

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

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

vs) No. 16-0032 (Brooke County 13-F-72 and 14-F-45)

**Adam Barnhart,
Defendant Below, Petitioner**

**FILED
November 18, 2016**

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

MEMORANDUM DECISION

Petitioner Adam Barnhart, pro se, appeals the January 5, 2016, order of the Circuit Court of Brooke County denying his motion for correction of illegal sentence. Respondent State of West Virginia, by counsel Julie A. Warren, filed a summary response in support of the circuit court's order.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In Case No. 13-F-72, petitioner was indicted for murder in the first degree. In Case No. 14-F-45, petitioner was charged by information of two counts of wanton endangerment with a firearm. The parties agreed to resolve both cases through a plea bargain. The State agreed to dismiss the indictment for first degree murder in No. 13-F-72 in exchange for petitioner agreeing to plead guilty to the lesser included offense of murder in the second degree. Petitioner agreed to waive his right to be indicted in No. 14-F-45 and to proceed in that case on the information. The parties agreed that petitioner would be sentenced to a definite term of forty years of incarceration for second degree murder. With regard to the two counts of wanton endangerment with a firearm, the parties agreed that petitioner would be sentenced to two definite terms of five years of incarceration. The parties further agreed that petitioner would serve his sentences consecutively

for an aggregate term of fifty years of incarceration. Finally, petitioner agreed to waive “the right to any parole [eligibility] on the of the above enumerated sentences[.]”¹

Prior to accepting petitioner’s guilty pleas for second degree murder and two counts of wanton endangerment with a firearm, the circuit court “question[ed] him” regarding the waiver of “his constitutional, statutory, and procedural rights in this matter.”² The circuit court noted the “specific condition of the plea agreement” that required petitioner to waive his right to parole eligibility. The circuit court found that petitioner understood his constitutional, statutory, and procedural rights, “indicated that he discussed the same with his counsel, . . . and . . . wished to waive those rights and proceed with the plea agreement[.]” Accordingly, the circuit court found that petitioner “knowingly, intelligently, and voluntarily waived” his constitutional, statutory, and procedural rights.

The circuit court further found that petitioner understood the plea agreement’s “terms and conditions” and that petitioner “knowingly, intelligently, and voluntarily” entered his guilty pleas. Accordingly, the circuit court accepted petitioner’s pleas, adjudged him guilty, and sentenced him consistent with the parties’ agreement.

On October 13, 2015, petitioner filed motion for correction of illegal sentence pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure. Petitioner asserted that his aggregate sentence was illegal because the parties’ agreement rendered him ineligible for parole in violation of West Virginia Code § 62-12-13(b)(1)(A), which provides that a defendant “is eligible for parole if he or she: (1)(A) . . . has served one fourth of his or her definite term sentence.” By order entered January 5, 2016, the circuit court acknowledged that the parties did not have the authority to enter into—nor did it have the authority to accept—a plea agreement specifying an illegal sentence. However, the circuit court found that parole eligibility constituted a statutory right that petitioner was capable of waiving as long as he did so knowingly, intelligently, and voluntarily. Given the circuit court’s finding at the time of petitioner’s guilty pleas that the waiver of his rights was valid, the court found that the requirement that petitioner waive parole eligibility was not in contravention of statute and accordingly did not make the sentence to which petitioner agreed illegal. Therefore, the circuit court denied petitioner’s motion.

Petitioner now appeals the circuit court’s January 5, 2016, order denying petitioner’s motion for correction of illegal sentence pursuant to Rule 35(a). In syllabus point one of *State v. Marcum*, __ W.Va. __, __ S.E.2d __, 2016 WL 5957386 (W.Va. October 11, 2016), we set forth the pertinent standard of review:

¹In *State v. Lindsey*, 160 W.Va. 284, 291, 233 S.E.2d 734, 738-39 (1977), we found that “[o]ne convicted of a crime and sentenced to the penitentiary is never *entitled* to parole,” but is “[only] eligible to be considered for parole.” (citation omitted and emphasis in original).

²See *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975).

“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).

On appeal, petitioner makes the same argument he made to the circuit court: the parties did not have the authority to enter into—nor did the court have the authority to accept—a plea agreement specifying an illegal sentence. *See State ex rel. Gessler v. Mazzone*, 212 W.Va. 368, 373, 572 S.E.2d 891, 896 (2002). In making this argument, we find that petitioner does not challenge the length of his aggregate sentence of fifty years of incarceration because he does not ask for the parties’ plea agreement to be vacated. Rather, petitioner states that his preferred remedy is have to the provision whereby he agreed to waive parole eligibility excised from the agreement.³ Thus, we find that petitioner’s argument is solely based on his contention that this provision so tainted the plea agreement with illegality that it rendered the sentence specified by that agreement illegal.

Petitioner relies on the decision of the United States Court of Appeals for the Eleventh Circuit in *Bates v. Secretary, Florida Dept. of Corrections*, 768 F.3d 1278 (11th Cir. 2014), to argue that a criminal defendant may not waive his right to parole eligibility. We find that the question that the Eleventh Circuit had to decide in *Bates* was not whether a defendant may waive his right to parole eligibility. Rather, the Eleventh Circuit addressed the question of whether the jury in the penalty phase of a capital murder case should have been instructed that the petitioner was ineligible for parole if given a life sentence—based on his agreement to waive parole eligibility—despite the fact, at the time of his offense, the relevant statute provided that he would be eligible for parole after serving twenty-five years of incarceration. 768 F.3d at 1300. As such, we find that *Bates* is readily distinguishable from the instant case and conclude that petitioner’s agreement to waive parole eligibility did not render petitioner’s sentence illegal.

We agree with the State that the circuit court correctly determined that parole eligibility constituted a statutory right that petitioner knowingly, intelligently, and voluntarily waived. Both constitutional and statutory rights are capable of being waived. *See Asbury v. Mohn*, 162 W.Va. 662, 665, 256 S.E.2d 547, 549 (1979) (stating that “the right to appeal may be waived”); Syl. Pt. 2, *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975) (holding that “[a] criminal defendant can knowingly and intelligently waive his constitutional rights . . . when such knowing and intelligent waiver is conclusively demonstrated on the record”). Upon our review of the record, we find that

³In *Gressler*, we found that the proper remedy if a plea agreement is legally impossible to fulfill is for the agreement to be vacated in its entirety and the parties to be placed, as nearly as possible, in the positions they occupied prior to the entry of the plea agreement. 212 W.Va. at 374, 572 S.E.2d at 897.

petitioner's waiver of parole eligibility was valid. Therefore, we conclude that the circuit court did not abuse its discretion in denying petitioner's motion for correction of illegal sentence.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 18, 2016

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Allen H. Loughry II