

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

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

vs) No. 11-0218 (Ohio County 10-F-75)

**Rodney McCardle,
Defendant Below, Petitioner**

FILED

November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Rodney McCardle appeals the circuit court order sentencing him to serve one to three years on each of two counts of attempted malicious assault. 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 record on appeal. 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.

Petitioner broke into the home of his female victim, who had to barricade herself in a bathroom, and petitioner then returned with a shotgun. He pointed the shotgun at police when they arrived before laying down the firearm. However, when police attempted to approach him, he repeatedly lunged for the gun and had to be subdued. He was charged with three counts of wanton endangerment involving a firearm, one count of nighttime burglary and one count of obstructing; however, petitioner suffers from bipolar disorder and was unmedicated at the time of these crimes. He underwent psychiatric hospitalization to regain his competency, and an examining psychologist suggests he is in need of continued treatment and medications. He pled guilty to two counts of attempted malicious assault, which are two lesser included offenses. Petitioner requested an alternative sentence due to his mental disorder. The circuit court found that the State took petitioner's mental health issues into consideration in offering a favorable plea deal, but that the seriousness of the crime dictated that petitioner should be incarcerated. Petitioner was sentenced to two consecutive one to three year sentences.

On appeal, petitioner argues that the circuit court abused its discretion in not granting his request for an alternative sentence, considering his mental disorder. He argues that

imposition of a harsh penitentiary sentence in this matter shocks the conscience and is contrary to public policy. The State argues in response that petitioner's actions require incarceration, and that his plea agreement was favorable to him because of his mental disorder. Further, while incarcerated, petitioner will receive the proper medications to treat his condition.

This Court has held that criminal sentences within the statutory limits of a crime are not subject to appellate review unless the sentence is based on some impermissible factor. Syl. Pt. 4, *State ex. rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007)(quoting Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)). Although the sentence in this matter is within the statutory limits, petitioner argues that his sentence violates the proportionality principle in the West Virginia Constitution. In *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), this Court recognized two tests to determine if a sentence violates the proportionality principle set forth in Article III, Section 5 of the West Virginia Constitution. The first is whether the sentence shocks the conscience, and if not, then the Court should proceed to the second test found in *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981), which considers the nature of the offense, the legislative purpose behind the punishment and a comparison with other offenses within the same jurisdiction. This Court has noted that “[w]hile our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.” Syllabus point 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).” Syl Pt. 3, *State v. Booth*, 224 W.Va. 307, 685 S.E.2d 701 (2009)(per curiam). Upon a review of the entire record in this matter, this Court finds that petitioner's sentence does not violate the West Virginia Constitution, and thus we affirm the circuit court's order.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 15, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh