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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

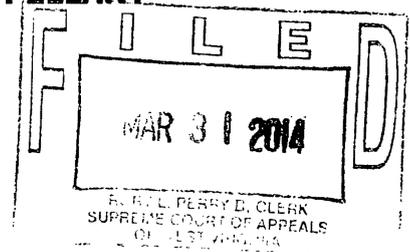
**SUPREME COURT NO: 13-1266**

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**VIRGIL EUGENE SHRADER**

**APPELLANT**

**v.**



**STATE OF WEST VIRGINIA,**

**APPELLEE**

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**APPEAL FROM THE CIRCUIT COURT OF  
MERCER COUNTY, WEST VIRGINIA**

**(08-F-117)**

**BRIEF OF APPELLANT**

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**ORAL PRESENTATION REQUESTED**

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## **ASSIGNMENTS OF ERROR**

Appellant, Virgil Eugene Shrader, assigns the following errors from the proceedings before the Circuit Court of Mercer County, West Virginia, the Honorable David W. Knight presiding.

- I.** The trial court erred in finding Appellant had violated the terms of his plea agreement.
- II.** The trial court denied Appellant the benefit of his plea bargain.
- III.** The trial court denied Appellant's due process rights in adjudicating him guilty without notice.
- IV.** The trial court denied Appellant his right of confrontation.
- V.** The trial court abused its discretion in denying Appellant credit for pre-plea time served on home confinement.

## STATEMENT OF CASE

The Appellant, Virgil Eugene Shrader, was charged in an indictment returned by the February 2008 Grand Jury for Mercer County, West Virginia with 12 counts of alleged sexual offenses. (App. 1). The alleged victim was A.A.T.<sup>1</sup> the child of a neighbor. Subsequently, an agreed order was entered dismissing 6 counts of the indictment, leaving only the 6 counts of 1<sup>st</sup> Degree Sexual Abuse to be tried. (App. 5)

After significant discovery and motion practice, Mr. Shrader appeared before Senior Circuit Court Judge, David W. Knight, on February 17, 2009, for the purpose of entering a plea.<sup>2</sup>The plea agreement was the result of negotiations between defense counsel Michael F. Gibson and Deborah K. Garton, a long time prosecutor with extensive experience in the prosecution of sexual offenses, and particularly sexual offenses involving children.<sup>3</sup>

Under the plea agreement, Mr. Shrader was to plead no contest to a single count of First Degree Sexual Abuse. In return the State would dismiss the remaining counts. Further under the plea agreement the court was to defer adjudication on Mr. Shrader's guilty plea, and place him on probation, or probation-like conditions for a period of five years. If Mr. Shrader completed the five year period of supervision and met conditions of his supervision, he would be permitted to withdraw his guilty plea, and the State

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<sup>1</sup> Consistent with court policy the minor victim in this matter is referred to by her initials.

<sup>2</sup> Judge Knight had been recalled to active service to preside by Administrative Order of the Chief Justice Elliott Maynard entered August 25, 2008. (App. 4)

<sup>3</sup> Mr. Shrader was originally represented by William Flanigan. However, Mr. Flanigan was forced to withdraw as defense counsel due to a conflict which had arisen during the course of his representation. Michael F. Gibson was substituted as counsel for Appellant.

would dismiss the remaining charges against him. Although not explicitly stated in the plea agreement, Appellant's plea was recognized as a "best interest" plea. (App. 14, 75, 94, 107). As such, the trial court required no allocution from Appellant.

As indicated, during the course of the prosecution of the case, plea negotiations and plea, as well as several subsequent proceedings, the State was represented by Debra Garton a longtime prosecutor, and the primary prosecutor of sexual offenses in Mercer County for a number of years. The apparent leniency of Appellant's plea was very much out of character for Ms. Garton, and was attributable to difficulties with the State's case and Ms. Garton's concern for the State's ability to successfully prosecute the case. Ms. Garton acknowledged as much to the court in hearings subsequent to the plea, "I thought that what we worked out was the best thing. It was the best thing for the state, I can tell you with certainty. I very rarely enter into plea bargains in these cases, and I thought this one -- --." Ms. Garton was then interrupted by the court expressing -- commenting on the unusual nature of the plea. (Feb. 27, 2009)(App. 74). Judge Knight also acknowledged the plea to be contrary to his experience with Ms. Garton, as her former boss as prosecuting attorney of Mercer County, and subsequently as a Circuit Court Judge in Mercer County."I never was much one to take deferred pleas. I don't like them. But for some reason I did it in that place. Probably because Ms. Garton consented to all of it, which was rare. At least in my experience with her it was rare. So there must be something there that I don't know about. " (April 18, 2011) (App. 145-146).

Following the plea, at the outset, the court encountered difficulty resulting from the conflict between Mr. Shrader's no contest, best interest, plea and the requirements of the providers of sexual offender treatment that Mr. Shrader make admissions as to offense conduct. Mercer County Adult Probation Officer, Kimberly Moore, the officer assigned to supervise Mr. Shrader, had referred him to Family Counseling Connection, at the Mercer County Day Report Center for sexual offender counseling. When Mr. Shrader hesitated to execute paperwork that classified him as an adult sexual offender, he was rejected from the program as unwilling to accept responsibility. (Feb. 27, 2009) (App. 13-14)

In order to address this issue, Mr. Shrader's counsel, as well as the prosecutor, agreed, with the trial court's approval, to have Mr. Shrader treat with William Brezenski, a licensed psychologist practicing in Mercer County. Mr. Shrader treated with Mr. Brezenski for 2 years, until Brezenski determined that his course of treatment was complete. (App. 158-159)

Following the conclusion of treatment with Mr. Brezenski, Mr. Shrader was returned to court on April 18, 2011. At that time, based on his completion of treatment, Mr. Shrader requested early release from his conditions of deferred adjudication, so that he could reestablish a relationship with his grandchildren from whom he had been separated since the time of his initial arrest almost 4 years earlier.

Judge Knight declined to end the conditions of the deferred adjudication early, indicating he wanted Mr. Shrader under conditions for the full five years contemplated in the plea agreement. (April 18, 2011) (App. 143). Judge Knight also indicated that he

wanted Mr. Shrader being followed by someone so that the court could “keep an eye on him somehow.” (April 18, 2011) (App. 146). Probation Officer Kimberly Moore recommended returning Mr. Shrader to the sexual offender treatment at the Mercer County Day Report Center, the same organization which had rejected Mr. Shrader as a participant at the outset of his conditions, two years prior, based on the fact that he would not make admissions they deemed necessary to participate in their program. Judge Knight accepted Ms. Moore’s recommendation and ordered Mr. Shrader to participate in the program.

The Court: ... What else can we do other than you? Can we get him to belong to some kind of a --- I’m going to call it a club --- I guess it’s not a club --- where you come in for like drug court or something or you come in for like counseling involved in this kind of thing.

Ms. Moore: Your Honor, that is initially what I set out to do and that’s what precipitated all this to begin with, is I attempted to put him at the Day Report Center with the sex offender treatment program that was available. He was offended by the paperwork that indicated he was a sex offender.

The Court: I don’t care if he’s offended or not. I’ll put him over there. I just think we need to have some touch – still have that program over there?

Ms. Moore: It’s still available

(April 18, 2011) (App. 147-48).

At that juncture, Mr. Moore also raised the issue of polygraph examinations, which she indicated were used in the course of the program at the Day Report Center. (April 18, 2011) (App. 150). Defense counsel raised concern as to the utilization of the failure of polygraphs regarding offense conduct as the basis for finding that Mr. Shrader had not complied with the conditions of his deferred adjudication. During the course of

the discussion the prosecutor assured the court that the polygraphs utilized did not address past, offense conduct, but rather were prospective, aimed at subsequent conduct, in order to determine if additional matters had arisen which required further investigation. With such assurances in hand, the court approved the utilization of polygraphs as part of the program to which Mr. Shrader would be subject. (April 18, 2011) (App. 153 – 154). Ms. Moore also informed the trial court that Appellant had been compliant in his reporting to her. (April 18, 2011) (App. 145).

No action on these issues was had in the matter for a period of over two years. On July 11, 2013, the matter was returned to court at which time the State, by assistant prosecutor Janet Williamson<sup>4</sup> requested the court find that Mr. Shrader had failed to adhere to the conditions of his deferred adjudication by virtue of the failure to adequately participate in the sexual offender treatment program at the Day Report Center. Contrary to the prosecutor's prior assurances to the court, polygraphs at the Day Report Center program had apparently, in fact, inquired as to alleged offense conduct, and had on two occasions supposedly resulted in failed polygraph examinations. Also cited was Mr. Shrader's refusal to make admissions to offense conduct, his no contest, best interest, plea notwithstanding. At that time it was brought to the trial court's attention by defense counsel that Mr. Shrader had taken a polygraph arranged by defense counsel, and had in fact passed that examination. Ms. Moore also confirmed that Appellant continued to be compliant with all other conditions. (July 11, 2013)(App. 193).

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<sup>4</sup> Ms. Garton had retired from the prosecutor's office since the time of the previous hearing two years prior.

No evidence was presented at the July 11, 2013 hearing. No witnesses offered testimony, no polygraph results were offered, no exhibits were entered into the record. However, it was clear that the trial court relied on representations from the State about polygraph results in reaching its conclusion. "You got to take into account that the questions he's lying on, according to them -- gosh in other words, he failed a polygraph on it -- -- related directly to what he's in court about."(July 11, 2013) (App. 173).

At the conclusion of the July 11, 2013 hearing, Judge Knight indicated a subsequent hearing would be held on October 1, 2013. The judge also offered Mr. Shrader a bit of guidance, suggesting that if he made the requisite admissions, that the situation may be rectified. "We are setting a date to proceed on the original plea, "unless things change in the meantime and he is more compliant during that period of time."The court also stated, "and I would suggest, if you would like to, that he admits of those things and see what the guy's polygraph says about his answers to that." (July 11, 2013)(App. 182).

The hearing set for October 1, 2013 was continued to November 1, 2013. Mr. Shrader appeared at the hearing with counsel, Derrick W. Lefler, appearing in place of Michael F. Gibson, who was absent due to medical reasons. The State was represented by Assistant Prosecutor, Janet Williamson. Also in attendance was Kimberly Moore, the adult probation officer who had supervised Appellant throughout his period of supervision.

At the November 1, 2013 hearing, Judge Knight, without any additional evidence and testimony and again clearly relying on representations as to polygraph results at

the Day Report Center made the determination that Mr. Shrader had violated the conditions of his deferred adjudication, and therefore adjudicated Mr. Shrader guilty of the offense of Sexual Abuse in the First Degree. Counsel for Appellant registered objection to the trial court's ruling and actions. (Nov. 1, 2013)(App. 201-202).

When it was brought to court's attention that Appellant had, since the time of the previous hearing, consistent with the court's advice, made admissions, and had in fact passed a polygraph examination at the Day Report Center, the judge disregarded those factors, indicating he did not believe Appellant's admissions. In response the court stated "he wouldn't admit he did anything and as a result of that, he couldn't be treated until we got to the point that he was looking at jail. I just think it's in his admission isn't sincere." (Nov. 1, 2013) (App. 193).

Subsequent to the adjudication, the court moved to disposition. In doing so, the court proceeded without referral for a presentence investigation report, as was indicated in the plea agreement. Counsel for Appellant requested that the court reinstate Appellant to conditions, again highlighting Appellant's compliance with all of the aspects of his supervision, and again with reference to those areas that the court had determined that Appellant was deficient emphasizing the nature of Appellant's plea as a no contest, best interest, plea. When defense counsel brought to the court's attention that defendant's plea had been a best interest plea, Judge Knight tersely responded:

well, it wasn't in her best interest. She hasn't benefited from it. I don't care what you call it, when I took his plea, whether he said guilty or not, I presumed him guilty. That's what the plea of guilty is. I don't care what you call it. It was a guilty plea and he didn't comply.

(Nov. 1, 2013)(App. 202).

Thereafter the court denied Appellant's request for probation and sentenced him to 1 to 5 years in the penitentiary upon the charge of First Degree Sexual Abuse, with an additional ten years of post-conviction supervision. (Nov. 1, 2013)(App. 205-206).

When inquired of to credit for the 21 months Appellant had served on home confinement prior to his plea, the court replied, "No I don't think he deserves that." (Nov. 1, 2013) (Tr. 206).

## **SUMMARY OF ARGUMENT**

The Appellant, Virgil Eugene Shrader rests his arguments on the points set forth in the Assignments of Error as follows:

**I.** Appellant asserts the trial court erred in finding Appellant had breached the terms of his plea agreement. There is no substantive evidence of record supporting any of the allegations or bases upon which Appellant was found to have violated the conditions imposed upon him. The state offered no testimony from any therapist or polygrapher, or any results of any polygraph examinations prior to the court's determination to adjudicate Appellant guilty.

The lack of evidence notwithstanding, and contrary to the findings of the trial court, Appellant had, in fact, attended and completed an extensive course of sexual offender treatment with William Brezinski, a licensed psychologist, approved by both the state and the trial court.

The information utilized by the trial court to determine that Appellant had failed to meet the conditions of his referral was polygraph examinations, a source of information recognized to lack reliability or evidentiary value. In addition, those polygraphs were utilized in a manner contrary for which they were approved by the court and represented by the State to be utilized.

**II.** Appellant was denied the benefit of his plea bargain in that by maintaining the position and posture of his plea, Appellant was deemed to have violated other provisions with the same plea agreement. Appellant entered a plea under which he was not called upon to make any admission as to alleged offense conduct. However, as the case progressed over time, the trial court increasingly demanded admissions of Appellant. Ultimately, Appellant's maintenance of the position set forth in his plea directly lead to, and was the cause of the trial court's finding that Appellant had not complied with the plea agreement.

**III.** The trial court denied Appellant his right to due process. Appellant's due process rights were not met by the procedure utilized by the trial court. Due process, as well as statutory obligations makes clear that individuals subject to probation revocation are entitled to written notice of their alleged violations, as well as the right to be heard. Appellant received no written notifications of the specific acts which were the basis of his violation of the conditions imposed by the court. While the trial court recognized that Appellant was not on probation per se, the trial court readily recognized that the circumstances of under which Appellant was placed were virtually identical to probation, and were without any substantive difference. The same due process principles which provide those rights to a probationer are equally applicable to Appellant in his situation.

**IV.** Appellant was denied the right of confrontation with reference to his alleged violation of conditions. At no time prior to the trial court determining that Appellant should be adjudicated guilty for violation of those conditions did he have the opportunity to confront any witness concerning the evidence for which he was supposedly being held to answer. Likewise, he did not have the opportunity to test any of the evidence which was used against him.

While Appellant recognizes that the rights of probationer to confrontation are somewhat circumscribed, those rights are not obliterated, and the lack of those rights is not absolute. At a minimum, the court must provide explanation as to why confrontation is not necessary. The trial court in this instance failed to provide such explanation.

**V.** Appellant asserts that the trial court's refusal, without significant consideration to afford him any credit for approximately 21 months during which he was on home confinement prior to his plea constitutes an abuse of discretion. Appellant was under conditions of home confinement from the date of his arrest until the date of his plea. During a significant portion of that time, was not only confined to his home, but was required to reside outside of his house, staying in a small camping trailer on a remote portion of his property due to the fact that at the time, his son, and grandchildren, resided in the home. As a result, in terms of home confinement, Appellants' experience was not the norm and he cannot be said to have enjoyed the comforts of his home during a significant portion of that period.

None of these factors were taken into consideration by the court at all. The court's decision was encompassed in a snap response to an inquiry by probation at the very end of the hearing in which the court adjudicated Appellant guilty and sentenced him to the penitentiary. The court's decision in some total was "no, I'm not going to do that."

The trial court gave no serious consideration to its decision including consideration of any factors that have supported the granting credit for time served on home confinement.

Appellant asserts the trial court abused its discretion in failing to give any of the considerations of Appellants' home confinement in determining whether to afford him any credit for any period of his extended home confinement.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Appellant submits that oral argument is necessary in view of the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure. Appellant submits that argument pursuant to Rule 19 may be appropriate in that the issues presented in the instant appeal involve assignments of error in the application of settled law; involve unsustainable exercise of discretion where the law governing that discretion is settled and involve insufficient evidence or a result against the weight of the evidence.

In addition, although all facts and arguments are significantly and adequately presented in Appellant's brief, Appellant believes the decision process would be significantly aided by oral argument.

Appellant believes that the instant matter would also be appropriate for oral argument pursuant to Rule 20 of the Rules of Appellate Procedure in that the appeal presents constitutional questions regarding the procedures of the trial court.

## ARGUMENT

The instant appeal follows from the trial court's conviction and sentencing of the Appellant. This court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. Challenges to findings of fact are reviewed under a clearly erroneous standard, and conclusions of law are reviewed de novo. Syl. Pt. 1, State v. Spade, 225 W.Va. 649, 695 S.E.2d 879 (2010); citing Syl. Pt. 4, Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996).

### I.

#### The Trial Court Erred in Finding Appellant Had Violated the Terms of His Plea Agreement

The Appellant entered into a best interest plea agreement by which he would plead no contest to a single count of sexual abuse in the first degree. Under that agreement the court would defer the adjudication of guilt upon Appellant's plea, as long as he met the conditions set by the court.<sup>5</sup> Those initial conditions were: "A) the defendant shall undergo a sexual offender psychiatric evaluation by an appropriate mental health professional selected or approved by the state; B) the defendant will abide by such treatment recommendations as may be contained in such evaluation; C)

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<sup>5</sup> Under Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure, the power is vested in the Circuit Court to accept or reject the plea, or to defer acting on it until the court obtains a presentence report under Rule 32(c) of the West Virginia Rules of Criminal Procedure. Syl. Pt. 3., Myers v. Frazier, 319 S.E.2d 782, 173 W.Va 658 (1984);

See also: Starrs v. Commonwealth, Record No. 122028, (Va. Jan. 10, 2014)(a circuit court upon accepting and entering a guilty plea still retains the inherent authority to defer the disposition, and to consider an outcome other than a felony conviction).

the defendant shall have no contact with his accusers or and her family; D) the courts sentenced conditions and terms for probation. "The agreement further stated that if the Appellant did not successfully complete terms and conditions set forth in the plea agreement that the court would schedule a presentence investigation of defendant and sentence him accordingly. (App. 7-8).

A revised plea agreement was filed with the court on March 13, 2009. The revised plea agreement was substantially similar to the previous agreement in terms of Appellant's obligations, except that it specified in paragraph (c) while the Appellant was to have no contact with his accuser and her family he was not restricted from contact with his own children grandchildren and anyone else other than the accuser and her family." Subparagraph (d) also specified that the Appellant would be subject to the court's standard conditions and terms for probation, but that he was not required at that time to enter into a specific sexual offender probationary contract. (App. 84-85).

A hearing was held on March 13, 2009 at the conclusion of which the court ordered that "the previously imposed probationary period be set aside, that disposition in this matter be deferred and that the defendant abide by the following conditions for period of five years":

1. That the defendant attends sexual offender counseling
2. That the defendant obey all laws;
3. The defendant not consume alcohol;
4. That the defendant report monthly to his probation officer and personally reschedule his appointment if you cannot make such appointment;

5. The defendant provide all information to his probation officer, including his address, telephone number, medications, and provide any change in the same;
6. That the defendant abide by the normal terms and conditions of probation although he is not on a probationary period.
7. That the defendant submit to another sexual offender evaluation by Dr. William Brezinski and that the report of such evaluation be provided to this court.

The March 13, 2009 order further stated that "the court advised the defendant that following five years of successfully completing an abiding by the above listed condition, he may petition the court to dismiss this matter." (App. 112-113)

A status hearing was conducted on June 9, 2009. At that time the court acknowledged receipt of a forensic evaluation by Dr. Bobby Miller, as well as updated reports from William Brezinski, the psychologist who had been seeing Appellant. (June 9, 2009) (App. 117). Further discussion was had at that hearing as to the parameters of Appellant's treatment. At that time it was recognized that Appellant was required to continue treating with Mr. Brezinski until such time as Brezinski determined that the treatment was no longer necessary and released the Appellant from his care. (June 9, 2009) (App. 123-124). The court also made note of the previous difficulty in obtaining appropriate evaluation in light of Appellant's denial under terms of his plea agreement. The court however, acknowledged that the court had received an appropriate evaluation and that "we've gotten past that stage." (June 9, 2009) (App. 125).

Following the June 9, 2009 hearing the trial court entered an order directing Appellant to continue his counseling with William Brezinski M. A., "until deemed unnecessary by said counselor." The court also made clear that if the Appellant discontinued his counseling it would result in violation of the terms of his probation. (App. 114)

Appellant treated with Brezinski for the two years following the entry of his plea. At a hearing on April 18, 2011 the court received a report from Mr. Brezinski indicating that Appellant had been fully compliant with his counseling and that the counseling had been completed in a satisfactory manner. (App. 158). The order resulting from the April 18, 2011 hearing specified, among other things, that (1) the defendant is released from any further obligation to undergo treatment at the hands of psychologist William Brezinski, M. A.; (2) the defendant is ordered to participate in the sexual offender -- offender evaluation and counseling at the Mercer County Day Report Center under such conditions and frequency as the Day Report Center counseling center staff deem appropriate, including but not limited to undergo polygraph examinations." (App. 134).

More than two years later, a status hearing was held on July 11, 2013. At that time the state asserted that the Appellant had not successfully completed his conditions of deferred adjudication and had therefore, violated his plea agreement.

Ultimately, the court determined that, in essence, the Appellant had violated the terms of his plea agreement by failing to abide by the conditions imposed under the agreement concerning his sexual offender counseling. "It's simply about the fact that he did not meet one of the conditions of probation because he can't get a psychologist

in here to say that he successfully completed a sexual -- -- sexual offenders counseling.” (June 11, 2013) (App. 175).

In the course of the counseling sessions at the Day Report Center, Appellant continued to maintain his position, consistent with that of his plea, that he admitted no guilt. In the process he purportedly failed two polygraph examinations, and was subsequently determined by the court to be noncompliant with his treatment.

A. The Trial Court Lacked Sufficient Evidence to Find Appellant Had Failed to Meet His Obligations Under the Terms of The Plea Agreement

The trial court record is devoid of any actual evidence as to the matters upon which the court’s decision was based. There were no polygraph results presented for admission into evidence. There was no polygraph operator who testified as to polygraph results, their own qualifications, or testing methods. Needless to say they could not be cross examined as to the same. There were no records from the treatment provider, or anyone testifying from the facility as to Appellant’s treatment status, including the particular statements he had or had not made which was the source of difficulty.

The only testimony that made its way into the record at all was that offered by Rance Barry, a therapist with the Day Report Center counseling group. However, Mr. Berry’s testimony was not taken until the conclusion of the final hearing, well after the trial court had made its determination as to Appellant’s violations and was considering disposition at sentencing. Therefore, the determination that Appellant had in fact violated the terms of the plea agreement were without any evidentiary foundation whatsoever.

B. Appellant Completed A Course of Sexual Offender Treatment as Required by the Terms of the Plea Agreement.

As an initial point, it should be recognized that the Appellant underwent a significant course of counseling with Mr. Brezinski, and successfully completed that course of counseling. Arguably, this successful completion satisfied the obligations imposed upon Appellant under the plea agreement, as to treatment. However, the trial court record makes precise determination as to this point difficult. The plea agreement required Appellant to undergo evaluation and to comply with the recommendations resulting from the evaluation. However, the evaluation, while performed and received by the court was never placed in the record.

It is clear, however, that both the Appellant and State, as well as the trial court considered Appellant's treatment with Mr. Brezinski to be satisfactory compliance with the recommendations contained in Dr. Miller's report.

The trial court's findings at the July 11, 2013 hearing, as well as the November 1, 2013 hearing, failed to recognize that Appellant had, in fact completed a program of treatment. The court's position can be essentially boiled down to Judge Knight's statement at the July 11, 2013 hearing. "It's simply about the fact that he did not meet one of the conditions of probation because he can't get a psychologist in here to say that he's successfully completed a sexual ... offender's counseling." (July 11, 2013)(App. 175).

The trial court's observation in this respect is simply not correct. Appellant was required to treat with Mr. Brezinski and did so for more than two years. That treatment concluded only when Brezinski determined that it was no longer necessary and that

Appellant had completed his course of treatment. To say that Appellant failed to complete any plan of treatment is simply wrong.

However, to the extent that the additional counseling, at the Mercer County Day Report Center could be appropriately seen as a condition of Appellant's obligations under the plea agreement, it cannot be said that Appellant violated the agreement. Appellant's plea was clearly recognized as a no contest, best interest, plea, under which Appellant agreed to accept the consequence of a guilty plea, pursuant to the provisions of the plea agreement, in order to minimize his exposure in the context of the charges set forth in the indictment. This was clearly the bargained for resolution agreed to between the State and the Appellant.

C. The Trial Court Improperly Relied On Polygraph Results

The lack actual evidence as to polygraph results notwithstanding, from the record it is clear that the trial court's determination was based significantly, if not wholly, upon the purported failure of polygraph examinations. “[I]f they require him to take a polygraph and he believes he is honest, then it’ll show he is honest. I mean, that’s my experience with polygraph examinations. (April 18, 2011) (App. 153).

“You’ve got to take into account that the questions he’s lying on, according to them – in other words, he failed the polygraph on it – relates directly to what he is court about.” (July 11, 2013) (App. 173).

The trial court’s reliance on the polygraph is problematic on several levels. First, and most obvious, is the admissibility of polygraphs as evidence in court proceedings Syl. Pt. 3, State v. Meadows, 231 W.Va. 10, 743 S.E.2d 318 (2013). While it is

recognized that as to matters of sentencing and even probation revocation proceedings evidentiary rules are not strictly applicable, that cannot mean that the gates are open to admission of any evidence without restriction. This is especially true when the evidence in question is generally regarded as lacking reliability and without evidentiary value, such as polygraph results. Other jurisdictions have appreciated this point and recognized specific prohibitions on use of polygraph results. White v. Commonwealth, 583 S.E.2d 771, 772-73 (Va. App. 2003)(trial judge erred by admitting into evidence the results of a polygraph examination in a probation revocation proceeding); State v. Pierce, 138 S.W.3d 820, 826 (Tenn. 2004) (when imposing sentences, trial courts should not consider polygraph examination results or any portion of a risk assessment report that relies upon polygraph examination results); State v. Staat, 811 P.2d 1261, 1262 (Mont. 1991)(Polygraph evidence shall not be allowed in any proceeding in a court of law in Montana); Buschauer v. State, 804 P.2d 1046, 1047 (Nev. 1990)(The general rule limiting the use of polygraph results at trial applies at sentencing as well).

The utilization of the polygraph to inquire as to offense conduct is also contrary to the basis upon which the court permitted the use of polygraphs in the Day Report Center program, as well as the manner in which polygraphs are authorized for use. At the time the issue of polygraphs came up in the April 18, 2011 hearing, the State, through its prosecutor, represented that the polygraphs would not be used to inquire as to offense conduct, but were to be utilized only to ensure that no, new conduct had arisen which might need to be investigated. It was with these assurances that the trial

court permitted utilization of polygraphs with reference to the Day Report Center. (April 11, 2011) (App. 154).

Polygraphs are utilized as part of the enhanced supervision, to which convicted sexual offenders are subject. See: West Virginia Code §62-11D-1 et seq. However, subsection (b) of § 62-11D-2 specifies that "the results of any examination are not admissible in evidence and are to be used solely as a risk assessment and treatment tool."West Virginia Code §62-11D-2(b). [Emphasis added]

It is clear that the polygraphs conducted at the Day Report Center, were undertaken, and utilized, contrary to the representations made to the trial court in authorizing their use, as well as contrary to the method in which such examinations are lawfully permitted to be utilized. For such examinations to be the foundation upon which Appellant was adjudicated, following more than four and a half years of compliance otherwise is clearly an abuse of the court's discretion.

It is also problematic that the conduct expected by the court appeared to shift with each hearing. At the outset, the court recognized Appellant's best interest plea, and indicated that all that was required was that he address the inquiries of treaters, even if to simply reference his plea.

Now, there's two things you can say to the sexual offender – when they ask you questions about it: "yes, I did, and here is what I did," or you could say, "I did not do those things, but I have pled guilty, basically in court by saying "no contest" to this, "and you can – but you can't say, "I'm not going to" – do you understand that? "I'm not going to answer that question." There has to be an answer to that question. "But you have to be truthful with them and say, "I did this," – "I did not do it," or "I didn't do it". You understand that? This no this – this no answer is not going to work anymore. (March 13, 2009) (App. 94-95).

And he can tell him whether he did these things or didn't do these things. But he has to be honest and not guarded about what he's saying. Either he --- "Yes, I did do that," or "No, I did not do that. I did this plea in my best interest. I really didn't commit any of these offenses, but I choose to say that I did." Do you understand that? (March 13, 2009) (App. 107).

In subsequent proceedings however, the court's expectation shifted to require what it perceived as truthfulness, (April 18, 2011)(App. 153-54), which yet again in further proceedings became a demand for admission. (July 11, 2013) (App. 177). Yet, when an admission of some variety was proffered, the court disregarded the admission, questioning either its veracity, or earnestness, or both. "Now, he is looking at going to jail, he wants to admit he did these things. I don't believe his admission is sincere. I believe it's just a way of keeping him out of jail." (Nov. 1, 2013) (App. 200-201). "This admission I think is a red herring. I think you are making this admission now just to stay out of jail." (Nov. 1, 2013) (App. 205).As a result, Mr. Shrader was consistently confronted with a standard which he would not consistently define, or comply with.

Of course, it is impossible to discern the nature and scope of the admissions Appellant allegedly made, as there was no testimony relating to those admissions offered.

## II.

### The Trial Court Denied Appellant the Benefit of His Plea Bargain

The Appellant, entered into a plea agreement with the State, which agreement was accepted by the trial court. Pursuant to that agreement, certain obligations fell to Appellant and certain benefits were due him. Appellant's plea was a no contest plea, as a best interest plea. The nature of this plea was explicitly recognized by this court.

An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury can convict him.

Syl. Pt. 1, Kennedy v. Frazier, 357 S.E.2d 43, 178 W.Va. 10 (1987).;

See also: North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970),

(a guilty plea that represents the voluntary and intelligent choice among the alternatives available to a defendant is not coerced within the meaning of the fifth amendment simply because it was entered into to avoid the possibility of a significantly higher penalty.)

Each party received valuable consideration for their participation in the plea. The State was able to bring to conclusion a difficult case in which it lacked significant confidence in its prospects at trial. Through that conclusion the Appellant would be subject to a set of conditions for a significant period of time, a result far superior to an outright acquittal at trial.

For Appellant's part, he was able to resolve a significant number, six, of pending charges which would carry significant penitentiary time, if convicted. One of the other

advantages Appellant gained from the plea agreement was the right to forgo the admission of any criminal act, as well as the right to have his plea acknowledged as being one he had accepted in order to avoid the exposure of additional charges at trial.

It is well established that the rights of a party under a plea agreement are recognized as contractual.

As a matter of criminal jurisprudence, a plea agreement is subject to principles of contract law insofar as its application ensures the defendant receives that to which is reasonably entitled" such agreements require "ordinary contract principle to be supplemented with a concern that the bargaining and execution process does not violate the defendant's right to fundamental fairness.

State ex rel Gardner v. West Virginia Division of Corrections, 210 W.Va. 783, 786, 559 S.E.2d 929, 932 (2002).

When a defendant enters into a plea agreement with the State that is accepted by the trial court, an enforceable "right" insures to both the State and the defendant not to have the terms of the plea agreement breached by either party. Syl. Pt. 4 State v. Stone, 225 W.Va. 649, 695 S.E.2d 879 (2010); Syl. Pt. 4, State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998). Here, the right acquired by the Appellant through his plea was the right to stand upon his plea and acknowledge that these had been no admission of guilt as to the alleged offense conduct, and that none was required.

An additional and significant benefit due to Appellant was the opportunity to have his adjudication deferred; so long as he met the conditions imposed. The State acknowledged that it had significant difficulties with its case. These difficulties were evidenced by the dismissal of six of the 12 original counts in the indictment. It was also significantly exhibited by the terms of the plea agreement, which Ms. Garton, a

longtime prosecutor in Mercer County acknowledged. (App. 74). This conclusion was further supported by the observation of the trial court judge, himself a longtime prosecutor, that such a plea was out of character for Ms. Garton, and indicated to him significant difficulties with the case, justifying the state's position. (App. 145-146). The trial court also confirmed that the plea agreement had been approved by the victim's family. (App. 44).

"Where the state agrees that a specific sentence is a suitable disposition of a criminal case and enters into a plea agreement with the defendant pursuant to Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure, the trial court may either accept or reject the entire agreement, but it may not accept a guilty plea and impose a different sentence." Syl. Pt. 2, State ex rel Forbes v. Kaufman, 185 W.Va.72, 404 S.E.2d 763 (1991).<sup>6</sup> In this instance the court accepted the plea agreement reached between the State and Appellant. Appellant's statements throughout the course of the matter were consistent with his plea, as a no contest, best interest, plea.

However, the trial court's acknowledgments of Appellant's right to stand upon his plea notwithstanding, the subsequent demands by the trial court judge for admissions by Appellant, fundamentally and unconstitutionally changed the deal, and deprived Appellant the benefit of his bargained for plea.

This point is further exemplified by the trial court's placement of Appellant in the Day Report Center at the April 18, 2011, hearing when it was clear, given the trial court's experience two years prior, the Appellant would not be accepted or successful

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<sup>6</sup> Although the specific rule was not referenced in the plea agreement, the agreement contained mandatory language, "shall", as to the trial court's action upon the plea. The trial court also acknowledged the binding nature of the plea. (App. 14, 49).

there were he to stand on his plea. Appellant was again sent to the Day Report Center for sexual offender treatment despite the fact that it had been clear from the outset that the program there would be incompatible with his plea under the plea agreement. For whatever reason, Mr. Shrader was in treatment at the Day Report Center for a period of two additional years before it was determined that he should be returned to court as unsuccessful. This determination was based upon his refusal to make admissions as to offense conduct, and alleged failure of polygraph examinations. Representations as to the polygraph results were taken by the court to determine that Mr. Shrader was not honest, and therefore not compliant with his obligations under the plea agreement, although the plea agreement does not require such.

While it is acknowledged that the terms of the plea, and the potential disposition were not changed, it is clear that as the case progressed across time Appellant did not enjoy the benefit of his plea and the benefit of his bargain by the end of the process. In that respect the trial court did not honor the plea that it had accepted, and did not afford Appellant his bargained for right.

### **III.**

#### **The Trial Court Denied Appellant's Due Process Rights In Adjudicating Guilt Without Proper Notice**

Pursuant to the plea agreement, the court withheld adjudication of guilt upon Appellant's plea, provided that Appellant met the conditions imposed by the court. While the court recognized that the Appellant was not, in fact, on probation, the court recognized that the conditions were identical to those of probation, and commented

that the situation was very much like probation. (App. 50 & 91). Appellant also had a contract executed through the probation office as to the terms of his conditions. (App. 127).

In probation revocation cases, this Court has recognized: (1) that probationers are not entitled to the full panoply of rights enjoyed by defendants in a criminal trial, (2) that the State is required to prove the violation, in contested cases, by a clear preponderance of the evidence, rather than by the more stringent beyond a reasonable doubt standard, and (3) that the West Virginia Rules of Evidence do not apply to revocation proceedings. State v. Brown, 600 S. E.2d 561, 564, 215 W.Va. 664, (2004).

It has been recognized however, that a probationer is entitled to due process. The due process of law guaranteed by the state and federal constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard. Syl. Pt. 2, State v. Spade, 225 W.Va. 649, 695 S.E.2d 879 (2010).

The final revocation proceeding required by the due process clause of the 14th Amendment and necessitated by W.Va. Code 62-12-10, as amended, must accord an accused with the following requisite minimal procedural protections: (1) written notice of the claimed violations of probation; (2) disclosure to the probationer of evidence against him; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation; (5) a "neutral and attached" hearing officer; [and] (6) a written statement by the fact finders as to the evidence relied upon and reason for revocation of probation. Syl. Pt. 12 Luke

v. Haynes Louk, 223 S.E.2d 780, 159 W.Va. 482 (1976); Syl. Pt. 2 State ex rel Jones v. Trent, 490 S.E.2d 357, 360, 200 W.Va. 538 (1997)

Even though Appellant was not technically a probationer he is still entitled to due process. This court has recognized the applicability of these due process rights, albeit limited, to other similar situations wherein the state was acting to lessen a party's liberty, such as transfer from youthful offender sentencing to the penitentiary. State v. Stuckey, 174 W.Va. 236, 324 S.E.2d 379 (1984). "(A) person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government." Watson v. Whyte, 162 W.Va. 26, 28, 245 S.E.2d 916, 918 (W.Va., 1978), citing Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)].

In this case, Appellant did not, at any point received written notice of the specifics of the violations of his conditions. While the court made pronouncements from the bench at the July 11, 2013 hearing, such pronouncements do not satisfy due process requirements. Furthermore, the apparently shifting standard with which the trial court expected Appellant to comply makes the lack of notice of significantly more prominent and prejudicial.

#### **IV.**

##### The Trial Court Denied Appellant His Right of Confrontation

As noted previously, the trial court made its determination that Appellant had violated the conditions placed upon him without an evidentiary hearing, and without any substantive evidence being admitted into the record. No witnesses appeared, no documentary evidence was submitted. In addition to lacking sufficient evidence to support the trial court's findings as argued previously, the lack of testimony or evidence also necessarily robbed the Appellant of any right to confrontation he was due.

This Court has recognized previously, in the context of probation revocation, rights of confrontation while limited, do exist. See: State v. Brown, *supra*; citing, Syl. Pt. 12, Louk v. Hayes, 159 W.Va. 482, 223 S.E.2d 780 (1976)

In the instant matter, the Appellant was afforded no right of confrontation to address the testimony and evidence upon which he was being judged, and the court made no finding of good cause, as required under Louk as to why it was appropriate to deny Appellant that right.

The lack of confrontation in this instance is particularly egregious given that the principal evidence the trial court relied on, and that evidence Appellant would have been confronting, were the polygraph examinations, and the individual conducting those examinations. Defendant was thus denied the opportunity to confront and attack polygraph evidence which is recognized to lack evidentiary value, and which was utilized for inappropriate purposes. The failure to afford confrontation is significantly exacerbated by the fact that the evidence in question, although not admitted into the

record was the primary basis upon which the trial court took its adverse action against the Appellant.

The trial court recognized the necessity of the opportunity for confrontation when it advised Appellant at the June 29, 2009 hearing, that he would receive a hearing as to any allegations of violations of the conditions imposed on Appellant. (App. 126). In a subsequent hearing, the trial court again recognized the need for an evidentiary hearing in the case of alleged violations of Appellant's conditions. (April 11, 2011) (App. 154). However, no such evidentiary hearing was ultimately held, and Appellant was provided not opportunity to confront the evidence against him.

#### **V.**

##### The Trial Court Abused Its Discretion in Denying Appellant Credit for Pre-plea Time Served on Home Confinement

The Appellant spent the period between his arrest on May 28, 2007 and the entry of his plea on February 17, 2009, a period of approximately 630 days, or almost 21 months under conditions of home confinement. A significant portion of that period of home confinement was served by Appellant residing in a camping trailer situated on a remote part of his property so as to be separated from his family because his grandchildren were living in his home (App. 213-14). Under such conditions, the Appellant was required to obtain specific permission from the court to even spend the holidays with his family. (App. 212).

Appellant acknowledges that it is within the discretion of the trial court whether to afford him credit for pre-plea home confinement. West Virginia Code § 62-11B-11.

However, in the instant matter, Appellant submits the trial court abused its discretion. The court denied Appellant any credit for his home from home confinement time. However, the trial court's denial was without deliberation or consideration, occurring at the very end of the final hearing, as an afterthought raised by the probation officer.

Ms. Moore: Your honor, are you going to give him credit for the time he was on home confinement.

The Court: No. I don't think he deserves that. (Nov. 1, 2013) (App. 206)

The trial court made not inquiry as to how much home confinement time had been served and was available for credit, or if the time in question was pre or post plea. Nor was counsel for Appellant afforded the opportunity to address the trial court as to the issue.

The practical result of the trial court's denial of any credit for home confinement time, defendant was sentenced to 1 to 5 years in the penitentiary on November 1, 2013 after having served almost 21 months of home confinement prior to the plea, and having been subject to conditions for approximately 57 months. Yet, at the time of his sentence on November 1, 2013 Appellant was afforded not a single day's credit towards his sentence.

The inequity of this result is highlighted by the fact the purported problem which lead to the withdrawing of Appellant's deferral of adjudication was not brought to the courts attention for two years despite the fact the fundamental problem alleged with Appellant's treatment at the Day Report Center had existed at the outset of his referral

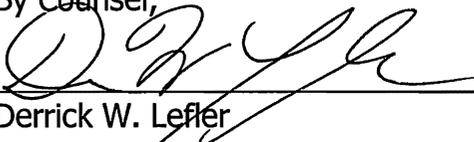
there and was known to the court and the therapists from the previous attempt to refer Appellant there immediately after the initial plea.

An appropriate exercise of discretion would have recognized this situation and afforded Appellant credit for at least a portion of the time spent on home confinement.

### **CONCLUSION**

For the reasons set forth herein, Appellant respectfully requests, that his appeal be granted and requests the conviction below be vacated, and that Appellant be returned to the Circuit Court of Mercer County, West Virginia, for further proceedings. In the alternative, Appellant requests that he be given credit for the period he was under conditions of home confinement, and that such time credited against his present incarceration.

VIRGIL EUGENE SHRADER,  
By Counsel,



Derrick W. Lefler

## CERTIFICATE OF SERVICE

I, Derrick W. Lefler, counsel for Appellant, do hereby certify that I have served a true copy of the foregoing Brief of Appellant to the Supreme Court of Appeals of Southern West Virginia, via Federal Express Mail Services, addressed to said counsel as follows, on this the 31<sup>st</sup> day of March, 2014:

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DERRICK W. LEFLER