequences will Mr. Arbaugh's violations entail? Will the circuit court ever feel justified in revoking Mr. Arbaugh's new probation or will it feel compelled to turn a blind eye if Mr. Arbaugh violates his probation–much as this Court has turned a blind eye to the facts and law governing this case?

D. The majority opinion places itself above the law and "breaks down one of the necessary conditions of a decent society" by reading its personal desires into the law.

My greatest concern in this case, however, is not that the majority has bent, stretched, ignored and distorted law and facts to afford Mr. Arbaugh yet another opportunity to avoid prison (although my concern in this regard, both for Mr. Arbaugh and society, is not inconsequential). Rather, my greatest concern is that the majority opinion is "a 'wolf in sheep's clothing,' for [its] rationale is no more than . . . [its own] *subjective* judicial judgment as to what . . . offends notions of 'fundamental fairness.'" *Williams v. Illinois*, 399 U.S. 235, 259, 90 S. Ct. 2018, 2031, 26 L. Ed. 2d 586, 603 (1970) (Harlan, J., concurring).

In this case, the majority substitutes its judgment for that of the circuit court to remedy what the majority personally views to be a "miscarriage of justice." In the past, this Court has wisely refused the temptation to use its power as an anodyne to remedy that which we might have thought personally to be objectionable. *See State v. Phillips*, 205 W. Va. 673, 684, 520 S.E.2d 670, 681 (1999) (noting that we decide cases "not only upon the[] facts [of a given case], where our sympathies might well lie . . . , but in a larger context."); *Hart v. NCAA*, 209 W. Va. 543, 548, 550 S.E.2d 79, 84 (2001) (per curiam) ("When all factors have been weighed on the scales of justice, though, this Court remains constitutionally bound to follow the guiding precedents before us, to apply the law as it has been interpreted by our predecessors, and to reach the result prescribed thereby.") "[T]here are many perfectly legitimate reasons for summary rejection of a Rule 35(b) motion, despite the presentation of an otherwise persuasive or sympathetic case by a defendant." *Head*, 198 W. Va. at 305, 480 S.E.2d at 514 (Cleckley, J., concurring). In other words, that a defendant may present "'"an affecting case for reconsideration of the sentence,"'" is simply not a factor upon which we can rely to reverse a circuit court. *Matthews v. United States*, 629 A.2d 1185, 1199 n.30 (D.C. 1993) (quoting *Walden v. United States*, 366 A.2d 1075, 1077 (D.C. 1976) (quoting *United States v. Krueger*, 454 F.2d 1154, 1155 (9th Cir. 1972)). The majority reneges on our commitment that "'the judiciary of this state is dedicated to the principle that ours is a government of laws and not of men.'" *Committee on Legal Ethics v. Karl*, 192 W. Va. 23, 34, 449 S.E.2d 277, 288 (1994) (citation omitted).

I continue to believe that "'[i]f we destroy the law's integrity in the pursuit of some goal, however worthy, we break down one of the necessary conditions of a decent society.'" *Dunlap*, 213 W. Va. 394, 403 n.4, 582 S.E.2d 841, 850 n.4 (2003) (Davis, J., dissenting) (citation omitted). While I do not dispute the majority's sincerity that there was a miscarriage of justice in this case, such personal beliefs cannot be the criteria under Rule 35(b). "Our duty, to paraphrase Mr. Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done." *Bifulco v. United States*, 447 U.S. 381, 401-02, 100 S. Ct. 2247, 2259-60, 65 L. Ed.2d 205, 220 (1980) (Burger, C.J., concurring).

Thus, I dissent. I am authorized to state that Chief Justice Maynard joins me in this dissenting opinion.