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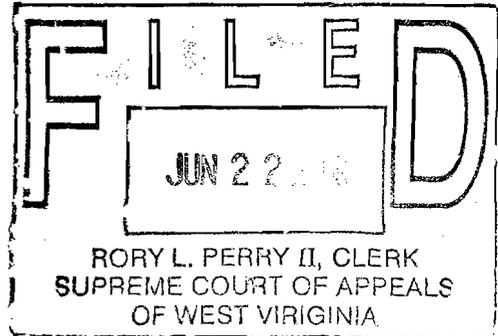
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

**State of West Virginia, Plaintiff Below,
Appellee,**

v.

**Keith D. Payne, Defendant Below,
Appellant.**



APPELLEE'S BRIEF

Submitted by:

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APPELLEE'S BRIEF

Comes now the State of West Virginia, by Assistant Prosecuting Attorney, Vickie L. Hylton, and responds to the Appellant, Keith D. Payne's Petition for Appeal.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

A jury, in the Circuit Court of Fayette County, West Virginia, convicted the Appellant, defendant below, on August 14, 2008 of one count of domestic battery and one count of obstructing an officer. Judge Paul M. Blake, Jr. sentenced the Appellant for the offense of domestic violence, a misdemeanor offense, to confinement in the Southern Regional Jail for a period of twelve (12) months and fined him the sum of \$250.00. In addition, the Appellant was convicted and sentenced for the offense of obstructing an officer, a misdemeanor offense, to confinement in the Southern Regional Jail for a period of twelve (12) months and he was fined the sum of \$250.00. These sentences were to be served consecutively.

ISSUE

The Issue before the Court is whether the Circuit Court committed error when relying upon facts not in the record nor in the Presentence Investigation Report when imposing sentence.

STANDARD OF REVIEW

“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.” State v. Richardson, 214 W.Va. 410, 413, 589 S.E.2d 552, 555 (2003) (quoting Syl. Pt. 1, State v. Lucas, 201 W.Va. 271, 496 S.E. 2d 221 (1997)).

Generally, sentences imposed by the trial court are not subject to appellate review, if within statutory limits and not based on some impermissible factor. State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999).

STATEMENT OF RELEVANT FACTS

The Complaint in this matter charged the Appellant¹ with several crimes, including a felony and several misdemeanors. The Indictment, 08-F-127, handed down by the May 14, 2008 Fayette County Grand Jury indicted the Appellant for Burglary, Domestic Battery, and two counts of Obstructing an Officer. On August 14, 2008, a jury trial convened in the Circuit Court of Fayette County on the charges listed in the aforementioned Indictment.

Prior to the trial, however, the State requested the Appellant’s bond be revoked because he had been threatening the State’s witnesses. Bob and Susan Hudson, neighbors of the victim and the Appellant, testified at a pre-trial hearing. Susan Hudson stated in her Complaint that the

¹ The Appellant herein, Defendant below, will be, for consistency, referred to in this Brief as the Appellant.

Appellant told her that if she showed up to the trial, she would be sorry. He threatened to blow her head off and stated that he would hide her body. She testified that she was afraid of the Appellant. The Appellant testified that he was only joking when he made those comments.

Based upon the evidence, the Circuit Court found the Appellant violated the “no-contact” provision of his bond. While the Appellant testified he was “just joking”, the Appellant’s witness, and current girlfriend, testified that she heard the threats, she heard the argument, and she removed the Appellant from the scene before it escalated.

The Circuit Court found the Appellant violated the law and violated the instructions the Circuit Court gave to the Appellant at Arraignment. To allow the Appellant to be free on bond would unduly depreciate the seriousness of this matter, the Court held. The Appellant’s bond was revoked, the Circuit Court finding the Appellant was too great a danger to be released at this point.

At the August 18, 2008 jury trial, the State presented evidence on all counts of the Indictment. The jury convicted the Appellant of Domestic Battery and one count of Obstructing an Officer², and deadlocked on the second count of Obstructing an Officer. The jury found the Appellant not guilty of Burglary.

During the trial, the State presented several photographs depicting the injuries the victim sustained at the hands of the Appellant. These included the bruises on her forehead made when the Appellant put the victim in a headlock and punched her with his fist, the cuts on her lips and tongue, the scratches on her neck, the lacerations on her torso – pictures separately showing the damage to her back (scratches and lacerations) and abdomen (identified as the footprint of the

² The remainder of this Brief will focus on the charges upon which the Appellant was convicted, those for which he is appealing his sentences.

Appellant made when he kicked her through the glass top table), and the defensive injuries to her right hand.

The State presented testimony that, during the Domestic Battery, the Appellant kicked the victim through the top of a glass coffee table. A picture of the coffee table, showing the damage to the table and broken glass, was presented to the jury. The victim testified that after the Appellant kicked her through the table, he pulled her up and down by her hair, causing the substantial amount of scratches to her back. This was not an accident, she testified, and after he pulled her from the inside of the coffee table, where she had been trapped, he continued to beat her. The pictures presented during the trial showed the brutality of the beating. All were admitted into evidence without objection by the defense.

In an attempt to end the violence, the victim hit the Appellant in the head with a glass ashtray, knocking him to the ground. She then testified that he stated, “bitch, you brought blood... it’s on now” and continued to batter her.

Additional testimony was presented, by the victim and another witness, that this beating continued into the neighbor’s apartment, resulting in the Burglary charge, but the jury did not convict the Appellant of Burglary. Whether it was because they did not believe the fight continued into the next apartment or whether they did not believe that the continued battery constituted Burglary, as defined in the jury instructions, is not known. Nonetheless, the victim testified that the beating ended when the neighbor yelled, “you’re going to kill her” and the Appellant returned to his apartment.

The victim escaped and contacted the police. Officer M.J. Jarvis of the Oak Hill Police Department responded. Officer Jarvis found the victim standing on the sidewalk, outside the

apartment building. She was disoriented, but stated that the Appellant had caused her injuries, injuries that were readily observed by the Officer.

Locating the apartment at issue, Officer Jarvis approaches the open door and saw the Appellant on his knees and elbows, on the floor, with his hands hidden underneath his torso. The Appellant was conscious, belligerent, and refused to show the Officer his hands. Officer Jarvis could not be certain that the Appellant was not concealing a weapon and continued to order the Appellant to put his hands behind his back, but the Appellant refused.

Throughout the remainder of Officer Jarvis' interaction with the Appellant, he faced a combative, uncooperative, and dangerous prisoner. Officer Jarvis testified that not only was the Appellant a danger to himself, he was endangering the safety of the officers and hospital personnel³.

The Appellant testified that he had been drinking for several hours before the incident. Further, he testified that the victim started the fight and tripped into the coffee table. He tried to help her out of the table and her injuries occurred when she rolled back and forth trying to get out of the table. This included the large bruise on her face, the lacerations on her back, and the marks on her abdomen. He admitted he did not call an ambulance and could not explain why the victim had injuries on both sides of her face.

The Appellant testified that he never left the apartment after he was hit in the head with the ashtray and did not follow the victim into another apartment. He further testified that he did not hear Officer Jarvis ask him to show his hands and admitted that he and the officer had a fight

³ Officer Jarvis transported the Appellant to Plateau Medical Center for treatment for the injury to the Appellant's head. The Appellant was treated and released for transport to the Southern Regional Jail. Evidence was presented regarding this second Obstructing an Officer charge that occurred at the hospital, but the jury did not convict the Appellant of this count.

at the hospital. However, the Appellant stated that Officer Jarvis started the fight and he did nothing to provoke the officer.

The Appellant was convicted for violating W.Va. Code Section 61-2-28, having committed the offense of domestic battery, in that he did unlawfully and intentionally cause physical harm to Brandi White, a family/household member, by striking her, or otherwise beating her. The punishment for this crime "shall be confined in a county or regional jail for not more than twelve months, or fined not more than five hundred dollars, or both." W.Va. Code § 61-2-28. The Appellant was sentenced to confinement in the Southern Regional Jail for twelve months and fined \$250.00.

Additionally, the Appellant was convicted for violating W.Va. Code Section 61-5-17, having committed the offense of obstructing an officer, in that he did, by his actions, hinder and obstruct a law enforcement officer in his official capacity by refusing to follow the lawful instructions of Patrolman M.J. Jarvis. The punishment for this crime "shall be fined not less than fifty nor more than five hundred dollars or confined in the county or regional jail not more than one year, or both." W.Va. Code § 61-5-17. The Appellant was sentenced to a \$250 fine and confinement in the Southern Regional Jail for twelve months.

At the end of the trial, the Circuit Court announced that a Presentence Investigation Report ("PSR") would be prepared by the probation department and would be reviewed by the Circuit Court, the State, and the defense prior to the sentencing hearing, set for September 29, 2008 and the State and defense would have an opportunity to make any changes, corrections, and deletions to said PSR.

On or about September 23, 2008, Probation Officer Jarrod A. White prepared and presented the PSR to the Circuit Court, the State, and the defense. On September 29, 2008, the

Appellant appeared for Sentencing. When asked if the Appellant had any additions or corrections to make to the report, James A. Adkins, counsel for the Appellant, stated, "Yes, we received the report. I reviewed it with him last week at the Southern Regional. No amendments to be made to the report, Your Honor." Sentencing Tr. at P.3.

The Appellant was given an opportunity to speak and stated the following, failing to apologize to the victim for the harm he caused her and failing to take responsibility for his actions. He attempts to blame the prosecution for there having been a trial because he was charged with a felony:

I'd like to apologize to the Court and the prosecutors. Actually, I'm sorry for what happened, and I would like to – as I say, I would like to be granted probation cause I made a mistake. I can tell I made a mistake by being incarcerated. I would like to continue back to work and help my children out. I feel that, if we wouldn't have had to go to trial and we would have stayed at a misdemeanor, this stuff wouldn't have never happened and we wouldn't be in trial today. And I feel that, if I would have stepped up being a man and realized what was going on, I wouldn't be here today.

Sentencing Tr. at P.4.

Immediately following the Appellant's statement, Mr. Adkins spoke on behalf of the Appellant, stating the following:

Yes. We – during the course of this trial Mr. Payne stopped me a couple of times and said, "I would have pled to the domestic battery." However, we were in a situation where we had both felony and misdemeanors I the same case. Sometimes when you have that situation, it's not possible to work out the case, when you have felonies and misdemeanors combined.

Prior to this case starting, and during the case leading up to trial, Mr. Payne was employed. He was in the past employed at Walmart. When he had a felony case pending, he could not maintain his employment. He took a lesser paying job at Save-a-Lot. I actually had some difficulties preparing for trial because he was at work all the time. I consider that to be a good thing when my clients are at work all the time.

We'd ask the Court to consider probation and alternative sentencing. I'd ask the Court to consider that Mr. Payne is 41 years of age and really doesn't have a criminal record.

If he's granted probation and alternative sentencing, he may have to participate in an anger management or domestic battery type program; that he would be expected to get back to some form of gainful employment; that he would have to refrain from the use of alcohol and drugs; and that, in general, when you're on bond or when you're on probation, he understands that it's your job as the person that's on probation or on bond to just keep yourself out of questionable situations entirely.

We'd ask the Court to consider probation and alternative sentencing for these convictions. Thank you.

Sentencing Tr. at PP. 4-5.

Like the Appellant, Mr. Adkins did not express any sorrow or remorse, on behalf of the Appellant, for the victim in the case. Like the Appellant, Mr. Adkins believed the case was flawed because both felonies and misdemeanors were present and the case couldn't be "worked out". Mr. Adkins spoke in detail about the Appellant's employment, rather than the Appellant's actions in the crimes for which he was convicted. Importantly, Mr. Adkins remarked that if given probation or bond, the Appellant would understand that it would be his "job as the person on probation to just keep yourself out of questionable situations entirely," but failed to state how the Appellant would be able to do so after having had his bond revoked for intimidating State's witnesses prior to trial.

The State spoke and reminded the Circuit Court that the Appellant, having been convicted by a jury, had caused his girlfriend "substantial harm." Sentencing Tr. at P. 6. The pictures presented to the jury showed her "bruises, cuts, scratches, wounds and knots." Id. The Circuit Court was reminded that the Appellant was "violent with the police officers who arrested him on the way to and from the hospital." Id. He was found guilty of the obstructing charge.

Regarding the Appellants actions prior to trial, the State recalled that the Appellant's "bond was revoked because, right before trial, there were allegations that some witnesses had been threatened. And actually, those witnesses came forth and said that they had been threatened by Mr. Payne..." Sentencing Tr. at P. 6.

In continuing to fail to take responsibility for the substantial harm caused to the victim, the Appellant, in his version of events found in the PSR, stated, "We got into it. Things happen. You know how it is." Sentencing Tr. at P. 6. The State requested incarceration stating, "that to grant probation would make what this victim had to go through pointless, not only having to actually endure the beating at the hands of this man, but also having to come into trial and face him, given that it is a domestic situation." Sentencing Tr. at P. 7.

Having heard from the Appellant, his counsel, and the State, the Circuit Court sentenced the Appellant for the offense of domestic violence, a misdemeanor offense, to confinement in the Southern Regional Jail for a period of twelve (12) months and fined him the sum of \$250.00. In addition, the Appellant was convicted and sentenced for the offense of obstructing an officer, a misdemeanor offense, to confinement in the Southern Regional Jail for a period of twelve (12) months and he was fined the sum of \$250.00. These sentences were to be served consecutively.

In considering the Appellant's application for probation, the Circuit Court took the following into consideration. The Appellant:

- Is a 41-year-old individual who is a high school graduate;
- Is divorced and has five dependents;
- ~~Was employed at Walmart and Save-a-Lot;~~
- Gave his girlfriend's phone number as his contact number;
- Did not accept responsibility for his conduct in this matter and, as a result, the jury found him guilty of two misdemeanor offenses;
- Tried to intimidate witnesses while this matter was pending, causing them to be intimidated and reluctant to testify candidly at the trial in this matter;

- Stated his version of events as “We got into it. Things happen, you know how it is.”
- Has no driver’s license due to unpaid fines;
- Has a sad family background with no knowledge of his father, a deceased mother, and a brother in Mount Olive for murder of Melissa Kidd;
- Put Melissa Kidd, his girlfriend at the time, in harm’s way, where her head was cut off by the Appellant’s brother and had he not brought her there, having full knowledge of the circumstances and his brother’s conduct, she’d probably be alive today;
- Has been irresponsible in his life, having four children by four different women, with another child due at the time of sentencing... four children that the taxpayers will support and maintain.

Sentencing Tr. at PP. 8-10.

The Circuit Court announced that “Based upon [the Appellant’s] lack of responsibility and conduct in this matter, to place [him] on probation would unduly depreciate the seriousness of the offenses” and denied the application for probation and alternative sentencing.

ARGUMENT

Both the United States Constitution and the West Virginia Constitution prohibit sentences which are disproportionate to the crime committed. The Eighth Amendment to the United States Constitution creates the federal prohibition. See Solem v. Helm, 463 U.S. 277 (1983). West Virginia's constitutional prohibition is contained in West Virginia Constitution, Article III, § 5, which provides: "Penalties shall be proportioned to the character and degree of the offense."

This Court established a subjective test for determining whether a sentence violates the constitutional disproportionality principle, questioning whether a sentence offends "the conscience and offends the fundamental notions of human dignity." State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983). Specifically, in Syllabus Point 5 of State v. Cooper, this Court stated:

Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.

Further, in State v. Cooper, the Court suggested that factors affecting the subjective impact of a sentence include the age of the defendant, statements of the victim, and evaluations and recommendations made in anticipation of sentencing.

Considering these principals, the facts show that the Circuit Court examined many factors, as listed above, when arriving at the Appellant's sentence. The sentences he received do not violate the constitutional proportionality principle nor do they offend the conscience or fundamental notions of human dignity. The sentences do not shock the conscience and are not constitutionally prohibited.

"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." State v. Mann, 205 W.Va. 303 518 S.E.2d 60 (1999). The sentences imposed in this case are within the statutory limitations and the fines, in fact, are below the statutory maximum. Given the nature of the offenses, the sentences are appropriate.

A trial court must, without exception, determine on the record that a defendant has had the opportunity to read and discuss the presentence investigation report with his counsel, and the record should demonstrate that such opportunity has been provided or extended to a defendant.

State ex rel. Aaron v. King, 199 W.Va. 533, 485 S.E.2d 702 (1997). The Appellant was given an

opportunity to provide information for the PSR. Rule 32(b)(4) of the West Virginia Rules of Criminal Procedure outlines the contents of the PSR⁴, stating:

The presentence report must contain:

(A) information about the defendant's history and characteristics, including information concerning the defendant's court and criminal record, occupation, family background, education, habits and associations, mental and physical condition, the names, relationships, ages and condition of those dependent upon the defendant for support and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence, determining the propriety and conditions of release on probation, or determining correctional treatment;

(B) a victim impact statement, pursuant to Chapter 61, Article 11A, Section 3 [§ 61-11A-3] of the West Virginia Code of 1931, as amended, unless the court orders otherwise, if the defendant, in committing a felony or misdemeanor, caused physical, psychological or economic injury or death of the victim; and

(C) any other information required by the court.

The PSR herein contained information including, but not limited to, the Appellant's history, family background, habits, relationships, and other factors that aided the Circuit Court in determining the propriety of release on probation.

Pursuant to the requirements of Rule 32(b)(6) of the West Virginia Rules of Criminal Procedure, the Appellant and his counsel had an opportunity to object to the contents of the PSR⁵. Moreover, prior to the imposition of sentence, and “[f]or good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.” This gave the Appellant and his counsel an opportunity to address the true statement in the PSR that the Appellant's brother,

⁴ T.C. Rule 43.01 also specifies information that must be provided in the PSR.

⁵ Rule 32(b)(6) Disclosure and objections.

(A) Within a period prior to the sentencing hearing, to be prescribed by the court, the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the state. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within a period prior to the sentencing hearing, to be prescribed by the court, the parties shall file with the court any objections to any material information contained in or omitted from the presentence report.

(C) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its finding of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

“James Payne, is an inmate at Mt. Olive Correctional Center for murder” and address any comments made by the Circuit Court during sentencing related to that statement. The Appellant failed to address the Circuit Court regarding said statements.

Rule 32(c) of the West Virginia Rules of Criminal Procedure sets forth the requirements of the Circuit Court at sentencing. Counsel for the defendant and the State are granted an opportunity to comment on the PSR and other matters relating to the appropriate sentence. W.Va. R.Cr.P. 32(c)(1). “For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not effect, sentencing.” *Id.*, State v. Craft, 200 W.Va. 496, 490 S.E.2d 315 (1997). The Appellant nor his counsel stated that Appellant’s involvement in the death of his girlfriend, as presented by the Circuit Court during sentencing, was in any way controverted. Remaining silent, no objection was made at sentencing hearing by the Appellant regarding the findings of the Circuit Court.

When imposing sentence upon the Appellant, the Circuit Court is required, pursuant to W.Va. R.Cr.P. 32(c)(3) to verify that the Appellant and his counsel have read and discussed the presentence report, give defendant's counsel an opportunity to speak on behalf of the defendant, address the defendant personally and determine whether the defendant wishes to make a statement and/or present any information in mitigation of sentence, give the State an opportunity to speak to the Circuit Court regarding sentencing factors. Where the sentence is to be imposed is one for a crime of violence, the Circuit Court must also address the victim personally, if the victim is present, and determine whether the victim wishes to make a statement or present any information in relation to the sentence. A right of allocution is conferred by the Rules upon one who is about to be sentenced for a criminal offense. State v. Holcomb, 178 W.Va. 455, 360

S.E.2d 232 (1987); State v. West, 197 W.Va. 751, 478 S.E.2d 759 (1996). Moreover, where a sentencing Circuit Court fails to accord a defendant the right of allocution, the appropriate disposition is to remand the case to the trial court for resentencing. State v. West, 197 W.Va. 751, 478 S.E.2d 759 (1996).

The Circuit Court complied with all the requirements set forth above for sentencing. The Appellant and his counsel were given an opportunity to speak. The Appellant never took responsibility for the substantial harm caused to his victim and believed that if he had been charged with a misdemeanor rather than a felony, there would not have been a trial and he "wouldn't be here today." Sentencing Tr. at P. 4. The Appellant failed to realize that had he not committed the offenses for which he was found guilty of these violent crimes, there would not have been a trial and a sentencing hearing. In his version of events, the Appellant simply minimized his actions against this victim by stating, "We got into it. Things happen, you know how it is."

This Court held previously that where the Circuit Court asked if the Appellant or his counsel had anything "to say with regard to the sentence that should be imposed," and the Appellant's counsel then rose and spoke on behalf of appellant, but did not respond to the question, appellant was not denied his right of allocution. State v. Brewster, 213 W.Va. 227, 579 S.E.2d 715 (2003). Counsel for the Appellant spoke on the Appellant's behalf about the prior employment of the Appellant, at Walmart and Save-a-Lot, rather than express the Appellant's remorse to the Circuit Court. Counsel did not plead for mercy or indicate that an incident such as this would not happen again. Counsel did not state that the Appellant had learned his lesson. Instead Counsel asked for alternative sentencing because the Appellant is 41 years of age and has

a limited criminal record. According to the PSR, the Appellant's prior criminal record consisted of a 1998 Domestic Battery charge that resulted in a jury verdict of not guilty.

Pursuant to W.Va. R.Cr.P 32(d), the Sentencing Order set forth the verdict, the Circuit Court's findings, and the sentence. Said Order set forth twelve (12) matters the Circuit Court took into consideration when sentencing the Appellant for the crimes of Domestic Battery and Obstructing an Officer, including the Appellant's age, education, marital status, five (5) dependents having different mothers, past employment, and the fact that the Appellant has no drivers' license. The Circuit Court considered that the Appellant has no knowledge of his father and that his mother has been deceased since 1973. The Circuit Court considered the Appellant's part in the death of his girlfriend at the hand's of the Appellant's brother. Importantly, the Circuit Court considered the fact that the Appellant "has no remorse for what he has done." Considering that the jury did not believe the Appellant's version of the events and that he has not accepted responsibility for his actions, the Circuit Court determined that "to grant probation would unduly depreciate the seriousness of this offense." Sentencing Order P. 2.

"Before imposing sentence, a trial court must: (1) assure that the defendant and [his] counsel have had the opportunity to read and discuss the presentence report; (2) afford defense counsel an opportunity to speak on behalf of the defendant; and (3) address the defendant personally and ask [him] if [he] wishes to make a statement in [his] own behalf and to present any information in mitigation of punishment. Once these formal requirements have been met, the trial court, in determining the character and extent of a defendant's punishment, may consider 'the facts of the crime and may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense.'" (quoting State v. Houston, 166 W.Va. 202, 208, 273 S.E.2d 375, 378 (1980). State v. Koon, 190 W.Va. 632, 641, 440 S.E.2d 442, 451 (1993)

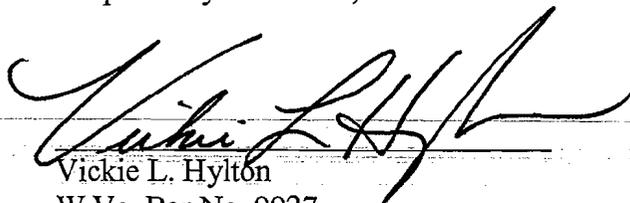
(internal citations omitted.) The Circuit Court did not simply consider one factor, as alleged in the Appellant's Petition. Instead, the Circuit Court considered several factors in determining the sentence... a sentence within the statutory limits and consistent with the crimes committed by the Appellant against this victim. The Circuit Court had the benefit of the PSR, the requests of the Appellant and his counsel, the recommendations of the State, the recommendations of the Probation Officer, and the retributive, rehabilitative, and deterrent effect which the sentence would serve.

The trial court's sentence was within statutory limits and was not based on impermissible factors. The trial court did not abuse its discretion and, as stated in State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999), the sentences imposed by the trial court are not subject to appellate review.

CONCLUSION

WHEREFORE, for the foregoing reasons, the sentences imposed upon Keith D. Payne in the Circuit Court of Fayette County should continue in full force and effect because the sentences are within statutory limits and were not based on some impermissible factor. Moreover, because the sentences are within statutory limits and not based on some impermissible factor, the sentences are not subject to appellate review.

Respectfully submitted,



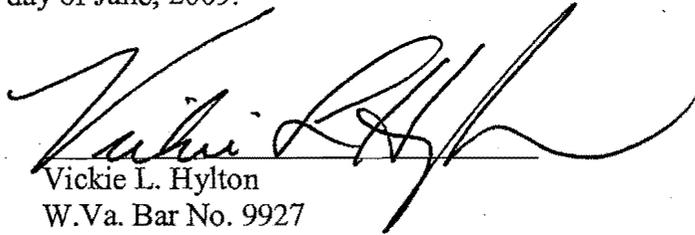
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CERTIFICATE OF SERVICE

I, Vickie L. Hylton, Assistant Prosecuting Attorney, do hereby certify that a true and accurate copy of the foregoing **"APPELLANT'S BRIEF"** was served upon

James A. Adkins, Counsel for Appellant
Assistant Public Defender
102 Fayette Street
Fayetteville, West Virginia 25840

by hand-delivering the same, this the 18th day of June, 2009.



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