

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

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

vs) No. 11-0408 (Mercer County 05-F-43)

**Edward William Wall,
Defendant Below, Petitioner**

FILED
December 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Edward William Wall appeals the circuit court's order sentencing him to serve ten to twenty years after his probation was revoked, following his conviction by guilty plea of sexual abuse by a custodian. 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.

After his conviction, petitioner served approximately sixteen months of his sentence and was released on probation. Within four months, a petition for revocation of probation was filed, to which petitioner pled guilty. His sentence was reinstated, but then suspended again, and he was allowed to return to probation. Less than a year later, another petition for revocation of probation was filed. Petitioner again pled guilty to violating his probation and requested a probation transfer to Ohio to live with his parents. Judge Knight presided over the probation revocation hearings, and ordered the probation office to determine if petitioner could live with his parents in Ohio, and if he could be properly transferred through the Interstate Compact. However, Judge Knight reinstated the petitioner's original sentence and reset the case for Judge Swope's docket, as Judge Knight was only sitting by temporary assignment due to the retirement of another judge. Petitioner then filed a motion to reconsider his sentence after his transfer to Ohio was approved, but Judge Swope declined to reconsider the sentence after a hearing and did not place petitioner back on probation. Judge Swope noted the seriousness of petitioner's crime and his lengthy sentence in determining that petitioner was not a candidate at that time for probation.

On appeal, petitioner argues that there was a breach of his plea agreement which was to allow petitioner to have his probation reinstated. Petitioner argues that Judge Knight would have allowed him to reinstate his probation after his transfer to Ohio was approved, and that the oral pronouncement of sentence imposed by Judge Knight is enforceable like a contract. In response, the State argues that there was no plea agreement, and even if there was, the agreement would have been non-binding on the trial court pursuant to Rule 11(e)(4) of the West Virginia Rules of Criminal Procedure.

This Court has noted that "[t]here is no absolute right under either the West Virginia or the United States Constitutions to plea bargain. Therefore, a circuit court does not have to accept every constitutionally valid guilty plea merely because a defendant wishes so to plead." Syl. Pt. 2, *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 465 S.E.2d 185 (1995). Plea agreements are governed by Rule 11 of the West Virginia Rules of Criminal Procedure. Rule 11(e) specifically notes that plea agreements are between the defense attorney and the attorney for the State, and that the court is not to be involved in plea discussions. In the present case, there is no evidence that the discussions between Judge Knight and the petitioner's counsel represented a plea agreement. A review of the transcripts specifically shows that Judge Knight made no promises or representations that he was going to sentence the petitioner to probation in Ohio, and Judge Knight specifically ruled that he was reinstating petitioner's ten to twenty year sentence, and that petitioner could later file a motion for reconsideration after the case was transferred to Judge Swope.

“When reviewing the findings of fact and conclusions of law of a circuit court sentencing a defendant following a revocation of probation, we apply a three-pronged standard of review. We review the decision on the probation revocation motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review.’ Syllabus Point 1, *State v. Duke*, 200 W.Va. 356, 489 S.E.2d 738 (1997).” Syl. Pt. 1, *State v. Hosby*, 220 W.Va. 560, 561, 648 S.E.2d 66 (2007). In the present matter, Judge Swope had the discretion to reinstate petitioner's sentence after the case was properly transferred to Judge Swope's docket. Judge Knight had previously revoked petitioner's probation, for the second time, and reconsideration of the sentence was the only issue before Judge Swope. “The Supreme Court of Appeals 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. 2, *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010). In the present case, this Court finds that the circuit court did not abuse its discretion in revoking petitioner's probation or in petitioner's sentence.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: December 2, 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