

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

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

vs.) **No. 19-0108** (Cabell County 16-F-340)

**G. M.
Defendant Below, Petitioner**

FILED
March 23, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner G. M.,¹ by counsel Justin M. Collin, appeals his convictions on seven counts of sexual abuse by a parent, guardian, custodian, or person in a position of trust; seven counts of third-degree sexual assault; and seven counts of incest. Respondent State of West Virginia, by counsel Andrea Nease-Proper, filed a response in support of petitioner’s convictions. Petitioner filed a reply.

This 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. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

In August of 2016, the Cabell County Grand Jury charged petitioner in a sixty-three count indictment with twenty-one counts of third-degree sexual assault; twenty-one counts of sexual abuse by a parent, guardian, custodian, or person in position of trust to a child; and twenty-one counts of incest. Ultimately, the circuit court reduced the charges to twenty-one total counts. The alleged victim in each charge was petitioner’s biological daughter, D.T., who was under the age of sixteen.

¹ Consistent 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).

In June of 2014, following his parole on an unrelated first-degree murder conviction,² petitioner was in contact with D.T. and her mother. Following a visit with petitioner in November of 2015, D.T. disclosed to her mother that she had been sexually abused by petitioner. Thereafter, D.T.'s mother contacted Child Protective Services and the Huntington Police Department.

On September 1, 2016, petitioner was arraigned on the underlying charges and counsel was appointed for him. On September 21, 2016, a pretrial hearing was held before the circuit court, with petitioner present, wherein petitioner's counsel asked for a continuance of petitioner's trial to the next term of court based upon the "extensive investigation" necessary to defend petitioner on a more than sixty count indictment. Petitioner's counsel advised the court that "[w]e understand that it is going to take a lot of time to prepare this." The court specifically inquired of petitioner, "[h]e [petitioner's counsel] is telling me you [petitioner] are willing to go into the January Term of Court. Is that – are you willing to do that?[,]" to which petitioner responded, "yes, sir." Petitioner's counsel's request for a continuance was granted and a pre-trial hearing was scheduled for January 9, 2017.

During a January 9, 2017, hearing, at which petitioner was present, petitioner's counsel advised the court, "this case won't be ready for a while" as there were many issues still requiring investigation. At the request of petitioner's counsel, a pre-trial status hearing was set for March 10, 2017. Neither the State, nor petitioner himself, objected to the continuance. At the March 10, 2017, status hearing, where petitioner was present, petitioner's counsel again requested additional time for development of petitioner's defense and stated that he and opposing counsel, "still needed to meet [for a discovery conference]" and discuss issues in the case. The court advised both counsel, in the presence of petitioner, "you all need to do something on this." A pre-trial hearing was set for April 7, 2017. Neither the State, nor petitioner himself, objected to the continuance.

At the April 7, 2017, hearing, at which petitioner was present, petitioner's counsel "informed the court that a discovery conference had occurred" but "[p]etitioner's counsel was still trying to locate some witnesses." Petitioner's counsel asked the court to set "one more pre-trial." The next pre-trial hearing was set for May 5, 2017. Neither the State, nor petitioner himself, objected to the continuance. During the May 5, 2017, hearing, at which petitioner was present, petitioner's counsel advised that petitioner needed a "[m]otion date" for "legal arguments." A motions hearing was set for June 23, 2017. Neither the State, nor petitioner himself, objected to the continuance.

Due to "family matters" petitioner's counsel was not present at the June 23, 2017, motions hearing, and prior to the hearing had contacted the court in an effort to reschedule the hearing due to his unavailability. Petitioner was present at the June 23, 2017, hearing, along with an attorney from petitioner's counsel's office (to represent petitioner) and a representative of the State. Because of the unavailability of petitioner's counsel, the motions hearing was reset for July 28, 2017. Neither the State, nor petitioner himself, objected to the continuance.

² In an unrelated case, petitioner pled guilty to first-degree murder and was sentenced to life with mercy. After serving approximately fifteen years of his life sentence, petitioner was released on parole in early 2014.

At the July 28, 2017, hearing pre-trial motions were argued and the parties agreed to the disposition of many issues. The court then directly asked the parties, “[h]ow quickly do you want a trial?” The State responded that it had been advised by petitioner’s counsel that “he needed some time due to some other matters he has got,” and noted that petitioner was “already serving another sentence at this point.” Petitioner’s counsel concurred and trial was set for November 15, 2017. Petitioner, who was present at the hearing, did not object to the continuance.

Prior to the November 15, 2017, trial, petitioner’s parole associated with his first-degree murder conviction was revoked and petitioner was placed at St. Marys Correctional Center. Consequently, petitioner did not appear in person at the November 15, 2017, scheduled trial date. The State advised the circuit court that it “forgot” to arrange petitioner’s transport to court. During the hearing, which commenced at 10:19 a.m. and ended, four minutes later, at 10:23 a.m., petitioner’s counsel advised that he had not spoken to petitioner for approximately one month, given petitioner’s relocation to another jail facility. Thereafter, sua sponte, the circuit court continued petitioner’s case to January 3, 2018, for the purpose of a status hearing to set a trial date. Neither the State nor petitioner’s counsel objected to the continuance.

At the January 3, 2018, status hearing, petitioner appeared in person. Counsel advised the court that they were ready to set a trial date in this matter. The court set the trial for April 10, 2018, and noted that petitioner “is serving a sentence anyway. He is not going anywhere.” Petitioner made no statements regarding his absence from the November 15, 2017, hearing and made no objection to the continuance of his trial.

Petitioner, still incarcerated, did not appear in person at the April 10, 2018, hearing, which began at 9:29 a.m. and ended at 9:33 a.m. The State’s attorney explained to the court that the case was ready for trial but that petitioner’s counsel needed a continuance. Petitioner’s counsel concurred and the trial was continued to August 8, 2018. The State did not object to the continuance.

At the August 8, 2018, hearing, at which petitioner was present, the parties agreed to again continue the trial of the case to October 31, 2018. Specifically, the court stated “[i]t was set for trial today and I understand [petitioner] is serving another sentence and you all had agreed to set this case to the next [t]erm of [c]ourt.” Neither the State, nor petitioner himself or his counsel, objected to the continuance. Further, petitioner made no statements regarding his absence from the April 10, 2018, hearing.

On October 31, 2018, petitioner’s trial began. On November 5, 2018, the jury returned a guilty verdict against petitioner on all twenty-one counts. Petitioner filed post-trial motions for judgment of acquittal notwithstanding the verdict and a new trial. During a December 18, 2018, hearing, the court denied petitioner’s post-trial motions and he was sentenced to a combination of concurrent and consecutive sentences for a total sentence of seventy to one-hundred and forty years

imprisonment, and fifty years of supervised release upon the expiration of his term of imprisonment.³ At the sentencing hearing, petitioner addressed the court and stated as follows:

Your Honor, I just feel like I have had- I haven't been [given] due process . . . You know, this is an old case. I mean, it has been going on three years, three and a half years, whatever the case may be. When I first met Mr. Henderson I asked for a fast and speedy trial. You know. He kept telling me it is better just to put it off, put it off.

This statement was the first time petitioner voiced any complaint about “how long it took to get to trial” or about “how his attorneys handled the case.” It is from his convictions that petitioner now appeals. In his appellate brief, petitioner asserts two assignments of error. First, petitioner argues that his constitutional right to be present at critical stages of the criminal proceedings against him were violated, as he was not present at hearings in November of 2017 and April of 2018, where his trial was continued. Second, petitioner argues that the circuit court abused its discretion in continuing the trial of petitioner’s case without good cause.

We have held that “[t]he general right of a criminal defendant to be present during courtroom proceedings is addressed through the interpretation of the state constitution, a Court rule and statute. Consequently, our review of the issue . . . is plenary.” *State v. Sites*, 241 W. Va. 430, 443, 825 S.E.2d 758, 771 (2019). This Court has long recognized that “Section 14 of Article III of the West Virginia Constitution, as well as the Fifth and Sixth Amendments to the United States Constitution, establishes a criminal defendant’s right to be present at all critical stages of a trial.” *State v. Crabtree*, 198 W. Va. 620, 629, 482 S.E.2d 605, 614 (1996).

In syllabus point 6 of *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977), this Court acknowledged that “[t]he defendant has a right under Article III, Section 14 of the *West Virginia Constitution* to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless.” Here, petitioner argues that the hearings in the underlying case held in November of 2017 and April of 2018, were critical stages of his case at which he was not present. This Court has identified “critical stage[s] of a criminal proceeding” and ones “where the defendant’s right to a fair trial will be affected,” syl. pt. 2, in part, *State v. Tiller*, 168 W. Va. 522, 285 S.E.2d 371 (1981), or “where anything may be done which affects the accused[.]” Syl. Pt. 1, in part, *id.* Petitioner contends that he lost his right to a prompt trial when the circuit court granted continuances of his case in his absence and negated his ability “to assert his right to a prompt trial.”

We find no merit in petitioner’s argument. The record reflects that petitioner made no objection to the continuance of his trial during the numerous hearings at which he was present both

³ Petitioner was sentenced to ten to twenty years on each of the seven counts of sexual abuse by a parent or guardian, to run consecutively to each other; five to fifteen years on each of the seven counts of incest, to run consecutively to each other, but concurrently with the sexual abuse by a parent or guardian sentences; and one to five years on each of the seven counts of third-degree sexual assault, to run consecutively to each other and with the sentences for sexual abuse by a parent or guardian.

before and after the hearings in November of 2017 and April of 2018. Specifically, petitioner did not object to the continuance of his trial and made no demand for a speedy and/or prompt trial during the September 21, 2016; January 9, 2017; March 10, 2017; April 7, 2017; May 5, 2017; and July 28, 2017 hearings. After petitioner missed the November 15, 2017 hearing, he appeared for a January 3, 2018 hearing and, again, did not object to the continuance or assert any issue with delay, or demand a speedy or prompt trial. After missing the April 10, 2018 hearing, petitioner appeared at an August 18, 2018 hearing, where he again raised no objection when the trial of his case was again continued, at the request of petitioner's counsel, and did not express any problems with delay, or demand a speedy or prompt trial. In fact, petitioner's first complaint about the delay of his case did not come until his sentencing hearing in December of 2018.

Petitioner would have this Court believe that, despite the fact that he had never before, and did not after, make the demand for a speedy trial, he would have made such a demand at the missed hearings. At the eight other hearings, some before and some after the two missed hearings, petitioner voiced no objection to the continuances or delay, made no complaints regarding his counsel, expressed no frustration or dissatisfaction, and made no assertion of his right to a speedy trial. Accordingly, we find that, under the limited facts and circumstances of this case, including the brevity of the four minute hearings on November 15, 2017, and April 10, 2018, that any error that occurred was harmless.

In his second assignment of error, petitioner argues that the circuit court abused its discretion in continuing the trial of the underlying case without good cause shown. We have long held that

“[t]he granting of a continuance is a matter within the sound discretion of the trial court, though subject to review, and the refusal thereof is not ground for reversal unless it is made to appear that the court abused its discretion, and that its refusal has worked injury and prejudice to the rights of the party in whose behalf the motion was made.” Syllabus Point 1, *State v. Jones*, 84 W.Va. 85, 99 S.E. 271 (1919).

Syl. Pt. 1, *State v. Richardson*, 240 W. Va. 310, 811 S.E.2d 260 (2018).

Here, petitioner argues that the circuit court abused its discretion in finding good cause to continue the trial of petitioner's case during the November of 2017 and April of 2018 hearings at which petitioner was not present. Conversely, respondent argues, and we concur, that the circuit court did not abuse its discretion in granting continuances of petitioner's trial at the two hearings where petitioner was not present. Petitioner's counsel requested the continuances of trial citing the need to effectively defend petitioner and to prepare petitioner's case for trial – a case that once included more than sixty contested charges. Accordingly, we find no abuse of the circuit court's discretion and no error.

For the foregoing reasons, we affirm petitioner's convictions.

Affirmed.

ISSUED: March 23, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison