

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

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

vs.) **No. 21-0076** (Berkeley County 17-F-92)

**Akeem E. Ellis,**  
**Defendant Below, Petitioner**

**MEMORANDUM DECISION**

Petitioner Akeem E. Ellis by counsel Shawn R. McDermott, appeals the Circuit Court of Berkeley County’s December 8, 2020, order revoking petitioner’s probation and imposing his sentence for his conviction of conspiracy to possess marijuana with the intent to deliver. Respondent State of West Virginia, by counsel Patrick Morrissey and Mary Beth Niday, filed a response in support of the circuit court’s order.

This 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 March of 2017, petitioner was charged, by information, with conspiracy to possess marijuana with intent to deliver. Petitioner pled guilty to the information in April of 2017. In June of 2017, he was sentenced to a term of imprisonment of not less than one nor more than five years. However, petitioner’s sentence was suspended in favor of five years of supervised probation.

In June of 2020, the State filed a petition to revoke petitioner’s probation. In the petition, the State alleged that petitioner violated his probation by being arrested and charged with a new offense of “child abuse [in violation of West Virginia Code § 61-8D-3(a)], alleged to have occurred on March 6, 2020.” Further, it was alleged that petitioner failed several drug tests during his probation. Specifically, in July of 2017, petitioner tested positive for ethanol. In August of 2018 and October of 2019, petitioner tested positive for marijuana. In December of 2019, petitioner tested positive for cocaine.

On June 25, 2020, petitioner was arrested for probation revocation. On October 8, 2020, before the hearing on the petition to revoke petitioner's probation, petitioner "moved the circuit court to order the State to provide him discovery regarding the allegations in the petition." In his motion for discovery, petitioner requested the following items regarding his alleged probation violation: 1) the probation contact sheet maintained by petitioner's probation officer; 2) the police report associated with the new criminal allegations; 3) pictures of any alleged injuries taken during the police investigation; 4) the written statement of the mother of petitioner's son; and 5) the video recording and/or transcript of the interview of petitioner's son.

The State objected to petitioner's motion and argued that a probation revocation hearing did not determine whether petitioner was guilty of any criminal offense committed while on probation. Rather, the State argued that the revocation hearing involves a factual determination that an offense has been committed which "imparts the conclusion that the rehabilitative and other purposes behind probation have failed and is a proceeding which may be held without an underlying conviction." The State represented that it

provided the defendant with all the evidence it intends to use at the probation revocation hearing in 17-F-92. The State will not be using the CAC interview of the minor child or any pictures of the injuries to the child. The State will not be using a written statement from [the victim's mother]. Further, there is a protective order currently in place for the CAC interview. The State will instead provide testimonial evidence from the supervising probation officer and the CPS worker involved in the investigation of the new allegations.

By order entered on October 21, 2020, without a hearing, the court denied petitioner's motion for discovery and found that the State had disclosed all evidence necessary to comply with Rule 32.1 of the West Virginia Rules of Criminal Procedure.<sup>1</sup> The court further found that petitioner's request for "full discovery of a separate [action], including a recorded CAC video, is beyond the scope of Rule 32.1." Additionally, the court noted that "it would be improper to turn a probation revocation hearing into a mini-trial" as to petitioner's guilt on a separate criminal case.

On October 27, 2020, a hearing was held on the motion to revoke petitioner's probation. Petitioner appeared at the hearing, admitted "that there was reasonable cause to believe that he committed the felony charge and had multiple positive substance abuse screens," and requested to be placed on home confinement. The hearing was continued to "allow for the completion of a home confinement sustainability report."

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<sup>1</sup>Rule 32.1(a)(2) of the West Virginia Rules of Criminal Procedure provides, in pertinent part, that prior to revocation, a petitioner shall receive

- (A) Written notice of the alleged violation of probation;
- (B) Disclosure of the evidence against him or her;
- (C) An opportunity to appear and to present evidence in his or her own behalf;
- (D) The opportunity to question adverse witnesses; and
- (E) Notice of his or her right to be represented by counsel[.]

On December 8, 2020, the hearing reconvened and the court rejected petitioner's request for home confinement. The court noted that in the home confinement sustainability report, that petitioner "lied about being arrested less than five times, when it was in fact twenty times, with ten convictions or guilty pleas to significant crimes[.]" including "other domestic and child endangerment crimes." Further, the court reasoned that petitioner did not have a "true addiction problem," as petitioner's counsel noted in a memorandum provided to the court, that petitioner "only used drugs when his son was with his mother, and that [petitioner] would never use drugs when his son was with him." Such a statement suggested to the court that petitioner "knows when to use drugs and chooses to do so when he thinks he will not be caught or held accountable" and led the court to believe that petitioner would not benefit from rehabilitation. Ultimately, the court revoked petitioner's probation and ordered that petitioner's underlying sentence of not less than one nor more than five years be imposed. It is from the circuit court's December 8, 2020, order that petitioner now appeals.

Petitioner raises two assignments of error on appeal. First, petitioner contends that the circuit court erred in denying his motion for discovery. Second, petitioner argues that the circuit court erred in his sentencing.

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.

Syl. Pt. 1, *State v. Duke*, 200 W. Va. 356, 489 S.E.2d 738 (1997). This Court "reviews sentencing orders ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997).

In his first assignment of error, petitioner argues that the circuit court erred in denying his motion for discovery. Petitioner argues that the court violated his reasonable right to discovery pursuant to Rule 32.1 of the West Virginia Rules of Criminal Procedure where it failed to order that the State provide any discovery to him, making it impossible for him to defend himself against the alleged violation. Petitioner further claims that although one of the allegations in the petition to revoke petitioner's probation was the fact that petitioner was arrested on the felony charge of child abuse, the court would not allow discovery into the child abuse offense. We have held that probation revocation proceedings do "not involve a determination of the defendant's guilt of the criminal offense committed while on probation." *State v. Ketchum*, 169 W. Va. 9, 12, 289 S.E.2d 657, 659 (1981).

Here, the court properly denied petitioner's request for discovery of the new criminal charges because the State provided petitioner with all the evidence it intended to use at petitioner's probation revocation hearing, thus meeting "the safeguards of Rule 32.1 and the procedural protections ensured in *State v. Brown*, 215 W. Va. 664, 600 S.E.2d 561 (2004)." Petitioner received written notice of the alleged violation of probation, had the opportunity to appear at a contested

hearing, and was afforded the opportunity to present evidence and question adverse witnesses. Accordingly, the circuit court did not err and petitioner's probation revocation should be affirmed.

In his second assignment of error, petitioner contends that the circuit court erred in sentencing him, by relying upon materially inaccurate information. We begin our analysis by reminding that “[p]robation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person who has been convicted of a crime.” Syl. Pt. 2, *State ex. rel. Strickland v. Melton*, 152 W. Va. 500, 165 S.E.2d 90 (1968).” Syl. Pt. 5, *State v. Metheny*, 245 W. Va. 719, 865 S.E.2d 461 (2021). Petitioner's primary objection is that “materially inaccurate information” regarding his criminal history contained in the home confinement report that was considered by the court in imposing the underlying sentence. Specifically, the home confinement report notes that petitioner reported to the officer that he had been arrested less than five times when a check of petitioner's criminal history reveals that he was, in fact, arrested a total of twenty times with ten convictions or guilty pleas. Petitioner was critical of the circuit court's failure to allow him to testify as to his criminal history to clarify that he did not lie to the home confinement officer. Instead, the circuit court relied upon the testimony of the home confinement officer and his recitation of petitioner's criminal history.

Based upon our review of the record herein, we find no abuse of the circuit court's discretion in revoking petitioner's probation. In the underlying proceedings, petitioner acknowledged that he had been criminally charged for child abuse and acknowledged that he had five failed drug screens during probation. Such facts constitute a clear basis for the revocation of petitioner's probation. Accordingly, there is no error.

For the foregoing reasons, we affirm the December 8, 2020, order revoking petitioner's probation and imposing his sentence for his conviction of conspiracy to possess marijuana with the intent to deliver.

Affirmed.

**ISSUED:** May 26, 2022

**CONCURRED IN BY:**

Chief Justice John A. Hutchison  
Justice Elizabeth D. Walker  
Justice Tim Armstead  
Justice William R. Wooton

**NOT PARTICIPATING:**

Justice C. Haley Bunn