

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Respondent Below, Respondent

vs.) **No. 21-0542** (Mingo County 94-F-43)

Jessie D.,
Defendant Below, Petitioner

MEMORANDUM DECISION

Self-represented petitioner Jessie D.¹ appeals the June 7, 2021, order of the Circuit Court of Mingo County construing a May 27, 2021, amendment to petitioner’s May 22, 1997, motion for reduction of sentence as a “second [such] motion” and denying it as untimely pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure. The State of West Virginia, by counsel Patrick Morrissey and Katherine M. Smith, filed a response conceding error in the circuit court’s order. Petitioner filed a reply.

The Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. This case satisfies the “limited circumstances” requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for disposition by a memorandum decision rather than an opinion. For the reasons expressed below, the decision of the circuit court is reversed, and this case is remanded to the circuit court with directions to evaluate not only petitioner’s May 22, 1997, motion for reduction of sentence but also the May 27, 2021, amendment to the May 22, 1997, motion.

On February 28, 1995, the Circuit Court of Mingo County found petitioner guilty of four counts of first-degree sexual assault and four counts of sexual abuse by a parent, guardian, or custodian pursuant to guilty verdicts returned by a jury. Petitioner is currently serving an aggregate

¹Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

term of thirty-five to eighty-five years of incarceration for those convictions.² This Court, by order entered on February 20, 1997, refused petitioner’s criminal appeal.

On May 22, 1997, within 120 days of the entry of this Court’s February 20, 1997, order, petitioner filed a motion for reduction of sentence in the circuit court, pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure. It is undisputed that the circuit court failed to rule upon petitioner’s May 22, 1997, motion.

On May 27, 2021, petitioner filed an amendment to his May 22, 1997, motion for reduction of sentence, stating that he was providing “additional information of . . . rehabilitation, educational[,] and vocational classes completed.” The circuit court, by order entered on June 7, 2021, construed petitioner’s amendment to his May 22, 1997, motion as “a second [Rule 35(b)] motion.” The circuit court denied the motion as being filed outside the 120-day timeframe set forth in Rule 35(b) for motions for reduction of sentence, finding (incorrectly) that it “previously denied a . . . timely . . . [m]otion for [r]eduction of [s]entence filed by [petitioner].” The circuit court based its ruling upon Syllabus Point 2 of *State ex rel. Smith v. Sims*, 239 W. Va. 764, 806 S.E.2d 420 (2017), in which this Court held that “[a] circuit court does not have jurisdiction to rule upon the merits of a motion for reduction of a sentence under Rule 35(b) . . . when the motion is filed outside the 120-day filing period set out under that rule.”

Petitioner appeals the circuit court’s June 7, 2021, order denying the amendment to his May 22, 1997, motion for reduction of sentence after construing it as “a second [Rule 35(b)] motion.” We have held 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). Rule 35(b) provides, in pertinent part:

A motion to reduce a sentence may be made . . . within 120 days after the sentence is imposed or probation is revoked, or within 120 days after the entry of a mandate

²On March 19, 1999, the circuit court entered a final order denying petitioner’s petition for a writ of habeas corpus, with the exception of the claim alleging that he had been sentenced under the wrong version of West Virginia Code § 61-8B-3 regarding two of his first-degree sexual assault convictions. The circuit court granted relief on that claim and resentenced petitioner under the version of West Virginia Code § 61-8B-3 in effect at the time of the commission of those offenses. *See Jessie D. v. Ames*, No. 17-0582, 2019 WL 1977033, at *2 (W. Va. May 3, 2019) (memorandum decision) (denying petitioner’s seventh petition for a writ of habeas corpus).

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.³

(Footnote added.)

On appeal, petitioner argues that the circuit court erred in finding that he failed to timely seek a reduction of sentence pursuant to Rule 35(b) when his May 22, 1997, motion for reduction of sentence was filed within 120 days of this Court’s refusal of his criminal appeal. The State counters that the circuit court’s application of Syllabus Point 2 of *Sims* to this case was proper given that court’s understanding of the record. However, we find that the circuit court’s belief that it had already denied a timely filed motion for reduction of sentence was erroneous because, as the State concedes, “the docket sheet does not reflect an order disposing of [p]etitioner’s [May 22, 1997,] Rule 35(b) motion[].”⁴ Based upon our review of the record, we agree with the parties that there has been no ruling with regard to the May 22, 1997, motion for reduction of sentence.

In Syllabus Points 2 and 4 of *Head*, we held:

Once a motion made under Rule 35(b) . . . is timely filed, the failure of a defendant to remind the trial court that the motion is pending does not constitute an abandonment of that motion.

. . . .

When a trial court fails to act on a motion timely filed by a defendant under Rule 35(b) . . . by reason of an administrative error, any resultant delay cannot, as a matter of law, be an unreasonable delay barring Rule 35(b) relief.

198 W.Va. at 299, 480 S.E.2d at 508.

As the State notes, the defendant in *Head* filed (1) a timely Rule 35(b) motion in August of 1991;⁵ (2) a second Rule 35(b) motion in June of 1994, which was not timely filed; and (3) an

³Rule 35(b) also allows the circuit court to reduce a defendant’s sentence sua sponte within the 120-day time frame and to impose probation as an alternative sentence.

⁴To the extent that petitioner has filed Rule 35(b) motions—in addition to the May 22, 1997, Rule 35(b) motion at issue in this appeal—upon which the circuit court has not yet ruled, we find that the circuit court may dispose of any such motions on remand, including denying untimely filed motions pursuant to Syllabus Point 2 of *Sims*.

⁵In *Head*, we refused the defendant’s criminal appeal on July 2, 1991. 198 W. Va. at 300, (continued . . .)

August of 1995 amendment to the August of 1991 motion. *Id.* at 300-01, 480 S.E.2d at 509-10. While Rule 35(b) barred the consideration of the second Rule 35(b) motion, we reversed the circuit court's decision in *Head* and remanded the case so that the circuit court could evaluate not only the first Rule 35(b) motion but also the amendment to that motion, which was filed almost four years later. *Id.* at 302-05 and n.9, 480 S.E.2d at 511-14 and n.9.⁶

We agree with the State that *Head* applies to this case. Pursuant to *Head*, because the circuit court failed to rule on petitioner's May 22, 1997, motion, that motion remained pending before the circuit court. Additionally, pursuant to *Head*, the May 27, 2021, amendment to that motion was not a new Rule 35(b) motion. Therefore, we reverse the circuit court's June 4, 2021, order and remand this case to the circuit court with directions to evaluate not only petitioner's May 22, 1997, motion for reduction of sentence but also the May 27, 2021, amendment to the May 22, 1997, motion.⁷

For the foregoing reasons, we reverse the circuit court's June 7, 2021, order and remand this case to the circuit court with directions.

Reversed and Remanded with Directions.

ISSUED: September 20, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker

480 S.E.2d at 509.

⁶In Syllabus Point 5 of *Head*, we held:

When considering [Rule] 35(b) motions, circuit courts generally should consider only those events that occur within the 120-day filing period; however, as long as the circuit court does not usurp the role of the parole board, it may consider matters beyond the filing period when such consideration serves the ends of justice.

198 W. Va. 299, 480 S.E.2d 508.

⁷On appeal, petitioner argues that the circuit court judge should be disqualified from presiding in this case because she served as an assistant prosecuting attorney at the time of his criminal trial. We do not address this issue because, as the State notes, petitioner failed to raise it before the circuit court judge. Syl. Pt. 2, *Sands v. Sec. Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958) ("This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."). Due to our remand of this case, we note that West Virginia Trial Court Rule 17.01 sets forth the proper procedure for seeking a judge's disqualification.

Justice Tim Armstead
Justice William R. Wooton
Justice C. Haley Bunn