IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 21-0532
Case No. 17-F-147/19-F-184
Circuit Court of Marion County

ADONNE A. HORTON,

Petitioner.

PETITIONER'S REPLY

GARY A. COLLIAS
West Virginia State Bar #784
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
gary.a.collias@wv.gov

Counsel for Petitioner

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The State's Response brief addresses some of the issues raised in the Petitioner's brief and leaves others unaddressed. In this Reply the Petitioner will discuss each of these issues in turn.

A. The Court Erred in Applying the New Recidivist Statute to the Petitioner

In its response the State argues that it was not a violation of the Petitioner's rights under the *ex post facto* clauses of the United States and West Virginia Constitutions to apply the new version of the W.Va. Code § 61-11-18 recidivist statute since the new version was not to the detriment or disadvantage of the Petitioner. Respondent's Brief at 6-7. This argument is simply wrong. As pointed out in the Petitioner's brief the circuit court expressly referred to the "recent amendment to the West Virginia Code § 61-11-18(a), the recidivist statute, in so far as all three of these offenses are now recognized as qualifying offenses under the recidivist statute" during the sentencing hearing and later in the sentencing order. A.R. 506, 598. Pet. Br. at 7. Furthermore, the court stated at the sentencing and in the sentencing order that it was of the opinion that the convictions of the petitioner were not stale *because* the conduct underlying the offenses all occurred within a 20-year period. A.R. 506, 598. This was a reference to the 20 year "look back" period contained in the new version of the recidivist statute. Finally, the court cites subsection (d) as authority for imposing a life sentence. A.R. 506. Subsection (d) did not exist in the old version of the recidivist statute. All the above demonstrates the circuit court's reliance upon the new version of the statute in rejecting the Petitioner's staleness argument and in determining that the three convictions of the Petitioner were qualifying offenses was to the disadvantage and detriment of the Petitioner. Since it is undisputed that all three of the Petitioner's convictions and corresponding offense conduction took place before the new version of the recidivist statute become effective on June 5, 2020, the Petitioner's *ex post facto* rights under both the West Virginia and United States Constitutions were violated.

In response to the Petitioner's argument that the circuit courts reliance upon the new version of the recidivist statute violated his rights under the "savings clause" at W.Va. Code § 2-2-8, the State simply cites a case that in footnote 7 states that the amendments to the recidivist statute do not apply to cases in which the sentencing took place before the effective date of the § 61-11-18 amendments. Resp. Br. at 7. *State v. Ingram*, No. 19-0016, 2020 WL 6798906, at *3, n. 7 (W.Va. Nov. 19, 2020) (Memo. Dec.). In the present case the sentencing hearing took place on May 21, 2021, long after the new version of the statute became effective on June 5, 2020. Moreover, the Petitioner's lawyer expressly objected to the new version being used in the sentencing of the Petitioner. A.R. 495. Even if Petitioner's counsel had not objected the law is clear that when a defendant is entitled to elect pursuant § 2-2-8 the law under which he is to be sentenced that "...it must appear from the record that he has been fully advised of his right to elect and he must be given an opportunity to exercise that right by the court." *State ex rel. Arbogast v. Mohn,* syl. pt. 3, 164 W.Va. 6, 260 S.E.2d 820 (1979).

It is interesting to note that while the State quotes two cases with regard to the *ex post facto* issue and quotes one case regarding the "savings clause" issue, it never actually *argues* that the sentencing of the Petitioner based upon the new version of the law does not violate his rights. Resp. Br. at 6-7. The State does not argue this because it cannot. The law and the record of this case make it absolutely clear that the circuit court erroneously relied on the new version of the W.Va. Code § 61-11-18. As a fallback position the State argues that even if the circuit court erred in applying the June 5, 2020 amendments to the Petitioner, such error was harmless because the amendments did not work to the disadvantage of the Petitioner in violation of *ex post facto* principles. Resp. Br. at 7. For the reasons set forth above and in the Petitioner's brief such is not the case. This is particularly true with regard to the staleness issue. As set forth in detail in the Petitioner's brief at page 12-13, the Petitioner's first conviction was for conduct in 1998 when he was 22 years old and the Petitioner was 45 when in 2021 he was sentenced to life imprisonment by the court based on the belief that that 20 year "look back" period applied to him. This was more than 23 years later, although the offense conduct for all three crimes took

place in a 20 years period. It is impossible to know what sentence the circuit court might have imposed had it believed it was free from the 20 year "look back" period set forth in the new recidivist statute. The State did not even bother the argue that the violation of the Petitioner's rights under the "savings clause" was harmless. For all the same reasons as the *ex post facto* violation, it was not harmless.

B. The Court Erred in Relying on the Language of the Recidivist Statute in Rejecting the Claim of Constitutional Disproportionally

The circuit court at the sentencing hearing and in the sentencing order erred when it justified the life sentence imposed on the Petitioner as not unconstitutionally disproportionate based on the language of the recidivist statute itself. Pet. Br. at 9-11. A.R. 506, 598. In its Response the State does not address this argument. The State does mention the Petitioner is making this argument but does not say anything further. Resp. Br. at 6, 10. Once again the State cannot argue that the circuit court did not err when it relied on the wording of the statute to determine whether a sentence imposed pursuant to that statute was constitutionally disproportionate. Whether the court was relying on the old or the new statute the answer to the question of whether a sentence is constitutionally disproportionate cannot be found in the statute itself. Constitutional provisions trump statutes. The circuit court in sentencing the Petitioner repeatedly referred to the language of the statute itself to justify the life sentence imposed. A.R. 506, 598. This argument and the references to the record that support it are set out in detail in the Petitioner's brief and need out be repeated here. See Pet. Br. 9-11. The fact that the circuit court relied on the statute itself indicates that the court completely misunderstood the constitutional argument of the Petitioner, and it is impossible to know how the court might have ruled and sentenced the Petitioner had the court conducted the proper analysis.

C. The Sentence of the Petitioner Shocks the Conscience

The Petitioner argues in his brief that his sentence is constitutionally disproportionate since it shocks the conscience. The State disagrees but gives no reasons in its brief. Resp. Br. 12-13. After citing numerous cases providing the legal standard, about which there is no disagreement between the parties, the State describes the circumstances of the Petitioner's final triggering offense, reckless fleeing in a vehicle. Resp. Br. 12. It is undisputed that the actions of the Petitioner were reckless but no one was injured and there was no property damage other than slight damage to the Petitioner's car when it struck a curb. A.R. 231-41. The Petitioner was convicted of reckless fleeing in a vehicle in violation of W.Va. Code § 61-5-17(f). This is punishable by one to five years imprisonment. The Petitioner's prior convictions were a 1999 conviction for malicious assault in violation of W.Va. Code § 61-2-9 for assaulting his girlfriend in 1998, punishable by two to ten years imprisonment, and a 2003 conviction for wanton endangerment in violation of W.Va. Code § 61-7-12 for pointing a gun at a man in 2002 that was punishable by one to five years imprisonment. The conduct involved in these convictions extends from 1998 to 2017. A period of 19 years. When the Petitioner was sentenced to life in May of 2021 at age 45 it had been more than 23 years since the offense conduct underlying his first offense in 1998 when he was 22 years of age. See Pet. Br. at 11-13 for citations to the record all of these dates and convictions.

The Petitioner's argument is simple. A sentence of life in prison with the *chance* of parole after 15 years is disproportionality severe when the triggering offense of reckless fleeing is only punishable by one to five years imprisonment and only involved reckless behavior. This is particularly true when the two other qualifying offenses are so stale and remote in time. In 1998 the Petitioner assaulted his girlfriend, in 2002 he pointed a gun at a man, and in 2017 he recklessly fled the police. Furthermore, the seriousness of the Petitioner's crimes seems to be declining. The first offense, malicious assault, involved actual violence. The second offense, wanton endangerment, involved, at most, a threat. The Petitioner's third and triggering offense only involved a risk that harm might come unintentionally to a person. This Court has ruled that

"initial emphasis" should be given to the final triggering offense. *State v. Costello,* syl. pt. 6, 245 W.Va. 19, 857 S.E.2d 51 (2021); *State v. Hoyle,* syl. pt. 11, 242 W.Va. 599, 836 S.E.2d 817 (2019), In response to this argument the State only points out that the actions of the Petitioner in fleeing the police were reckless, as they were, and that the Petitioner has two prior felonies. Resp. Br. at 12-13. The State describes the prior felonies as "violent," although one, the wanton endangerment conviction, involved only pointing a gun at a man. A.R. 574.

It is for this Court to decide if the life sentence of the Petitioner shocks the conscience based upon his record of convictions and conduct spread over the time involved. It is the Petitioner's position that it does shock the conscience. This is the same sentence the Petitioner could have received for first degree murder. W.Va. Code § 62-3-15. No reasonable member of the public would accept a life sentence to be appropriate punishment for the crimes of the Petitioner. The sentence of life imprisonment would certainty shock the conscience of the jurors that convicted the Petitioner of reckless fleeing.

D. The Petitioner's Convictions Should Not Qualify under the Recidivist Statute

The State argues in its response that all three of Petitioner's prior convictions were qualifying offenses under § 61-11-18. Resp. Br. at 7-8. The State sets forth the current case law that provides that for purposes of a life sentence under the recidivist statute two of the three felony convictions considered must have involved either actual violence, a threat of violence, or substantial impact upon the victim such that harm results. *State v. Hoyle*, syl. pt. 12, 242 W.Va. 599, 836 S.E.2d 817 (2019). The Petitioner does not disagree with this and cites the same case in his brief. Pet. Br. at 14.

The State does not address the actual argument of the Petitioner on this issue. The Petitioner requested that this Court reconsider this current "two out of three" standard, particularly in light of the newly enacted version of the recidivist statute. Pet. Br at 14. The Petitioner argues in his brief and this reply that the current standard as set forth in the *Hoyle* case is vague, subjective, and not based on firm principles. Pet. Br. at 14-17. In support of this

argument the Petitioner cited the United States Supreme Court case of *Johnson v. U.S.*, 576 U.S. 591, 596-99 (2015) for the proposition that the language, "or otherwise involves conduct that presents a serious potential risk of physical injury to another" is so vague in defining a "violent felony" that it violates a criminal defendant's right to due process. *Id.* The State in its brief does not respond to or address this argument. The entirety of this argument is set forth in the Petitioner's brief and need not be repeated here. Pet. Br. at 14-17. The Petitioner does, however, respectfully request that this court adopt a more objective and principled standard for all the reasons provided in his opening brief.

CONCLUSION

The Petitioner received a life sentence in 2021 with eligibility for parole in 15 years. His crimes were assault in 1998, wanton endangerment in 2002, and reckless fleeing in 2017. In all the circumstances of this case this is an outrageous sentence and shocks the conscience. The Petitioner is not asserting that given his criminal history an enhanced sentence was not appropriate, but rather that a sentence under which the Petitioner is not even *eligible* for parole for 15 years is excessive. A defendant is normally eligible for parole after serving one fourth of a determinate sentence. W.Va. Code § 62-12-13(b)(1)(A). Had the court imposed a 50 year sentence the Petitioner would have been eligible for parole in twelve and a half years. Had the sentence been 40 years he could have been paroled in ten years. A 30 year sentence would have made him parole eligible in seven and a half years. The point is that the circuit court could have sentenced the Petitioner to a much greater sentence than the normal one to five years for reckless fleeing and still not imposed the clearly excessive sentence of life with a chance of parole after 15 long years. This sentence shocks the conscience.

The current standard for determining constitutional disproportionally which provides that two of the three qualifying offenses be for actual or threatened violence is vague, subjective and unworkable. The circuit court erred in relying on the new version of the statute, particularly in relation to staleness or remoteness in time, and further erred in relying on the language itself of

either the old or the new statute in deciding whether a life sentence was disproportionate in this case.

For all the reasons set forth above and in the Petitioner's opening brief this case should be remanded to the circuit court with direction to resentence the Petitioner and reconsider the issue of constitutional disproportionally in light of this Court's decision.

Respectfully Submitted,

Adonne A. Horton,

By Counsel,

GARY A. COLLIAS
West Virginia State Bar #784
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
gary.a.collias@wv.gov

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Gary A. Collias, counsel for Petitioner, Adonne Horton, do hereby certify that I have caused to be served upon counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Reply"* to the following:

Mary Beth Niday
Assistant Attorney General
Appellate Division
Office of the Attorney General
1900 Kanawha Boulevard East
State Capitol, Building 6, Suite 406
Charleston, WV 25305

Counsel for Respondent

via hand-delivery on the 10th day of January, 2021.

GARY A. COLLIAS
West Virginia State Bar #784
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
gary.a.collias@wv.gov

Counsel for Petitioner