

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

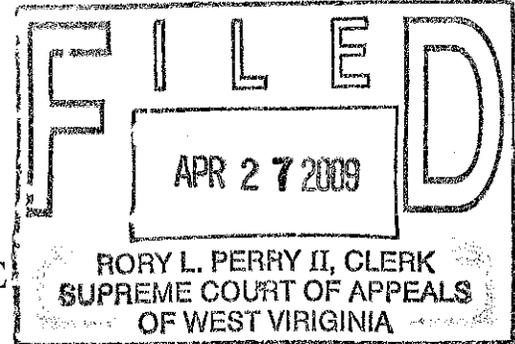
STATE OF WEST VIRGINIA, PLAINTIFF BELOW,  
APPELLEE,

v.

APPEAL NO.: 34711

CASE NO.: 07-F-51

RICHARD A. BOOTH, DEFENDANT BELOW,  
APPELLANT.



REPLY OF APPELLEE

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**REPLY OF APPELLEE**

**TO: THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF  
APPEALS OF THE STATE OF WEST VIRGINIA**

**HON. BRENT D. BENJAMIN, CHIEF JUSTICE  
HON. ROBIN JEAN DAVIS, JUSTICE  
HON. MARGARET L. WORKMAN, JUSTICE  
HON. MENIS E. KETCHUM, II, JUSTICE  
HON. THOMAS E. MCHUGH, JUSTICE**

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**RORY L. PERRY, II, CLERK**

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*People v. Isitt*, 55 Cal.App.3d 23, 127 Cal.Rptr. 279 (1976)

*State v. Boad*, 104 Ariz. 362, 453 P.2d 508 (1969)

*State v. Victorian*, 332 So.2d 220 (La. 1976)

## **KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL**

This is an appeal by Mr. Booth (Defendant-Appellant) from a final Order of the Ohio County Circuit Court (Mazzone, J.) after Mr. Booth plead guilty to one count of Robbery in the First Degree (West Virginia Code § 61-2-12(a) (2000)) on June 8, 2007. He was sentenced to eighty-years in the penitentiary on August 2, 2007. This Court granted Mr. Booth's Petition for Appeal on February 2, 2009.

Mr. Booth alleges that his eighty-year sentence violates Article III Section Five of the West Virginia Constitution because it is disproportionate to how the crime was committed.

## **FACTS AND PROCEDURAL HISTORY**

On March 21, 2007, Mr. Booth, Jennifer Jordan, Jeremy Harper, and Jessica Wood decided to drive from Moundsville to Wheeling to sell fake crack in an attempt to get money to buy real drugs. Record Pre-Sentence Report, 140 at 1. Mr. Booth had taken five Xanax pills before leaving Moundsville. Record Pre-Sentence Report, 140 at 1. They could not find anyone who would buy the fake crack. Record Pre-Sentence Report, 140 at 1, 6. Continuing their search for money to buy drugs, Mr. Booth attempted to gain access to the home of an elderly women, Linda Carney. Ms. Carney was suspicious and would not let him inside. Record Pre-Sentence Report at 6. After driving aimlessly around Wheeling, Mr. Booth and the others spotted Doris Schafer and her husband on the street outside a local restaurant. Record Pre-Sentence Report at 1. At the time of the robbery, Ms. Schafer was eighty-two years old and in good physical condition. Record Pre-Sentence Report at 2. Jessica Wood told Mr. Booth and Jeremy Harper to get out of the car and get Ms. Schafer's purse. Record Pre-Sentence Report at 2. Mr. Booth ran up to Ms. Schafer and tried to yank her purse off her shoulder. Record, Plea Hearing Transcript, June 8, 2007, page 18. Mr. Booth could not get the purse off Ms. Schafer's shoulder so he continued pulling. Record,

Plea Hearing Transcript, June 8, 2007, page 18. Mr. Booth eventually pulled Ms. Schafer to the ground. Record, Plea Hearing Transcript, June 8, 2007, page 18. The force of being drug to the ground by Mr. Booth as he was yanking on Ms. Schafer's purse was enough to shatter her hip. Record, Plea Hearing Transcript, June 8, 2007, page 18. Mr. Booth abandoned his attempt to rob Ms. Schafer and ran back to the car, leaving Ms. Schafer writhing on the ground in agony. Record, Plea Hearing Transcript, June 8, 2007, page 18. This occurred in the presence of Ms. Schafer's elderly and infirm husband who was unable come to the aide of his wife during the attack. Record, Sentencing hearing transcript, August 2, 2007, page 33. A witness followed the car that Mr. Booth was in and gave the license plate number to the 911 dispatcher. Record at 45. Mr. Booth was arrested later that night and charged with Robbery, in violation of West Virginia Code § 61-2-12(a) (2000).

Mr. Booth was indicted by an Ohio County Grand Jury with two counts of Robbery in the First Degree (West Virginia Code § 61-2-12(a)), Assault During the Commission of or Attempt to Commit a Felony (West Virginia Code § 61-2-10), and Conspiracy (West Virginia Code § 61-10-31). On June 8, 2007, Mr. Booth entered into a plea agreement with the State. Mr. Booth agreed to plead guilty to one count of Robbery in the First Degree. The remaining Counts of the Indictment were dismissed. Record, Plea Agreement at 129-130. The Plea Agreement also stated that both parties would be free to recommend to the Court their respective recommendations of sentencing. Record, Plea Agreement at 130. This Plea Agreement also bound the State into not seeking a higher sentence than what the probation officer recommended in his pre-sentence report. Record, Plea Agreement at 130. The trial court accepted Mr. Booth's plea on June 21, 2007. Record, Plea Order at 134. After Mr. Booth's plea, a pre-sentence investigation report was ordered. Record, Plea Order at 134.

The Pre-Sentence Investigation Report recommended an eighty-year sentence. Record, Pre-Sentence Report at 5. The basis for this recommendation was:

1. The defendant is a violent offender who assaulted an eighty-two-year-old woman by viciously knocking her to the ground in the attempt to rob her of her purse. During the assault, both he and the victim fell to the ground where he continued to pull on her purse while she screamed for help. The victim's eighty-seven-year-old husband who is in poor health was right there when it happened, but was unable to come to the aid of his wife due to his age and physical condition. He is also a victim of this crime.
2. Due to the serious injury to the victim caused by the defendant's assault and attempted robbery. The victim received a broken hip when she was knocked to the sidewalk. A broken hip is one of the most devastating injuries that can happen to an elderly person. This eighty-two year old innocent victim has now had to endure two painful surgeries to her hip and femur and is still in rehabilitation at Peterson Rehabilitation Center. According to her doctor she faces the possibility of another surgery. Before this crime was committed the victim was in good physical health and enjoyed an active fulfilling life. She enjoyed going to the Howard Long Wellness Center and walking anywhere she wanted to go. She was an active helper to her husband and a babysitter for her nine-year-old grandson who loved to come and stay at his grandmothers' house. All of that has been taken from her and her loved ones due to the violent actions of the defendant. She is now unable to care for herself let alone anyone else. She faces an uncertain future and is not sure if she will ever walk again. She has to make renovations to her home so that it will be suitable for her return. When this officer visited her at Peterson Hospital she was bedridden and could only hop on one leg with great difficulty with the aid of a walker. Mrs. Schafer has gone from being an independent caregiver to what she characterizes as a burden to her husband, son, daughter-in-law, and friends. The final years of Mrs. Schafer's life will never be what they could have been due to the criminal actions of the defendant.
3. Due to the defendant's prior criminal record. The defendant is a repeat offender. He has a prior felony conviction in West Virginia for which he served time in the penitentiary. Furthermore, he was out on bond on a felony drug charge in Marshall County, West Virginia, when he committed the present offense in Ohio County. He also has several misdemeanor convictions.
4. Due to the deliberate nature of the crime committed by the defendant. The defendant and his three co-defendants drove from Marshall County to Wheeling

to commit crimes. The defendant and co-defendants were predators looking for easy prey that day. They attempted to rob another elderly woman, Linda Carney, who they saw walking with a cane. They saw her go into her apartment in North Wheeling and the defendant tried to gain access to her apartment by knocking on the door and making some excuses for her to let him in. However, she was suspicious and turned him away or she would have been a victim. Then the defendant and co-defendants saw Mrs. Schafer walking with her husband and decided to hunt her as their prey. The defendant was indicted in Count Two of the indictment for the attempted first degree robbery of Linda Carney, but that count was dismissed.

5. The Court has already shown the defendant leniency by accepting the plea agreement in this case that dismissed Count Two "Robbery in the First Degree," Count Five "Assault During Commission or Attempt to Commit a Felony," and Count Seven "Conspiracy to Commit the Felony Offense of Robbery in the First Degree."
6. Due to the defendant's anti-social attitude and behavior. At twenty-one years of age, this defendant has accumulated a serious criminal record. He is a violent and repeat offender who now has two felony convictions and another possible felony conviction pending. He also has two misdemeanor convictions. He is a healthy young male who refused to find regular employment. Instead, he chose to use drugs every day and commit crimes against the public to support his drug habit. He is a danger to the public and needs to be incapacitated for a long time by being removed from the lawful society for which he has such contempt. He has shown by his actions that he cannot be trusted to abide by the rules and law of our society.

At the sentencing hearing, the State called Dr. Mary Haus who had performed a second surgery on Ms. Schafer. Dr. Haus testified that as a result of breaking her hip, that "the quality of her life for the remainder of her life" would be affected. Record, Sentencing hearing transcript, August 2, 2007, page 20. Dr. Haus also testified that before Ms. Schafer was violently attacked, she was able to walk without using a cane or crutch. Record, Sentencing hearing transcript, August 2, 2007, page 20. Dr. Haus also stated that since the attack, Ms. Schafer is unable to drive a car. Record, Sentencing hearing transcript, August 2, 2007, page 21.

Ms. Schafer was so traumatized by the robbery, she could not face Mr. Booth at the sentencing hearing. She chose instead to send a letter to the Court expressing her views. In this letter, Ms. Schafer stated: “[t]his has turned my life upside-down. I went from being an active helper for my husband (who has great difficulty walking as well as standing for any length of time) and an ‘always available’ baby sitter for my 9-yr. old grand son and enjoying many activities including going to the Wellness Center and walking anywhere I wanted, into a helpless person who can’t even go to the bathroom without assistance.” Record, Pre-Sentence Report. Ms. Schafer went on to lament: “I have literally been robbed of a large chunk of my remaining life.” Record, Pre-Sentence Report.

After hearing the testimony of Dr. Haus, and weighing the arguments made by the State and Mr. Booth, Judge Mazzone followed the recommendation in the Pre-Sentence Report and sentenced the Defendant to eighty years in the penitentiary Record, Sentencing Order, December 3, 2007 at 151. A Sentencing Order was entered on December 3, 2007 and the Defendant was resentenced on May 23, 2008. Record, Sentencing Order, May 23, 2008. Mr. Booth filed a *Motion for Reduction of Sentence* arguing that he be resentenced to the Youthful Offender Program.<sup>1</sup> Record, Motion for Reduction of Sentence. A Notice of Intent to Appeal was filed on August 31, 2007 and this Court granted the Petition for Appeal on January 27, 2009. Mr. Booth argues that his eighty-year sentence is disproportionate.

## **JURISDICTION**

A final order from the Ohio County Circuit Court was entered on December 3, 2007. The Petition for Appeal was filed on September 19, 2008, and granted on February 2, 2009. The jurisdiction of this

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<sup>1</sup> This motion was never ruled upon.

Court rests on Article Eight Section III of the West Virginia Constitution and West Virginia Code Section 58-5-1 (1998).

## **SUMMARY OF ARGUMENT**

### **I. THE SENTENCE IMPOSED BY THE COURT, IN LIGHT OF THE VICIOUS FACTS OF THIS CASE, DOES NOT SHOCK THE CONSCIENCE.**

Mr. Booth's eighty-year sentence does not shock the conscience and must be upheld. Mr. Booth committed this robbery to get money to buy *more* drugs. Mr. Booth and his co-defendants preyed upon elderly citizens, knowing they were easier targets. When Mr. Booth robbed Ms. Schafer, she did not let go of her purse immediately and was viciously drug to the ground by Mr. Booth. When Ms. Schafer hit the ground, her hip was fractured. Realizing that his attempt to rob Ms. Schafer was unsuccessful, Mr. Booth ran back to the car and left Ms. Schafer writhing on the ground in agony. As a result of the robbery, Ms. Schafer's life has been destroyed. She has gone from a healthy, active woman, who cared for her husband to needing almost continuous care for herself. Further, Mr. Booth had two felony convictions for Petit Larceny Second Offense for which he served time in the penitentiary.<sup>2</sup> Mr. Booth was also on bond after being indicted by a Marshall County Grand Jury for Delivery of a Controlled Substance Within 1000 Feet of a School when he robbed Ms. Schafer.

### **II. MR. BOOTH'S EIGHTY-YEAR SENTENCE IS NOT DISPROPORTIONATE TO HIS CRIME BECAUSE MS. SCHAFER WAS SEVERELY INJURED DURING THE ROBBERY.**

Mr. Booth's sentence does not violate the proportionality requirement of Article III, Section Five of the West Virginia Constitution under the objective test set forth in *Wanstreet v. Bordenkircher*, 166

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<sup>2</sup> These convictions were part of a plea in Marshall County Circuit Court whereby Mr. Booth plead guilty to two counts of Petit Larceny Second Offense in exchange for the three counts of Entering without Breaking an Auto being dismissed. Mr. Booth served one year in the penitentiary.

W. Va. 523, 276 S.E.2d 205 (1981). Robbery is a crime of the gravest character, Mr. Booth had no regard for the safety of Ms. Schafer. He destroyed her life when he drug her to the ground and broke her hip. The legislatively created sentencing scheme allows trial court judges to weigh the aggravating and mitigating factors in sentencing. Here, the trial court judge found that the aggravating factors outweighed the mitigating factors and sentenced Mr. Booth to a lengthy penitentiary sentence. Mr. Booth's sentence is proportionate with sentences in other jurisdictions and is also proportionate with sentences in West Virginia.

## **ARGUMENT**

### **I. THE SENTENCE IMPOSED BY THE COURT, IN LIGHT OF THE VICIOUS FACTS OF THIS CASE, DOES NOT SHOCK THE CONSCIENCE.**

#### **STANDARD OF REVIEW**

This Court should review the proportionality of Mr. Booth's sentence under an abuse of discretion standard. *See e.g., State v. Newman*, 108 W. Va. 642, 152 S.E.2d 195 (1930); *State v. Cooper*, 172 W. Va. 266, 271, 304 S.E.2d 851, 856 (1983).

#### **ARGUMENT**

Mr. Booth claims that his eighty-year sentence for robbing Ms. Schafer and destroying her life shocks the conscience and thus violates Article III, Section Five of the West Virginia Constitution. Mr. Booth's claim is without merit.

To determine if a sentence is so disproportionate to the crime and thus unconstitutional, this court must determine if the sentence shocks the conscience. *State v. Mann*, 518 S.E.2d 60, 205 W. Va. 303 (1999). A sentence shocks the conscience if it is "so offensive that it cannot pass a societal and judicial

sense of justice.” *Id.* This Court must look at all the circumstances surrounding the offense in determining if a particular sentence shocks the conscience. *State v. Adams*, 211 W. Va. 231, 565 S.E.2d 353(2003).

On March 21, 2007, Ms. Schafer’s life changed forever. In an attempt to obtain money to buy *more* drugs, Mr. Booth and his accomplices hatched a scheme whereby they would sell fake crack and use the proceeds to buy real drugs. Record, Pre-Sentence Report. Before embarking on this criminal enterprise, Mr. Booth ingested five Xanax pills and smoked marijuana. Record, Pre-Sentence Report. When this criminal enterprise failed, Mr. Booth and his accomplices consciously chose to prey upon the elderly. Mr. Booth spotted Linda Carney walking to her apartment. Record, Pre-Sentence Report. Mr. Booth attempted to gain access to Ms. Carney’s apartment by making excuses to let him in. Record, Pre-Sentence Report. Ms. Carney was suspicious of Mr. Booth and, thankfully, did not let him enter the apartment. Record, Pre-Sentence Report. Frustrated at not being able to steal any money from Ms. Carney, Mr. Booth and his accomplices sought and found their next victim: Doris Schafer. Mr. Booth got out of the car, ran up to Ms. Schafer and violently attempted to yank her purse off her arm. Record, Pre-Sentence Report. When Ms. Schafer would not let go of her purse, Mr. Booth continued to viciously yank on the purse and in the process, drug Ms. Schafer to the ground. Record, Pre-Sentence Report. Ms. Schafer still refused to let go of her purse and Mr. Booth finally abandoned his robbery, leaving Ms. Schafer writhing on the ground in agony. Record, Pre-Sentence Report. Mr. Booth and his accomplices were arrested a short time later. Record, Pre-Sentence Report.

Mr. Booth pled guilty and the trial court ordered a pre-sentence investigation. A Pre-Sentence Report was prepared that recommended an eighty-year sentence. Record, Pre-Sentence Report. The basis for this report was that “(1) [t]he defendant is a violent offender who assaulted at eighty-two year old

woman by viciously knocking her to the ground in an attempt to rob her of her purse; (2) [d]ue to the serious injury to the victim caused by the defendant's assault and attempted robbery; (3) [d]ue to the defendant's prior criminal record; (4) [d]ue to the deliberate nature of the crime committed by the defendant; (5) [t]he court has already shown the defendant leniency by accepting the plea agreement in this case which dismissed Count Two 'Robbery in the First Degree,' Count Five 'Assault During the Commission or Attempt to Commit a Felony.' and Count Seven 'Conspiracy to Commit the Felony Offense of Robbery in the First Degree;' and (6) [d]ue to the defendant's anti-social attitude and behavior." Record, Pre-Sentence Report, *supra* pages 8-9. It was also noted in the Pre-Sentence Report that Mr. Booth was on bond when he viciously attacked Ms. Schafer. Mr. Booth had been indicted by a Marshall County Grand Jury for Delivery of a Controlled substance within 1,000 feet of a School<sup>3</sup>. Record, Pre-Sentence Report.

As a result of this malicious attack, Ms. Schafer suffered a broken hip. She underwent one surgery shortly after the attack to place pins in her hip. She then had to undergo a second surgery because her hip was not healing correctly.<sup>4</sup> Ms. Schafer has gone from being a healthy, active eighty-two year old that took care of her husband and her grandson to being a burden on her friends and family. Record, Pre-Sentence Report.

This Court has upheld lengthy prison sentences in other cases similar to this, the case at bar. In *State v. King*, 205 W. Va. 422, 428, 518 S.E.2d 663, 669 (1999) the defendant was sentenced to

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<sup>3</sup> This charge was dismissed on August 27, 2007.

<sup>4</sup> Since Mr. Booth has been sentenced, Ms. Schafer has undergone a third surgery, a complete hip replacement.

eighty-four years in the penitentiary. In *King*, the defendant broke into the home of an eighty-two year old woman and threatening her with a knife and gun. *Id.* The pre-sentence report indicated that the defendant had previously been convicted of daytime burglary and entering without breaking and was on parole at the time of the robbery<sup>5</sup>. *Id.* In the case now to be determined, Mr. Booth also preyed upon an elderly victim - eighty-two year old Doris Schafer. Moreover, Mr. Booth did actual serious physical injury to Ms. Schafer. Also, Mr. Booth robbed Ms. Schafer while he was on bond after being indicted by a Marshall County Grand Jury for Delivery of a Controlled Substance Within 1000 Feet of a School and had a two prior felony convictions for Petit Larceny.

Another case in which this Court has upheld a lengthy prison sentence is *State v. Phillips*, 199 W. Va. 507, 485 S.E.2d 676 (1997). In *Phillips*, the defendant was sentenced to 140 years in the penitentiary after robbing a fast food restaurant and threatening the employees with an air pistol, which resembled a real gun. The pre-sentence report revealed facts similar to those herein: that the defendant had been arrested for auto larceny in North Carolina; been discharged from the Navy for an unauthorized absence; and had a history of, and a high potential for substance abuse. *Id.* at 513, 682. The pre-sentence report also indicated that the defendant had signs of a personality disorder and antisocial characteristics. *Id.*

In Mr. Booth's case, while his criminal history is not particularly violent, it is lengthy for a twenty-one year old. He has been convicted of two felonies (albeit stemming from the same incident) and served time in the penitentiary. This is his *third* felony. He also has a substance abuse problem. Even though Mr. Booth did not use a weapon when he attempted to steal Ms. Schafer's purse, she was subject to serious

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<sup>5</sup> The defendant was also charged with kidnaping for forcing the victim's son-in-law to accompany him while trying to escape.

physical injury. Mr. Booth viciously drug Ms. Schafer to the ground while trying to yank her purse off her arm and in the process, fractured her hip. This Court has recognized that “[a]ggravated robbery in West Virginia has been recognized as a crime that involves a high potentiality for violence and injury to the victim involved” and “emotional or physical injury to the victim may be considered in the sentencing of a convicted defendant.” *State v. Woods*, 194 W. Va. 250, 460 S.E.2d 65 (1995) quoting *State v. Ross*, 184 W. Va. 579, 402, S.E.2d 348 (1990) and *State v. Spence*, 182 W. Va. 472, 388 S.E.2d 498 (1989).

At the sentencing hearing, the trial court judge explained his reasoning for sentencing Mr. Booth to eighty-years in the penitentiary. Judge Mazzone stated: “Mr. Booth and the others with him, quote, unquote wanted to go to Wheeling to rip off some people and targeted elderly individuals, saw Ms. Schafer. Mr. Booth attempted to rob her, and during that assault, knocked her to the ground, fracturing her hip requiring two surgeries, extensive therapy . . .” Transcript of Sentencing Hearing, August 2, 2007 at 33. He also stated: “[s]he has suffered excessively. She’s been in a lot of pain. . . . And it’s going – all of that is going to continue for the rest of her life.” Transcript of Sentencing Hearing, August 2, 2007 at 33. The trial court judge concluded: “[t]here’s nothing about the facts of this case that warrant leniency. They’re disturbing. They’re serious. And I think to impose anything but a stiff sentence would send the wrong message and would severely diminish the seriousness of Mr. Booth’s actions that day.” Transcript of Sentencing Hearing, August 2, 2007 at 35.

Based upon (1) Mr. Booth preying upon Ms. Schafer and other elderly people, in his quest to get money for drugs; (2) the violent nature of the robbery, the physical injury to Ms. Schafer; and (3) the permanent physical and emotional effects to Ms. Schafer, an eighty-year sentence is proportionate to this crime. If anything, the crime itself, not the sentence, shocks the conscience.

**II. MR. BOOTH'S EIGHTY-YEAR SENTENCE IS NOT DISPROPORTIONATE TO HIS CRIME BECAUSE MS. SCHAFFER WAS SEVERELY INJURED DURING THE ROBBERY.**

Although Mr. Booth's sentence does not shock the conscience as required by the subjective test, his sentence must still be reviewed to determine if it violates the proportionality principles of Article III, Section Five of the West Virginia Constitution using the objective test set forth in *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).

The objective test to determine if a sentence violates the proportionality principle of Article III, Section Five of the West Virginia Constitution considers: "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." *Id.* at Syl. Pt. 5.

**STANDARD OF REVIEW**

This Court should review the proportionality of Mr. Booth's sentence under an abuse of discretion standard. *See e.g., State v. Newman*, 108 W. Va. 642, 152 S.E.2d 195 (1930); *State v. Cooper*, 172 W. Va. 266, 271, 304 S.E.2d 851, 856 (1983).

**ARGUMENT**

**A. NATURE OF THE OFFENSE.**

Mr. Booth pled guilty to Robbery in the First Degree, a felony. This Court has stated: "[r]obbery has always been regarded as a crime of the gravest character." *State v. Mann*, 205 W. Va. 303, 325, 518 S.E.2d 60 (1999) quoting *State v. Glover*, 177 W. Va. 650, 659, 355 S.E.2d 631, 640 (1987). In *Mann*, the defendant pointed a gun at a store clerk who was alone and demanded money. The victim was so traumatized by the event that she could not go back to work at the store. In the case now to be

determined, Ms. Schafer was also traumatized by the robbery. Ms. Schafer could not even be present at the sentencing hearing out of fear of Mr. Booth. Also, her life as she knew it changed forever after being robbed by Mr. Booth. She went from being a healthy, active person who took care of herself and her husband to needing almost constant care. Record, Pre-Sentence Report. Even though no weapon was involved, the facts clearly demonstrate that, Mr. Booth showed no regard for Ms. Schafer's safety when he savagely drug her to the ground and fractured her hip.

**B. THE LEGISLATIVE PURPOSE BEHIND THE PUNISHMENT.**

This Court has held that "... the Legislature, by not expressly fixing a maximum term, has impliedly authorized life imprisonment as the maximum penalty for aggravated robbery." *State v. Mann*, 205 W. Va. 303, 325, 518 S.E.2d 60 (1999) quoting *State v. Turley*, 177 W. Va. 69, 350 S.E.2d 696 (1986). This legislatively created sentencing scheme "gives recognition to the seriousness of the offense by imposing a minimum sentence below which a trial court may not go" and "the open-ended maximum sentencing discretion allows trial courts to consider aggravating and mitigating factors in each particular case." *Mann*, 205 W. Va. at 316, 518 S.E.2d at 73.

In the case now to be decided, the trial court judge found that the aggravating factors: preying on an elderly woman, causing severe physical injury while robbing her, outweighed the mitigating factors: the defendant's lack of a violent criminal record, the absence of a deadly weapon, and chose to sentence Mr. Booth to a lengthy penitentiary sentence.

**C. A COMPARISON OF THE PUNISHMENT WITH OTHER JURISDICTIONS.**

This Court has recognized in previous cases that other jurisdictions authorize lengthy sentences for aggravated robbery. In *Glover*, this Court cited these cases from other jurisdictions: *State v. Boad*, 104

Ariz. 362, 453 P.2d 508 (1969) (en banc) (seventy-five to ninety-nine years for robbery is not cruel and unusual punishment); *People v. Isitt*, 55 Cal.App.3d 23, 127 Cal.Rptr. 279 (1976) (life sentence without possibility of parole is not disproportionate); *State v. Victorian*, 332 So.2d 220 (La. 1976) (forty-five years without possibility of parole is not cruel, excessive or unusual punishment for armed robbery . . .); *Garrett v. State*, 486 S.W.2d 272 (Mo.1972) (ninety-nine years for first degree robbery with a prior felony, is not excessive punishment.)

In Mr. Booth's case, an eighty-year sentence for committing violence against Ms. Schafer and destroying her life is consistent with punishments imposed by other jurisdictions.

#### **D. A COMPARISON OF PUNISHMENT WITH OTHER OFFENSES WITHIN THE STATE.**

Mr. Booth alleges that his case is similar to *State v. Cooper*, 175 W. Va. 266, 304 S.E.2d 851 (1983) and *State v. Buck*, 173 W. Va. 243, 314 S.E.2d 406 (1982)<sup>6</sup>. In *Cooper*, the defendant's forty-year sentence was overturned. This Court stated that there were several factors that warranted overturning the sentence: the defendant was only nineteen years old, the crime committed was his first offense, and the probation officer recommended a minimum sentence. *State v. Mann*, 205 W. Va. at 316, 518 S.E.2d at 73, quoting *Cooper*, 172 W. Va. at 271, 304 S.E.2d at 855. In *Buck*, the defendant's seventy-five year sentence for aggravated robbery was set aside. The Court found the sentence in *Buck* excessive because it was the first crime of violence committed by the defendant, the defendant had

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<sup>6</sup> This is the second of three cases. In the first case, this Court remanded the case back to the trial court so it could develop a record and explain why it chose to sentence the defendant to seventy-five years. On remand the Court resentenced the defendant to seventy-five years based upon the defendant's juvenile record. This Court again remanded the case holding that the seventy-five year sentence was disproportionate. The trial court resentenced the defendant to thirty-six years that was upheld by this Court. See, *State v. Buck*, 178 W. Va. 505, 361 S.E.2d 470 (1987).

expressed remorse, and offered to pay restitution to the victim.<sup>7</sup> *State v. Mann*, 205 W. Va. at 316, 518 S.E.2d at 73, quoting *Buck*, 173 W. Va. at 410, 314 S.E.2d at 247.

Mr. Booth's case is distinguishable from both *Cooper* and *Buck*. Mr. Booth committed serious physical injury to Ms. Schafer while under the influence of at least five Xanax pills and marijuana. Mr. Booth was trying to rob Ms. Schafer in an attempt to get money to buy *more* drugs. Mr. Booth has ruined Ms. Schafer's life. She went from being able to care for herself and others to being in need of almost constant care. The Pre-Sentence report was negative and recommended an eighty-year sentence. Mr. Booth also had anti-social behavior. According to the Pre-Sentence Report: "[h]e is a healthy young male who refused to find regular employment. Instead, he chose to use drugs everyday and commit crimes against the public to support his drug habit." Record, Pre-Sentence Report. Mr. Booth was also on bond for a felony offense, Delivery of a Controlled Substance within 1000 feet of a School, when he robbed Ms. Schafer.

A case similar to Mr. Booth's in which a lengthy penitentiary sentence was upheld is *State v. King*, 205 W. Va. 422, 518 S.E.2d 663 (1999). In that case, the defendant broke into the home of an eighty-two old woman and threatened to kill her with a knife and gun. The defendant had previous convictions for

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<sup>7</sup> As the population of the State has aged, the Legislature has enacted criminal statutes that specifically protect elderly people. Some of these statutes proscribe higher penalties if the victim is over sixty-five years of age. For example, if a person is convicted of a violent felony and the victim is found to be over sixty-five years of age, the sentence is not subject to probation or suspension. *See e.g.*, W. Va. Code § 61-2-10a (1984). Also, the Legislature has enacted new statutes that protect the elderly from abuse or theft from a caregiver or guardian. Abusing or stealing from a person who is over sixty-five years of age is classified as a felony with a penitentiary sentence of not less than five years. *See e.g.*, W. Va. Code § 61-2-29 (2004). In light of the Legislature enacting specific laws with harsh penalties protecting persons over sixty-five years of age, an eighty-year sentence for savagely dragging an eighty-two year old woman to the ground must be proportionate.

Daytime Burglary and Breaking and Entering and was on parole at the time of the robbery. Similarly, Mr. Booth was on bond for a felony offense when he attempted to rob Ms. Schafer. Although Mr. Booth did not involve the use of an actual weapon, his strength was all that was required to attack and conquer his eighty-two year old victim, and did cause serious physical injury to Ms. Schafer. And he left her writhing on the ground in agony when she would not let go of her purse.

Based upon the serious physical injury to Ms. Schafer, the toll this attack has taken on Ms. Schafer's life, Mr. Booth's drug abuse, being on bond for a felony while committing this crime, the negative pre-sentence report, an eighty year sentence is not disproportionate to this crime and must be upheld.

## **CONCLUSION**

The eighty-year sentence imposed by the trial court is not disproportionate to this crime. Eighty-two year old Doris Schafer's life was ruined on March 21, 2007. That was the day that Mr. Booth tried to rob her of her purse. During the robbery, Mr. Booth drug Ms. Schafer to the ground because she did not let go of her purse. When Ms. Schafer hit the ground, her hip was fractured. She has since endured three surgeries, including a hip replacement to repair the physical damage done to her by Mr. Booth.

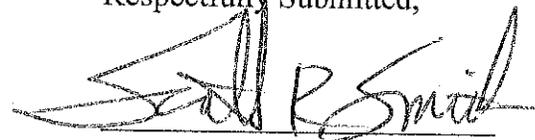
Not only did Ms. Schafer suffer physical trauma from being robbed by Mr. Booth, she has suffered psychological trauma as well. Due to her hip injury, Ms. Schafer is no longer able to care for herself. Now, she needs almost constant attention. Before the attack, Ms. Schafer cared for her elderly husband. Now she is incapable of caring for him. She used to baby-sit her grandson. Now she is incapable of that. She used to go to the Howard Long Wellness Center. Now she is incapable of that. Ms. Schafer said it best in her victim impact statement submitted by way of a letter to the Court: "[i] have literally been robbed of a large chunk of my remaining life."

Nothing in Mr. Booth's background warrants a lesser sentence. Mr. Booth is a man whose sole reason for existence was committing crimes to buy more drugs. Nothing in Mr. Booth's record indicates that he attempted to do anything else. His employment history was spotty at best. His criminal history, in his few years since becoming an adult, indicates that he cannot conform his behavior to the law. This robbery was committed after Mr. Booth and his associates failed in their scheme to sell fake crack. After this scheme failed, Mr. Booth went looking for easy prey and, unfortunately, found Ms. Schafer.

Nothing about this case warrants a lesser sentence. At the sentencing hearing, the trial court judge stated: [t]here's nothing about the facts of this case that warrant leniency. They're disturbing. They're serious. And I think to impose anything but a stiff sentence would send the wrong message and would severely diminish the seriousness of Mr. Booth's actions that day." Transcript of Sentencing Hearing, August 2, 2007, at 34.

The eighty-year sentence imposed by the trial court does not shock the conscience. Mr. Booth ruined Ms. Schafer's life. Eighty years for ruining the life of Ms. Schafer is not disproportionate to this crime. The trial court judge exercised his discretion given to him by the legislature and found that the aggravating factors outweighed any possible mitigating factors and imposed an eighty-year sentence. This was not an abuse of discretion. Therefore, the State of West Virginia urges this Honorable Court to allow this sentence to stand and affirm the Circuit's Court's ruling.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Scott R. Smith", written over a horizontal line.

Scott R. Smith  
Prosecuting Attorney,  
Ohio County, West Virginia

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, PLAINTIFF BELOW,  
APPELLEE,

v.

APPEAL NO.: 34711

CASE NO.: 07-F-51

RICHARD A. BOOTH, DEFENDANT BELOW,  
APPELLANT.

CERTIFICATE OF SERVICE

Service of the foregoing *Reply of Appellee* was had upon the Appellant, Richard Booth, by delivering a true copy thereof, to his attorney, Thomas Moore, Esq., this 23<sup>rd</sup> day of April, 2009 by U.S. Mail, to his last known address of Public Defender Corporation, P. O. Box 347, Wheeling, West Virginia 26003.



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