

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs.) **No. 21-0529** (Gilmer County 20-F-17)

Robert Wayne Klotz Jr.,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Robert Wayne Klotz Jr., by counsel Timothy P. Rosinsky, appeals the Circuit Court of Gilmer County’s June 7, 2021, sentencing order following his convictions for driving under the influence (“DUI”) of alcohol second offense and driving revoked for DUI third offense. Respondent State of West Virginia, by counsel Patrick Morrissey and Karen C. Villanueva-Matkovich, filed a response. On appeal, petitioner argues that the circuit court erred in sentencing him to a term of incarceration rather than imposing an alternative sentence.

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 November of 2020, petitioner was indicted on one count of driving revoked for DUI third offense in violation of West Virginia Code § 17B-4-3(b), one count of DUI second offense in violation of West Virginia Code § 17C-5-2(e), and one count of driving without security (insurance) in violation of West Virginia Code § 17D-2A-3. Petitioner was arraigned and released on bond.

Petitioner entered into a plea agreement in March of 2021 whereby he agreed to plead guilty to one count of driving revoked for DUI third offense and one count of DUI second offense. In exchange, the State agreed to dismiss the charge of driving without security and to not object to concurrent sentencing. The circuit court accepted petitioner’s plea agreement, finding that he understood his rights and his potential sentence under the agreement. The circuit court further found that petitioner received competent assistance from counsel.

The parties appeared for sentencing in May of 2021. Petitioner argued for alternative sentencing, but the circuit court found that imprisonment was appropriate because petitioner had twenty-five prior convictions and because alternative sentencing in petitioner's case would be contrary to the fair administration of justice. The circuit court noted that "[i]ndividuals cannot continue to engage in criminal conduct, especially criminal conduct which threatens the health, safety and welfare of the people, as . . . driving under the influence of alcohol does, and expect to be treated leniently." Accordingly, the court sentenced petitioner to a determinate term of six months of incarceration for his conviction of DUI second offense and an indeterminate term of one to three years of incarceration for his conviction of driving revoked for DUI third offense.¹ The court's sentencing order was entered on June 7, 2021, and this appeal followed.

Petitioner raises one assignment of error on appeal: The circuit court abused its discretion in denying him an alternative sentence in light of the facts and circumstances of the case. Petitioner acknowledges that the sentences are within statutory limits and were not based on any impermissible factors. He argues, however, that the circuit court abused its discretion in denying him an alternative sentence when he had serious health issues, such as liver damage, bilateral carpal tunnel, anxiety, and depression. Moreover, petitioner has elderly parents, one of whom was recently diagnosed with cancer. Given these factors, petitioner asks this Court to "rule that the trial court abused its discretion in denying him an alternative sentence."

"The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). "Probation is a matter of grace and not a matter of right." Syl. Pt. 1, *State v. Rose*, 156 W. Va. 342, 192 S.E.2d 884 (1972). Likewise, a circuit court retains discretion in ordering home confinement: "As a condition of probation or bail or as an alternative sentence to another form of incarceration for any criminal violation of this code over which a circuit court has jurisdiction, a circuit court *may* order an offender confined to the offender's home for a period of home incarceration." W. Va. Code § 62-11B-4(a) (in part) (emphasis added).

Petitioner acknowledges that his sentence is within statutory limits and not based on some impermissible factor. This Court has held that "[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 3, *State v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010) (citation omitted).

¹The circuit court ordered that the sentences "will run consecutively in part and concurrently in part as to the Second Offense DUI." For all time served prior to the sentencing hearing, or credit for time served, the sentences were ordered to run consecutively. However, moving forward, the sentences were ordered to run concurrently. The circuit court explained that petitioner would "receive credit [for time served] up until today upon the six-month sentence for DUI Second, from today forward those sentences shall run concurrently which means the effective sentence date [for the sentence of] not less than 1 no[r] more than 3 years in the penitentiary [is] the 10th day of May, 2021."

Given that petitioner does not claim error regarding the statutory limits of his sentence or the consideration of any impermissible factor, his claims are not subject to appellate review.²

For the foregoing reasons, we find no error in the decision of the circuit court, and its June 7, 2021, order is hereby affirmed.

Affirmed.

ISSUED: August 31, 2022

CONCURRED IN BY:

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

²Even if petitioner's sentence is subject to appellate review, petitioner fails to persuasively argue that the circuit court abused its discretion in sentencing petitioner, especially given his extensive criminal history.