

IN THE SUPREME COURT OF APPEALS OF  
THE STATE OF WEST VIRGINIA

MICHAEL O'DELL DENNIS, )

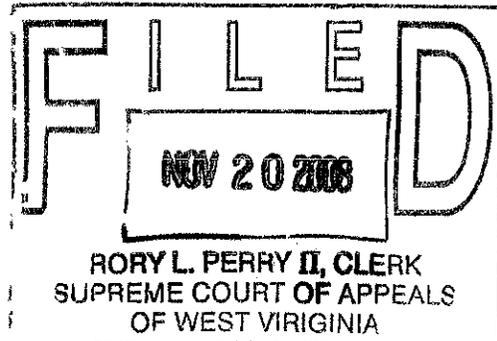
Appellant, )

v. )

STATE OF WEST VIRGINIA, DIVISION OF )  
CORRECTIONS, TERESA WAID, WARDEN, )  
HUTTONSVILLE CORRECTIONAL CENTER) )

Appellees. )

Supreme Court No. 34273



APPELLEE'S REPLY BRIEF

Scott R. Smith (W.Va. Bar No. 3485)  
Ohio County Prosecuting Attorney  
Ohio County Prosecutor's Office  
Room 216  
1500 Chapline Street  
Wheeling, West Virginia 26003  
Phone: (304) 234-3631  
Fax: (304) 234-3870



The Appellant drove the victim to Barkcamp, a state park in the State of Ohio, where he pushed the victim towards the woods, forcing her to walk in the underbrush rather than on a nearby path. The Appellant told the victim he did not want her to walk on the path because he wanted her to “suffer like he had to suffer, because he used to hide in the woods whenever the police were looking for him” for violating a protective order she had against him. The Appellant then pushed the victim onto a fallen tree where he raped her both vaginally and anally. The Appellant continued to hold the victim against her will and the next day, when the Appellant was removing the credit card from the victim’s purse to make a gas purchase, he found a picture of one of her male friends. The Appellant then questioned her relative to her relationship with this friend, while he continued to strike her repeatedly on the arm, leg and head. The victim attempted to contact her grandmother by using a code she had established with her grandmother to let her know when she was in trouble and needed help. The victim then attempted to use the restroom in hopes of finding a means of escape from the Appellant, but to no avail. At the next stop, the Appellant attempted to get a cash advance on the victim’s credit card, however the victim could not remember her personal identification number. The Appellant then attempted to make a telephone call to obtain the personal identification number when the victim ran inside an Exxon station screaming and crying for help. The Appellant followed her, and upon being made aware the attendant at the station was calling the police ran out of the station and drove off to be later apprehended several blocks away by the Marietta Police. A B-B gun, resembling a real firearm was found in the Appellant’s vehicle.

### **PROCEDURAL HISTORY**

On September 21, 2001, the Appellant was indicted for the felony offenses of “Kidnapping”, “Robbery in the First Degree”, two counts of “Sexual Assault in the Second Degree”, “Abduction with the

Intent to Defile” and the misdemeanor offenses of “Violation of a Protective Order” and “Domestic Battery”.

On August 22, 2002, a jury convicted the Appellant of “Kidnapping”, two counts of “Sexual Assault in the Second Degree”, “Robbery in the Second Degree”, “Violation of a Protective Order” and “Domestic Battery”. The Appellant was acquitted of the felony offense of “Abduction with Intent to Defile”.

On September 19, 2002, the Appellant was sentenced to serve life with mercy for the kidnapping conviction, ten to twenty-five years for each count of “Sexual Assault in the Second Degree”, five to eighteen years for the “Second Degree Robbery” conviction, one year for the “Violation of a Protective Order” conviction and one year for the “Domestic Battery” conviction. The Circuit Court ordered the life sentence for “Kidnapping” and two ten to twenty-five year sentences for “Sexual Assault” to run consecutively to each other. This Court further ordered the sentences for “Robbery in the Second Degree”, “Violation of a Protective Order” and “Domestic Battery” run concurrently with the life sentence for “Kidnapping”. On December 1, 2004, the Supreme Court overturned the convictions for both counts of “Sexual Assault” as well as “Robbery”, but affirmed the remaining convictions of the Appellant.

The State subsequently recharged the Appellant with two counts of “Sexual Assault in the Second Degree” and one count of “Robbery in the Second Degree”. Waiving his right to trial, the Appellant voluntarily chose to and entered a plea of guilty to “Robbery in the Second Degree”. As part of the plea negotiations, the State agreed to and dismissed both “Sexual Assault” charges against the Appellant. Pursuant to the aforementioned plea to “Second Degree Robbery”, this Court sentenced the Defendant to serve not less than five nor more than eighteen years in prison, with said sentence to run consecutively

to the life sentence for “Kidnapping”.

The Appellant attempted to obtain credit for time previously served on the “Robbery” conviction (pursuant to the jury’s finding of guilty). The Parole Board refused to grant the Appellant with credit for time previously served for the previous robbery conviction. The Appellant brought suit in the Kanawha County Circuit Court to challenge the Parole Board’s decision and grant him the credit for time previously served. The Kanawha County Circuit Court dismissed that action on March 21, 2007, noting the Appellant had failed to establish a legal entitlement to relief. An appeal of that decision was filed and on October 24, 2007, the West Virginia Supreme Court refused to hear that appeal. The Appellant now seeks relief from this Court.

#### **Decision of Parole Board**

The Appellant now seeks to have this Court reverse the Parole Board’s interpretation of this Court’s sentence. The parole board refused to grant Appellant the relief requested insofar as Appellant wanted credit for time previously served for his robbery conviction pursuant to the jury’s finding of guilt. This Court ordered that Appellant’s sentence (pursuant to his voluntary plea) run consecutively to his life sentence for kidnapping. This court further held that whether Appellant should be given credit for time previously served was a decision to be left to the parole board. The parole board determined that Appellant would not be given credit for time served. The Appellant now wants this court, in essence, to not only overturn the decision of the parole board, but also essentially reverse itself.

Insofar as Appellant is requesting a modification of his sentence, what he actually seeks is to have this Court grant relief pursuant to rule 35 of the West Virginia Rules of Criminal Procedure. As the Court is well aware, a sentencing court cannot interfere with the role of the parole board. Our

Supreme Court has stated that a circuit court cannot “usurp the role of the parole board”. *State vs. Head*, 198 WV 298, 480 S.E. 2d 507 at syllabus pt. 5. As such, this Court cannot overrule the parole board’s decision and grant Appellant’s *habeas* relief.

### **Challenge of Circuit Court’s Sentencing Order**

Under this Count, the Appellant seeks to have this Court grant relief by effectively modifying the Circuit Court’s Sentencing Order. The State contends the appropriate vehicle by which to have a sentence modified is a motion for modification of sentence pursuant to West Virginia Rule of Criminal Procedure 35. As stated in paragraph two *supra*, a circuit court cannot interfere with or supersede the role of the parole board. *Id.*, at p. 512 as previously noted by the Circuit Court. Furthermore, under WVRCP 35, a motion for modification or reduction of a sentence must be filed within 120 days of sentencing. As the time frame to file this type of relief motion is one hundred and twenty days from the sentencing date, the Appellant has not timely sought Rule 35 relief.

### **Challenge of Circuit Court’s Sentencing Order**

Appellant’s arguments pursuant to Count Four essentially mirror those contained in Count Three. Furthermore, Appellant argues that running the sentence for “Robbery in the Second Degree” pursuant to Appellant’s plea of guilty creates a “chilling effect on the right to appeal.” Since this is a Constitutional issue, the appropriate venue for such relief by appeal is the West Virginia Supreme Court of Appeals. The West Virginia Supreme Court of Appeals previously refused to hear Appellant’s appeal.

### **RES JUDICATA/COLLATERAL ESTOPPEL**

As the parole board has refused the relief requested by the Appellant, the Kanawha County Circuit Court dismissed Appellant’s Writ of Mandamus and the Supreme Court refused to hear Appellant’s

appeal, the doctrines of *res judicata* and/or collateral estoppel bar Appellant from again attempting to obtain the relief sought.

“Collateral estoppel will bar a claim if four elements are met: (1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with the party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.” *State of West Virginia vs. Susan Miller, 194 WV 3, 459 SE 2d 114 at Syl. Pt. 1.* (Cleckley, J.)

Clearly, all four elements pursuant to Syllabus Point 1, *id.*, have been met in this instance. The Appellant sought to obtain identical relief from the Parole Board, the Kanawha County Circuit Court, the West Virginia Supreme Court and now this Court. The Appellant has merely disguised the vehicle used to obtain said relief. Also, there has been not one, but two final adjudications in this matter, one being by the Kanawha County Circuit Court and the second being by the West Virginia Supreme Court. Clearly, the Appellant was a party to all of the aforementioned actions. Therefore, the doctrines of *res judicata* and/or collateral estoppel properly apply to Appellant. Finally, the Appellant had more than full and fair opportunities to litigate any issues raised relative to the sentence in this matter. Consequently, the Appellant cannot continue to forum shop in an attempt to obtain the relief he seeks and his claims are now barred by the doctrines of *res judicata* and collateral estoppel.

### CONCLUSION

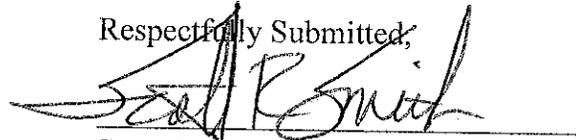
This is Appellant’s fourth attempt to obtain the relief he seeks. He began with the parole board, filed suit in the Kanawha County Circuit Court, appealed to the West Virginia Supreme Court and now presents his request to this Court in the form of a *habeas* petition. The State reiterates that the proper

vehicle by which to modify Appellant's sentence is a motion for modification of sentence pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure. Clearly, the time frame in which to request such relief has lapsed. Of more significant import, this Court has spoken directly to the issue of whether a circuit court can interfere with the functions of the parole board in *State v. Head, supra*.

Furthermore, Appellant's conviction for Robbery pursuant to a jury's finding of guilt was overturned by the West Virginia Supreme Court. Procedurally, that ruling effectively placed the Robbery in the First Degree count of the indictment in a pre-trial posture. Consequently, it is as though the sentence for the initial Robbery conviction never existed. Therefore, the Appellant cannot receive credit for time served on a sentence that procedurally never existed.

**WHEREFORE**, the Appellees respectfully request this Court deny Appellant's prayer for relief and for any further this Court deems appropriate.

Respectfully Submitted,



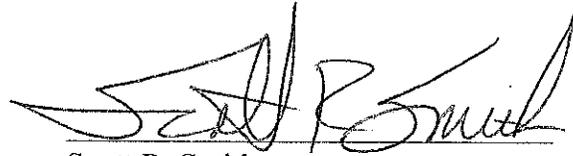
Scott R. Smith

Counsel for Appellees

Scott R. Smith  
W.V. State Bar #3485  
Ohio County Prosecutor's Office  
Ohio County Courthouse  
1500 Chapline Street  
Wheeling, WV  
(304) 234-3631

**CERTIFICATE OF SERVICE**

Service of the foregoing APPELLEE'S REPLY BRIEF was had upon the Appellant, Michael O'Dell Dennis, by delivering a true copy thereof, to his attorney, Andrew Price, P. O. Box 6908, Wheeling, West Virginia 26003 this 18<sup>th</sup> day of November, 2008, by U.S. Mail, to his last known address.



Scott R. Smith  
Counsel for Respondents

Scott R. Smith  
W.V. State Bar #3485  
Ohio County Prosecutor's Office  
Ohio County Courthouse  
1500 Chapline Street  
Wheeling, WV  
(304) 234-3631