
NO. 33244

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

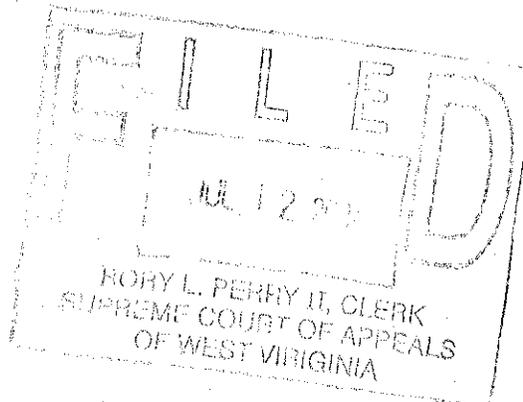
FREDERICO HATCHER,

Appellant,

v.

STATE OF WEST VIRGINIA,

Appellee.



BRIEF OF APPELLEE

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v.

STATE OF WEST VIRGINIA,

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BRIEF OF APPELLEE

I.

STATEMENT OF THE CASE

The Appellant claims that the August 13, 1996, sentencing order sentencing him to 212 years on one count of aggravated robbery is disproportionate to the underlying offense.

This Court refused Appellant's original appeal on February 20, 1997. Appellant filed a *pro se* petition for post-conviction relief in the Circuit Court of Cabell County. The habeas court convened an evidentiary hearing on December 4, 1998. During this hearing the habeas court reviewed the procedural requirements of *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981), with Appellant. The Appellant stated that he was aware of his rights, had reviewed his claims with counsel, and had waived the right to assert any claims not set forth on his checklist. (Omnibus Hr'g at 4-5.)

The habeas court rejected Appellant's petition by order entered March 22, 1999. The order thoroughly addresses Appellant's proportionality claim. (R. 234-39.) Petitioner appealed the court's order on October 6, 1999. By order entered March 23, 2000, this Court denied Appellant's appeal.

On February 17, 2006, Appellant filed a second habeas petition in the Circuit Court of Cabell County. By order entered the same day, the habeas court denied the petition. Appellant filed a Notice of Intent to Appeal on February 27, 2006.

By order entered March 2, 2006, the habeas court appointed counsel, Susan Breece, for the limited purpose of determining whether there were legal grounds for filing an appeal. Counsel filed a petition for appeal with this Court on September 11, 2006. By order entered November 28, 2006, the Court accepted Appellant's appeal.

Appellant is currently serving life, without mercy based upon his companion Case No. 32977. *See Hatcher v. McBride*, No. 32977, 2006 WL 3456480 (2006).

II.

FACTS

Appellant, along with two co-defendants robbed Dennis Johnson, a delivery person for Domino's. They made off with two pizzas and a bottle of soda. According to Mr. Johnson the Appellant hit him in the back of the head, while one of his co-defendant's made off with the property. Appellant was 19 years old when he committed the offense.

Both co-defendants testified against Appellant. One co-defendant, James Manns, was sentenced to ten years, suspended. As a condition of his probation he was sent to Forestry Camp, and then to Anthony Center. The other co-defendant, Andre Branch, was sentenced to ten years.

Mr. Johnson testified that the Appellant struck him with a large wooden club, which knocked him forward two feet. After he was hit, he ran towards his car.

Appellant claimed that Mr. Johnson pulled a bottle of pepper spray out as one of his co-defendants was counting out the money. In order to stop him from spraying any further, the Appellant hit him on the back of the head. (Omnibus Hr'g at 54.) He described the club he used as a metal pipe, an inch in diameter and a foot and a half long. (*Id.* at 56.)

III.

ARGUMENT

A. **THE APPELLANT'S SENTENCE WAS PROPORTIONAL TO THE OFFENSE, AND SHOULD *NOT* SHOCK THE CONSCIENCE OF THIS COURT.**

1. **The Standards of Review.**

Subject to certain narrowly drawn exceptions, this Court has consistently held that sentencing decisions rest within the sound discretion of the trial court. "The Supreme Court of Appeals 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). The balance struck by the sentencing judge in weighing competing sentencing factors will not be disturbed by this Court unless it is manifestly unsupported by reason.

2. **The Appellant's Conduct While on Bail Was a Relevant Sentencing Factor.**

In West Virginia, sentences must be proportionate. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offense." W. Va. Const. art. III, § 5. In *State v. Cooper*, 172

W. Va. 266, 272, 304 S.E.2d 851, 857 (2003), this Court identified two tests to determine whether a sentence is so disproportionate to a crime that it violates our Constitution: (1) whether the sentence for the particular crime shocks the conscience of the court and society; and (2) whether the sentence violates the proportionality principles found in Article III, Section 5. When it cannot be said that the sentence shocks the conscience, a disproportionality challenge is guided by the objective test that this Court first spelled out in Syl. Pt. 5 of *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 524, 276 S.E.2d 205, 207 (1981):

In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

This Court described the subjective test in *Cooper*, 172 W. Va. at 272, 304 S.E.2d at 857: “The first [test] . . . asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.” See *State v. David D.W.*, 214 W. Va. 167, 588 S.E.2d 156 (2003) (sentence of 1,140 to 2,660 years effectively imposed multiple life sentences and therefore failed the subjective test). A trial judge is afforded wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by him should not be set aside under this test absent a manifest abuse of discretion. “To determine whether a sentence shocks the conscience, we consider all of the circumstances surrounding the offense as well as the information contained in the presentence investigation report.” *State v. King*, 205 W. Va. 422, 428, 518 S.E.2d 663, 669 (1999).

Appellant's claims that the sentencing court improperly sentenced him based, not upon the serious nature of his act, but on his subsequent actions, i.e., murdering a convenience store clerk.¹ This contention is simply without merit. Sentencing courts are free to consider any and all evidence of future dangerousness. In the case at bar, the court did not have to speculate about the Appellant's potential danger to the community: He was confronted with concrete evidence of the Appellant's complete disregard for the law, and contempt for human life. A ruling requiring a sentencing court to ignore such evidence would lack reason and common sense. *State ex. rel. Ballard v. Painter*, 213 W. Va. 90, 582 S.E.2d 737 (2003) (*per curiam*), quoting Syl. Pt. 2, *State v. Buck*, 173 W. Va. 243, 314 S.E.2d 406 (1984) (trial court may consider such factors as *post-arrest conduct* in formulating sentence).

Appellant also argues that this was a minor robbery. The Appellant did not take the victim's money or severely injure him. Therefore, it is unfair to impose such a harsh sentence. This Court has long recognized the violent nature of aggravated robbery. By imposing a minimum ten-year sentence the Legislature has clearly expressed its intent to punish this crime harshly.

The Appellant struck the victim on the back of his head with a club. He conspired with two other defendants, and reflected on his violent course of action before committing the crime. He used an instrumentality in a matter which created a severe risk of harm. Far from mitigating his conduct, the fact that he was willing to engage in such violent behavior for the sake of a single pizza only demonstrates a malicious heart.

¹The Appellant has repeatedly tried to relitigate the facts of that case. Appellant's direct appeal of the jury's conviction was appealed and rejected by this Court, as was his habeas appeal. To raise that issue in the context of this appeal is clearly improper.

Additionally, the Appellant had a lengthy criminal record reaching back over years. Several attempts had been made at rehabilitation: All failed.

The evidence supports the trial court's sentence. The Appellant is a violent, repeat offender with no concern for the rights of others, or the requirements of the law. This Appellant's position is without merit.

IV.

CONCLUSION

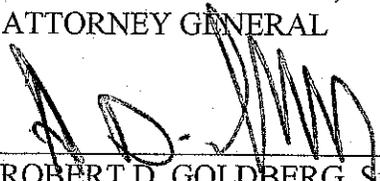
For the foregoing reasons, this Court should dismiss this appeal as improvidently granted and remand the matter to the Circuit Court of Cabell County.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee* was mailed to counsel for Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 12th day of July, 2007, addressed as follows:

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