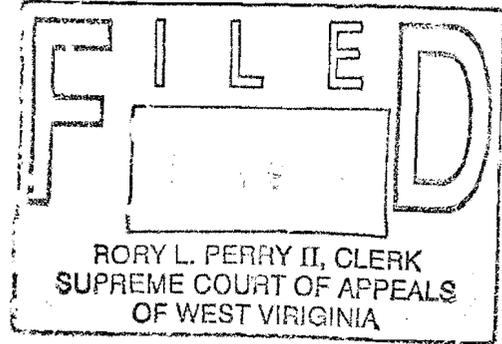


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 34771

STATE OF WEST VIRGINIA, Plaintiff Below,
Appellee

v.

KEITH D. PAYNE, Defendant Below, Appellant



APPELLANT'S BRIEF ON APPEAL

Submitted by:

James A. Adkins
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(WV Bar # 9892)
(304) 574-2583

POINTS AND AUTHORITIES RELIED UPON

State v. Goodnight, 169 W.Va. 366, 287 S.E. 2d 504(1982).....5

State v. Lucas, 201 W.Va. 271, 496 S.E. 2d 221 (1997).....5

State v. Maxwell, 174 W.Va. 632, 328 S.E. 2d 305 (1985).....5,6

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston
No. 34771

STATE OF WEST VIRGINIA

v.

KEITH D. PAYNE

APPELLANT'S BRIEF ON APPEAL

Now comes the Petitioner, and Defendant below, by counsel, James A. Adkins and files this Petition for Appeal.

I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

On the 14th day of August, the Petitioner, Keith D. Payne was convicted, following a jury trial, of one count of domestic battery and one count of domestic battery in the Circuit Court of Fayette County, Judge Paul M. Blake, Jr. presiding. The Petitioner was acquitted on the felony offense of burglary and the jury hung on an additional count of obstructing an officer. On September 29, 2008, the Petitioner was sentenced to two one year terms to be served consecutively at Southern Regional Jail. This is an appeal of the sentence.

II. FACTS OF THE CASE

The facts which gave rise to this appeal is as follows:¹

On December 4, 2007, the Petitioner and his girlfriend were in an altercation at the Petitioner's apartment in Oak Hill, Fayette County, West Virginia. During the

¹ The Petitioner is not challenging the underlying convictions, therefore did not request the transcript of the trial.

altercation, the Petitioner was struck in the head with a glass ashtray and fled the apartment.²

The State alleged that the Petitioner followed her into a neighbor's apartment and continued the altercation. [The Petitioner was indicted for burglary, however, the jury returned a not guilty verdict on burglary.]^{3 4}

When police arrived, the Petitioner was found in a semi conscious state lying on the floor in his own apartment. He did not comply with Officer Jarvis' request to show his hands. The Petitioner testified that he had been drinking and that due to alcohol and being stuck in the head, he was not aware of the officer's request to show his hands.

The Petitioner was indicted for a second count of obstructing an officer for being belligerent and not obeying orders after he was transported to Plateau Medical Center.

The Defendant was convicted of one count of domestic battery and one count of obstructing an officer (not showing hands when officers arrived at his apartment.) The Petitioner was acquitted of burglary and the jury hung on the second count of obstructing an officer.

At sentencing, the Defendant and counsel were afforded the opportunity to speak. Several years prior to this trial, the Defendant's brother had murdered a woman at a residence owned by the Defendant's family. This information was known to the court,⁵ but was not part of any information presented at the trial or pretrial hearings, nor was it

² The Petitioner testified on his own behalf and admitted his participation in an altercation with his girlfriend.

³ The Petitioner moved prior to trial to sever the misdemeanor counts from the felony count of burglary and that motion was denied. The Petitioner had waived his preliminary hearing in magistrate court and agreed to transfer the misdemeanors when that waiver was done.

⁴ The investigating officers thoroughly photographed the scene inside the Petitioner's apartment but did not enter the neighbor's apartment to investigate the allegation of burglary.

⁵ Judge Paul Blake is a former Fayette County Prosecuting Attorney and prosecuted the Defendant's brother.

presented in the pre sentence investigation report. The court, at length, berated the Petitioner over this incident, and faulted him for bringing the woman to the residence.

The Petitioner was sentenced to one year at Southern Regional Jail for the offense of domestic battery and one year at the Southern Regional Jail for the offense of obstructing an officer with those sentences to run consecutively.

III. ASSIGNMENT OF ERROR

The Trial Court committed error when it relied upon facts not in the record or in the pre sentence report when imposing sentence.

IV. STANDARD OF REVIEW

. “The Supreme Court of Appeals reviews sentencing orders ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syllabus Point 1, in part, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997).

“Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.” Syllabus Point 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).

V. ARGUMENT

The Trial Court committed error when it relied on facts not in the record, nor in the pre sentence report when imposing sentence.

Any facts which have bearing on a sentencing should be brought out in a presentence report or by witnesses called in open court in the presence of the defendant so that the

defendant has an opportunity to refute any derogatory statements and to cross examine the witnesses. Syllabus Pt. 3 *State v. Maxwell*, 174 W.Va. 632, 328 S.E. 2d 506 (1985)

In *Maxwell*, the defendant was denied probation and sentenced on several offense related to the sale of marijuana from a tavern he operated in Pendleton county. The court placed great weight upon an incident in which a 15 year girl was discovered drinking beer and smoking marijuana at the appellant's tavern. The court referred to this incident repeatedly, however, this incident was not part of the pre sentence investigation report nor did witnesses appear in open court to testify about this incident. The Court found that there was prejudicial error in the sentencing proceeding because the method of presentation regarding the incident interfered with the defendant's right to be present at every stage of the proceedings and to confront and cross examine witnesses 174 W.Va. 635-36, 328 S.E. 2d 510.

In the Defendant's sentencing hearing, he was afforded the right of allocution and defense counsel was permitted to speak on his behalf. The fact that the Petitioner's brother was incarcerated at Mount Olive was in the family history portion of the pre sentence report. [The Petitioner's brother is serving a life sentence for murder and the victim was the Petitioner's girlfriend.] The Court berated the Petitioner for having the victim at the family residence and told him that if not for him she might still be alive today. The Petitioner was not charged with any crime regarding the actions of his brother.

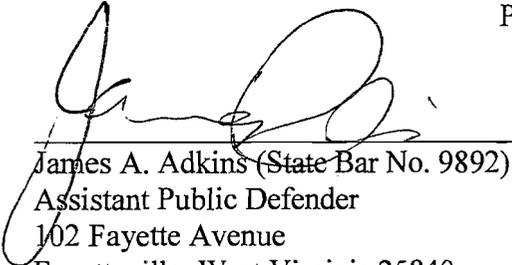
Like the defendant in *Maxwell*, the Trial Court relied on sentencing factors outside of the pre sentence report and not supported by witness testimony. Furthermore, the incident involving his brother was introduced by the court after his opportunity for allocution had passed.

The sentence of one year for domestic battery consecutive to one year for obstructing an officer is within the statutory limits, however, it was imposed based not solely upon matters of record and matters within the pre sentence report, but upon matters within the knowledge of the Court. Furthermore, it appears that the Petitioner was punished, in part, based upon the actions of his brother several years earlier, of which he had no control.

VI. CONCLUSION

The Petitioner's sentencing was based on factors not on the record and not within the pre sentence investigation report. In consequences all of which, the Petitioner, Keith D. Payne, respectfully requests that this Court reverse his sentence for domestic battery and obstructing an officer and remand this case to Fayette County Circuit Court for proper judgment of sentence.

Respectfully submitted,
KEITH D. PAYNE
Petitioner by Counsel,



James A. Adkins (State Bar No. 9892)
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(304) 574-2583
Counsel for Petitioner

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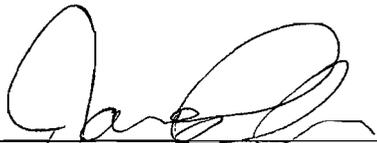
v.

KEITH D. PAYNE

CERTIFICATE OF SERVICE

I the undersigned counsel for the Petitioner hereby certify that on the
19 day of May 2009, I served a true copy of the foregoing Brief on Appeal on the
Prosecuting Attorney of Fayette County by either hand delivery or by regular mail
delivery in a postage prepaid envelope addressed as follows:

Mrs. Vickie Hylton
Assistant Prosecuting Attorney
108 E. Maple Avenue
Fayetteville, West Virginia 25840



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