

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

**Andrew Mugnano,
Petitioner Below, Petitioner**

vs.) No. 11-0464 (Greenbrier County 09-C-89)

**David Ballard, Warden, Mt. Olive
Correctional Complex, Respondent
Below, Respondent**

FILED

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

MEMORANDUM DECISION

Petitioner Andrew Mugnano appeals the circuit court's March 2, 2011, order denying his Rule 35(b) motion for reduction of sentence. Petitioner argues that the circuit court abused its discretion in denying his motion as untimely filed. Upon consideration of the standard of review, the record on appeal, and the briefs of the parties, the Court finds no substantial question of law has been presented. For these reasons, a memorandum decision is appropriate under Rule 21(d) of the Revised Rules of Appellate Procedure.

On November 5, 1999, petitioner shot and killed his wife, from whom he was separated, at a convenience store. Petitioner also shot and wounded his wife's companion. Petitioner asserted that he just happened upon the victims and had acted in a moment of psychological distress, upset that his wife had left him and their children for another man. The State asserted that petitioner had been lying in wait for the victims. Pursuant to a written plea agreement, petitioner pled guilty to first degree murder and to malicious wounding and the State agreed not to make a sentencing recommendation. The circuit court determined that petitioner should not receive mercy and sentenced him to life without the possibility of parole and to a term of two to ten years, to run concurrently. Petitioner's direct appeal was refused. Subsequently, in *Mugnano v. Painter*, 212 W.Va. 831, 575 S.E.2d 590 (2002) (*per curiam*), this Court affirmed the denial of habeas corpus relief. The circuit court denied a second petition for a writ of habeas corpus on February 24, 2010, and this Court refused petitioner's petition for appeal on October 20, 2010.

After the denial of his second habeas petition, petitioner filed a Rule 35(b) motion for reduction of sentence on February 8, 2011. The circuit court denied the motion in a letter to petitioner dated February 22, 2011. Petitioner requested that the circuit court reconsider its decision. In an order dated March 2, 2011, the circuit court held as follows in pertinent part:

West Virginia Rules of Civil Procedure Rule 35(b) provides in part:

A motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed or probation is revoked, or within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation.

Further, our Supreme Court of Appeals has held that there exists no entitlement to application of *West Virginia Rules of Civil Procedure Rule 35(b)* based upon an underlying unsuccessful attempt to obtain habeas corpus relief. *Barritt v. Painter*, 215 W.Va. 120, 595 S.E.2d 62 (2004) [(*per curiam*)].

The circuit court concluded that “the Petitioner’s Motion for Reduction of Sentence and Motion for Appointment of Counsel must be **DENIED**.”

On appeal, petitioner argues that Rule 35(b) of the West Virginia Rules of Criminal Procedure is ambiguous as to whether a defendant may file a motion for reduction of sentence within 120 days of an order affirming the denial of a habeas petition and that the circuit court erroneously applied *Barritt*, supra, to bar his Rule 35(b) motion for reduction of sentence as untimely filed. The respondent warden argues that the post-1996 version of Rule 35(b) is clear and that the circuit court correctly applied *Barritt* to petitioner’s case.

STANDARD OF REVIEW

This Court has held that the following standard of review applies:

In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 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.

Syl. Pt. 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

DISCUSSION

Contrary to petitioner's arguments, this Court has previously ruled that because of its amendment in 1996, Rule 35(b) is no longer ambiguous as to when a motion for reduction of sentence may be filed:

The explicit language of Rule 35(b) indicates that the motion must be filed within 120 days from the time (1) the sentence is imposed or probation is revoked, (2) a mandate is entered by the supreme court of appeals upon affirmance of a judgment of a conviction or probation revocation, or (3) an order is entered by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation. Those three precise instances are the only triggers specified in the rule, and the more expansive and amorphous phrase, "or having the effect of upholding" is no longer in existence.

Barritt, supra, 215 W.Va. at 122, 595 S.E.2d at 64. In *Barritt*, this Court explicitly stated that "[t]he omission of the phrase 'or having the effect of upholding' eliminates the right to a Rule 35(b) hearing for an individual whose appeal for review of a habeas corpus petition is denied." *Id.* The *Barritt* Court construed the previous decision in *State v. Thornton*, 197 W.Va. 726, 478 S.E.2d 576 (1996), which stated that the 1996 amendment to Rule 35(b), effective September 1, 1996, "would govern the timeliness of motions filed on or after that date." 197 W.Va. at 728, 478 S.E.2d at 578. In the case sub judice, petitioner filed his motion for reduction of sentence on February 8, 2011; thus, the post-1996 version of Rule 35(b) applies. Therefore, this Court concludes that the circuit court did not abuse its discretion in denying Mr. Mugnano's Rule 35(b) motion as untimely filed pursuant to *Barritt*, supra.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 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