

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

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

vs.) No. 11-0584 (Ohio County 10-F-58)

**Danny L. Wise,
Defendant Below, Petitioner**

FILED

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

MEMORANDUM DECISION

Petitioner, defendant below, appeals the enhancement of his sentence for Delivery of a Schedule III Controlled Substance within one thousand feet of a school. Respondent has filed its response.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on May 31, 2011. 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 was indicted on one count of delivery of a schedule III controlled substance within one thousand feet of a school, and one count of transportation of a controlled substance into the State of West Virginia with the intent to deliver. Petitioner's two prior felony convictions made him susceptible to a recidivist action and a sentence of life imprisonment.

Petitioner, his counsel, and the State drafted a plea agreement in which petitioner agreed to plead guilty to delivery of a schedule III controlled substance and admit that the delivery took place within one thousand feet of a school. In exchange, the State would dismiss the second count of the indictment with prejudice and agree not pursue recidivist penalties. The parties also agreed to ask the circuit court to accept petitioner's plea to delivery of a schedule III controlled substance but to withhold any action on petitioner's admission that the delivery took place within one thousand feet of a school. Not included in

the written plea was petitioner's agreement to cooperate with the local drug task force by working as a confidential informant. In exchange, the State agreed that – if petitioner cooperated with the drug task force – it would not ask the court to enhance petitioner's sentence for admitting that the delivery took place within one thousand feet of a school.

At petitioner's plea hearing, the circuit court thoroughly reviewed the plea agreement and explained that if petitioner pled guilty to delivery of a schedule III controlled substance, his sentence would be one to fifteen years in prison. The circuit court also explained that if it accepted petitioner's admission that the delivery had occurred within one thousand feet of a school, petitioner's sentence would be enhanced so that he would not be eligible for parole until he had served three years of his prison sentence. The circuit court noted it would decide at the sentencing hearing whether to enhance petitioner's sentence.

The circuit court then commented on the lack of written terms and conditions regarding petitioner's proposed work as a confidential informant. The circuit court suggested that the State draft a "side agreement" that would include terms and conditions that the court could use to determine if petitioner had cooperated with the drug task force. The circuit court granted a recess so that petitioner, his counsel, and the State could discuss terms and conditions. The discussion took place, however, no terms and conditions were reduced to writing or placed on the record. Immediately thereafter, petitioner's counsel stated that "it's very clear that [petitioner] is willing to go forward with this agreement." The circuit court accepted petitioner's plea and released him on bond until the sentencing hearing so that he could work with the drug task force.

About a month later, a corporal from the drug task force met with petitioner and petitioner's counsel and told petitioner that he had to "be able to meet people and produce these buys on his own." Petitioner told the corporal that since the plea hearing, he had: pled guilty to, and been jailed for, driving on a suspended license; been charged with domestic assault; and been investigated for committing arson, all of which occurred in Ohio. Petitioner then said that he was ready to make a controlled buy but needed transportation to the site because his driver's license had been suspended. The corporal responded that it would not work for someone from the drug task force to transport petitioner because the drug dealer knew everyone on the drug task force. Petitioner replied that he would need transportation to any other controlled buys.

Immediately after the meeting, the corporal decided to terminate petitioner's confidential informant arrangement because petitioner had admitted to the crime of driving on a suspended license. The corporal informed the State of his decision to terminate the relationship but did not tell either petitioner or petitioner's counsel. The corporal continued to take calls from, and make calls to, petitioner until a week or so before the sentencing

hearing. A few days before the sentencing hearing, the State told petitioner that it would seek an enhanced sentence because petitioner had proved ineffective as a confidential informant.

At the sentencing hearing, the circuit court heard the testimony of petitioner and the corporal, and the arguments of the parties. Thereafter, the circuit court accepted petitioner's admission that the delivery had occurred within a thousand feet of a school, and thereby enhanced petitioner's prison sentence.

This Court set forth the standard of review for evaluating the propriety of a plea agreement in Syllabus Point 1, *State ex rel. Brewer v. Starcher*, 195 W. Va. 185, 465 S.E.2d 185 (1995):

Cases involving plea agreements allegedly breached by either the prosecution or the circuit court present two separate issues for appellate consideration: one factual and the other legal. First, the factual findings that undergird a circuit court's ultimate determination are reviewed only for clear error. These are the factual questions as to what the terms of the agreement were and what was the conduct of the defendant, prosecution, and the circuit court. If disputed, the factual questions are to be resolved initially by the circuit court, and these factual determinations are reviewed under the clearly erroneous standard. Second, in contrast, the circuit court's articulation and application of legal principles is scrutinized under a less deferential standard. It is a legal question whether specific conduct complained about breached the plea agreement. Therefore, whether the disputed conduct constitutes a breach is a question of law that is reviewed *de novo*.

Petitioner argues that the circuit court erred by accepting the proposed plea agreement given the agreement's lack of specific performance terms and conditions for his work as a confidential informant. “[W]here this failure requires an implication as to what was intended, the implication must be construed against the circuit court because the court possessed control over clarity.” *Id.* at 194 n.6, 465 S.E.2d at 194 n.6. Petitioner avers that this lack of specificity does not satisfy West Virginia Rule of Criminal Procedure 11(e)(2), which requires that all elements of a plea agreement be disclosed in open court. The State argues that its agreement with petitioner regarding his work as a confidential informant was separate and distinct from the underlying plea agreement. The State avers that the terms and conditions of petitioner's confidential informant work were “spread on the record” and the corporal told petitioner what was expected of petitioner at their meeting.

We find that the circuit court did not clearly err in accepting petitioner's plea agreement. The circuit court reviewed the terms of the plea agreement with petitioner during the plea hearing. That review included a discussion regarding petitioner's decision to work as a confidential informant; the possibility of creating terms and conditions for that work; and a clear statement that the circuit court was the final arbiter regarding sentence enhancement. Thereafter, petitioner chose to plead guilty instead of waiting for terms and conditions to be drafted. In pleading guilty to delivery of a schedule III controlled substance, petitioner received the benefits for which he bargained, the dismissal of the second count and no institution of recidivist proceedings. Moreover, he was given the opportunity to work as a confidential informant in exchange for the *possibility* that his sentence would not be enhanced.

Petitioner next argues the circuit court committed plain error because, in accepting the State's recommendation that petitioner's sentence be enhanced, it modified the plea agreement thereby substantially affecting his rights and impacting the fairness and integrity of the proceeding. Petitioner argues that plain error analysis involves two determinations: whether the plea agreement included an enforceable right that benefitted him, and whether he waived or forfeited the benefits of such a right. Syl. Pt. 3, *State v. Meyers*, 204 W.Va. 449, 513 S.E.2d 676 (1998). Petitioner claims that under the plea agreement he had the enforceable right to a one to fifteen year prison sentence, and that he did not waive or forfeit that right.

We find that the circuit court did not commit plain error when it accepted the State's recommendation to enhance petitioner's sentence. Any terms or conditions that the parties created would have been used to measure whether petitioner cooperated with the drug task force – and not to modify the plea agreement. In regard to petitioner's enforceable right to a one to fifteen year sentence, petitioner was in fact sentenced to a one to fifteen year prison term as agreed. Petitioner's sentence enhancement affected the timing of his parole eligibility, not the length of his sentence.

Petitioner's final argument is that the circuit court erred in basing its decision to enhance petitioner's sentence on the State's finding that petitioner had proved ineffective as a confidential informant. The State counters that petitioner was ineffective as a confidential informant because he was unable to get to the one controlled drug buy he suggested, did not produce any other buys, and pled guilty to driving on a suspended license during the time he was to serve as a confidential informant. The State avers that even if petitioner had made a controlled drug buy as a confidential informant, his testimony would have been virtually useless because of his criminal record.

We find that the circuit court did not clearly err in basing its decision to enhance petitioner's sentence on the State's finding that petitioner had proved ineffective as a confidential informant. The circuit court correctly stated "even if [petitioner] did desire to fully cooperate, he did not have the means to do so, nor did he make any controlled purchases."

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