



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0081

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

MATTHEW J. ROBEY,

Defendant Below, Petitioner.

SUMMARY RESPONSE

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
I. STATEMENT OF THE CASE	1
II. SUMMARY OF THE ARGUMENT	1
III. STATEMENT REGARDING ORAL ARGUMENT	2
IV. ARGUMENT	2
The Circuit Court did not abuse its discretion in denying the Rule 35(b) motion	2
V. CONCLUSION	4

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SUMMARY RESPONSE

Comes now the respondent, by counsel, Andrew D. Mendelson, Assistant Attorney General, pursuant to Rule 10(e) of the West Virginia Rules of Appellate Procedure, and files the following Summary Response to the petitioner's brief.

I.

STATEMENT OF THE CASE

Respondent agrees with the petitioner's statement of the case.

II.

SUMMARY OF THE ARGUMENT

The circuit court did not abuse its discretion in denying the petitioner's second Rule 35(b) motion even if this Court finds that the second Rule 35(b) was timely filed. None of the grounds the

petitioner relied upon in his second Rule 35(b) motion required the circuit court to grant him relief. “First, case law holds that a defendant’s behavior or rehabilitation while incarcerated does not provide grounds to support a Rule 35 motion.” *United States v. LaMorte*, 940 F. Supp. 572, 578 (S.D.N.Y. 1996). The petitioner is to be commended for his progress made during his incarceration. The fact that he has a job waiting for him when he gets out, two young sons that he wants a full relationship with so he can keep them from making the same mistakes he made, and that he wants to show his family and community that he has changed for the better, all point to him successfully avoiding recidivism. (App. at 5.)

Therefore, his grounds in support of a Rule 35(b) motion, while positive, do not require the judge to grant the petitioner Rule35(b) relief.

III.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case.

V.

ARGUMENT

The circuit court did not abuse its discretion in denying the Rule 35(b) Motion.

West Virginia Rule of Criminal Procedure 35(b) provides:

Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed or probation is revoked, or within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

It is the defendant's burden to prove his entitlement to relief under Rule 35(b). *See, e.g., United States v. Giltner* 842 F. Supp. 1439, 1440 (M.D. Fla. 1994) ("A party making a motion for reduction of sentence bears the burden of establishing that he is entitled to such relief."); *United States v. Wilson*, No. Crim. A. 89-00020-01, 1994 WL 22718, at *2 (E.D. Pa. Jan. 26, 1994) ("it is the defendant's burden to establish his entitlement to any reduction in sentence").

This Court's review of a circuit court's Rule 35(b) decision is as follows:

In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. 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, *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996).

Abuse of discretion and clear error are "highly deferential modes of review[.]" *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 106, 459 S.E.2d 374, 383 (1995), and abuse of discretion under Rule 35(b) should be so deferential as to impose "almost no scrutiny." *Head*, 198 W. Va. at 305, 480 S.E.2d at 514 (1996) (Cleckley, J, concurring).

"First, case law holds that a defendant's behavior or rehabilitation while incarcerated does not provide grounds to support a Rule 35 motion." *United States v. LaMorte*, 940 F. Supp. 572, 578 (S.D.N.Y. 1996).

It is commendable that the petitioner has gotten off of drugs and alcohol while incarcerated. In addition, the petitioner obtained certificates of completion for helpful programs he has taken while in prison. He also states that he has a good job waiting for him upon his release. Most importantly, he has two wonderful sons that he wants a full relationship with so he can keep them from making the same mistakes he has made. (App. at 4-5.)

None of these grounds, however, require a judge to grant a Rule 35(b) motion. Therefore, even if this Court finds the petitioner's second Rule 35(b) motion was timely, the circuit court did not abuse its discretion in denying the petitioner's second Rule 35 (b) motion.

V.

CONCLUSION

For the foregoing reasons, the circuit court's order should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

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CERTIFICATE OF SERVICE

I, Andrew D. Mendelsen, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the respondent's *Summary Response* upon the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 6th day of May, 2013, addressed as follow:

Matthew J. Robey
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