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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RORY L. PERRY II, CLERK
COURT OF APPEALS
OF WEST VIRGINIA

NO. 35656

STATE OF WEST VIRGINIA,

Appellee,

v.

ROY "IKE" CUNNINGHAM,

Appellant.

BRIEF OF STATE OF CONFESSING ERROR

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I.

**KIND OF PROCEEDING
AND RULING OF LOWER TRIBUNAL**

This matter is before the Court pursuant to Roy "Ike" Cunningham's ("Appellant") appeal from the Circuit Court of Wood County's ("court") Resentencing Order of December 11, 2009. In this Order, the court resentenced Appellant to indeterminate terms of 2 to 20 years and 1 to 10 years in the penitentiary, respectfully, for his first and second degree arson convictions. On appeal, Appellant asserts that the court committed error in resentencing him to indeterminate, rather than determinate, terms of imprisonment. As more fully discussed below, the State agrees.

II.

STATEMENT OF PERTINENT FACTS

On January 11, 1995, the Grand Jury for Wood County returned a 26 count indictment against Appellant, including 11 counts (counts 1, 2, 3, 8, 9, 10, 11, 20, 21, 22, and 23) of first degree

arson, 10 counts (counts 6, 7, 12, 13, 14, 15, 16, 17, 18, and 24) of second degree arson, three counts (counts 4, 5, and 19) of attempted murder, one count (count 25) of felony murder, and one count (count 26) of conspiracy to commit first and second degree arson.

Appellant's trial began on January 22, 1996, and ended on February 5, 1996, with the jury convicting him of five counts (counts 1, 2, 11, 21, and 22) of first degree arson, four counts (counts 7, 12, 14, and 18) of second degree arson, and one count (count 26) of conspiracy to commit first and second degree arson.¹

Following his trial and conviction, on March 15, 1996, the prosecution filed a recidivist information against Appellant, charging that he had two prior felony convictions and was thereby subject to a life sentence consistent with the sentencing guidelines of W. Va. Code § 61-11-18 (c).²

On August 30, 1996, Appellant entered into a plea agreement with the prosecution, wherein he agreed to plead guilty to the recidivist charge in exchange for the prosecution's recommendation that he receive a life sentence, with parole eligibility in 15 years, on the recidivist charge, 2 to 20 years for the first degree arson charges, 1 to 10 years for the second degree arson charges, and 1 to 5 years on the charge of conspiracy to commit first and second degree arson. The plea agreement contemplated that the sentences for the first degree arsons (2 to 20s), second degree arsons (1 to 10s), and conspiracy (1 to 5) run consecutively to one another, and that the life sentence on the recidivist

¹ The jury acquitted Appellant of the following charges: counts 3, 8, 9, 10, 20, and 23 (first degree arson); counts 6, 7, 13, 15, 16, and 17 (second degree arson); and counts 4, 5, and 19 (attempted murder). Prior to trial, counts 24 (second degree arson) and 25 (felony murder) were severed from the indictment. After Appellant's trial, pursuant to a plea agreement on a recidivist charge, the State agreed to dismiss counts 24 and 25.

² The prior felony convictions consisted of a 1957 conviction for robbery and a 1984 conviction for interstate transportation of stolen vehicles.

charge run concurrently with the underlying arson and conspiracy charges.

Also, on August 30, 1996, the court initially sentenced Appellant. For each of the first degree arsons (5 counts), the court gave Appellant a 2 to 20 year sentence. On each of the second degree arsons (4 counts), the court sentenced Appellant to 1 to 10 years. On the conspiracy charge (1 count), the court gave Appellant a 1 to 5 year sentence. On the recidivist charge, the court sentenced Appellant to life. The court ran all of the sentences, including the first degree arsons, second degree arsons, conspiracy, and recidivist charge, consecutively.³

On November 23, 2009, Appellant moved the court to resentence him to definite sentences, rather than the indefinite sentences previously imposed on him, on his arson convictions.⁴

On December 11, 2009, the court resented Appellant as follows: five indeterminate terms of 2 to 20 years for his first degree arson convictions; four indeterminate terms of 1 to 10 years for his second degree arson convictions; an indeterminate term of 1 to 5 years for his conspiracy conviction; and a term of life on the recidivist charge. The court ran the sentences for first degree arson, second degree arson and conspiracy consecutive to one another, and the recidivist life sentence concurrent to the arson and conspiracy sentences. Thus, the court refused to grant Appellant's motion to resentence him to definite, rather than indefinite, sentences on his arson convictions.

Following the court's issuance of its December 11, 2009 Resentencing Order, Appellant brought the current appeal.

³ Thus, the court deviated from the plea agreement by refusing to run the life sentence concurrently with the arson and conspiracy charges.

⁴ As more fully discussed below, after his initial sentencing, the penalty guidelines of the arson statutes changed, allowing for the court to give Appellant definite sentences between 2 and 20 years for his first degree arson convictions and 1 and 10 years for his second-degree arson convictions.

III.

ASSIGNMENTS OF ERROR

On appeal, Appellant makes the following assignments of error:

- (a) The Court violated Appellant's constitutional rights as secured by Article III, §§ 5, 10 of the Constitution of West Virginia and the United States Constitution, Amendments 5, 8 and 14, when Circuit Court failed to impose definite sentences upon the Appellant when he was re-sentenced in February 1997 for convictions for Arson in the First Degree and Arsons in the Second Degree as required by West Virginia Code § 61-3-1 (1997) and West Virginia Code § 61-3-2 (1997) or in the alternative

- (b) The Court erred in not re-sentencing the Appellant to definite terms as required by West Virginia Code § 61-3-2 (1997), which became the applicable law after the Appellant was indicted, tried and convicted but prior to the Appellant's sentencing on February 27, 1997; the submission of the Petition for Appeal to the Supreme Court of Appeals on August 25, 1997; the denial of the Petition for Appeal on December 3, 1997; and the expiration of the ninety (90) day period for filing a Petition to certiorari with the United States Supreme Court. [See also *SER Miller v. Bordenkircher*, 166 W. Va. 169 (1980) (The rule is that the sentence pronounced becomes final at the end of the term at which it is declared.)].

Appellant's Brief at 1.

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.” Syl. pt. 1, *State v. Tyler*, 211 W. Va. 246, 565 S.E.2d 368 (2002) (per curiam) (*quoting* Syl. pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)).

As a general rule, the sentence imposed by a trial court is not subject to appellate review. However, in cases as the one before us in which it is alleged that a sentencing court has imposed a penalty beyond the statutory limits or for impermissible reasons, appellate review is warranted. Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). Once an appropriate basis for review is established, this Court applies a three-pronged standard of review to issues involving motions made pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure: “We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review.” Syl. pt. 1, in part, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996).

State v. McLain, 211 W. Va. 61, 65, 561 S.E.2d 783, 786 (2002).

V.

DISCUSSION

The Attorney General

has standing to exercise judgment in the role of a party litigant when he appears in this Court as counsel for the state in criminal appeals and other actions to which the State of West Virginia is a party. For example, the Attorney General has the power and discretion to confess reversible error in criminal appeals before this Court.

Manchin v. Browning, 170 W. Va. 779, 789, 296 S.E.2d 909, 919 (1982).

On appeal, Appellant asserts that the court committed error by resentencing him to indefinite, rather than definite, terms for his first and second degree arson convictions – and the State is inclined to agree with him. Prior to 1997, the first degree arson statute, W. Va. Code § 61-3-1, provided for an indeterminate sentence of “not less than two nor more than twenty years.” The pre-1997 second degree arson statute, W. Va. Code § 61-3-2, likewise provided for an indeterminate sentence of “not less than one nor more than ten years.” However, effective July 11, 2007, and before Appellant was

resentenced on December 11, 2009, the Legislature amended the penalty guidelines of the first and second degree arson statutes. West Virginia Code § 61-3-1 (first degree arson), as amended, provides that persons convicted of first degree arson be sentenced to a “*definite term* of imprisonment which is not less than two nor more than twenty years.” (Emphasis added.) West Virginia Code § 61-3-2 (second degree arson), as amended, likewise provides that persons convicted of second degree arson be sentenced to a “*definite term* of imprisonment which is not less than one nor more than ten years.” (Emphasis added.) These statutory changes support Appellant’s assertion that he has been improperly resentenced by the court. Additionally, the statutory and case law surrounding what is to be done in the event that a penalty provision in a criminal statute changes also lends support to Appellant’s position that the court has improperly resentenced him.

West Virginia Code § 2-2-8 provides the following:

The repeal of a law, or its expiration by virtue of any provision contained therein, shall not affect any offense committed, or penalty or punishment incurred, before the repeal took effect, or the law expired, save only that the proceedings thereafter had shall conform as far as practicable to the laws in force at the time such proceedings take place, unless otherwise specifically provided; and that *if any penalty or punishment be mitigated by the new law, such new law may, with the consent of the party affected thereby, be applied to any judgment pronounced after it has taken effect.*

(Emphasis added.)

This provision has been interpreted by the Supreme Court to allow a defendant to elect the statute that he wishes to be sentenced under when the penalty provision of the statute has been changed. Specifically, “[t]he statute in force at the time of the commission of an offense governs the character of the offense, and generally the punishment prescribed thereby, *unless*, as provided by our statute [W. Va. Code § 2-2-8], *the defendant elects to be punished as provided in an*

amendment thereof.” Syl. pt. 4, *State v. Cline*, 206 W. Va. 445, 525 S.E.2d 326 (1999) (emphasis added) (*quoting* Syl. pt. 4, *State v. Wright*, 91 W. Va. 500, 113 S.E. 764 (1922)). Furthermore, “[w]hen a general saving statute specifically provides for the application of mitigated penalties upon the election of the affected party, *he is entitled to choose the law under which he wishes to be sentenced.* W. Va. Code § 2-2-8.” *Id.*, Syl. pt. 5, (emphasis added) (*quoting* Syl. pt. 2, *State ex rel. Arbogast v. Mohn*, 164 W. Va. 6, 260 S.E.2d 820 (1979)).

Here, Appellant requested that the court resentence him under the amended versions of the first and second degree arson statutes (W. Va. Code §§ 61-3-1 and 61-3-2), which provide that persons convicted of first and second degree arson are to be given determinate, rather than indeterminate, sentences.⁵ Despite this, the court again gave Appellant indeterminate sentences of 2 to 20 years and 1 to 10 years, respectfully, for his first and second degree arson convictions. After considerable review and analysis, the State must confess that the court committed error in so doing.

⁵ In the case of first degree arson (W. Va. Code § 61-3-1), a defendant is to receive a determinate sentence between 2 and 20 years. For second degree arson, (W. Va. Code § 61-3-2), the defendant is to be sentenced to a determinate term between 1 and 10 years.

VI.

CONCLUSION

The Circuit Court's Resentencing Order of December 11, 2009, should be reversed and the case remanded to the court with instructions to resentence Appellant in accordance with W. Va. Code §§ 61-3-1 and 61-3-2, as amended in 1997.

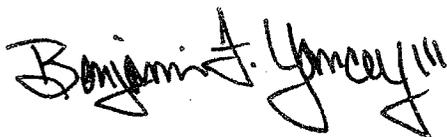
Respectfully submitted,

STATE OF WEST VIRGINIA,

Appellee,

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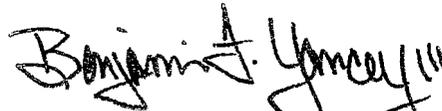
ROY "IKE" CUNNINGHAM,

Appellant.

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of State Confessing Error* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 24th day of November 2010, addressed as follows:

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