

Appendix A

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

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

vs.) No. 18-0575 (Jefferson County 18-F-24)

**Olin Matice Gaskins,
Defendant Below, Petitioner**

**FILED
June 25, 2020**

EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Olin Matice Gaskins, by counsel Matthew T. Yanni, appeals the May 30, 2018, order of the Circuit Court of Jefferson County sentencing him to a recidivist life term of incarceration. The State of West Virginia, by counsel Shannon Frederick Kiser, filed a response in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in sentencing him to a recidivist life sentence as the sentence is disproportionate to the crime of possession of a firearm by a prohibited person.

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. 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 circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In January of 2018, petitioner was indicted on one count of possession of a firearm by a prohibited person. Trial began in March of 2018. The State of West Virginia called Patrolman Charles Ellis of the Ranson Police Department who testified that he initially stopped a vehicle due to an expired motor vehicle inspection sticker and found petitioner as a passenger in that vehicle. During the traffic stop, the driver consented to a search of the vehicle. Patrolman Ellis testified that petitioner exited the vehicle and began "swinging his arms around" in a manner that Patrolman Ellis described as "very nervous." Petitioner consented to a search of his person, but Patrolman Ellis discovered nothing illegal. As Patrolman Ellis began to search the vehicle, he observed petitioner move toward the passenger side of the vehicle and request to retrieve his backpack from the backseat. Patrolman Ellis testified that, for his safety, he informed petitioner that he could not retrieve the backpack. Patrolman Ellis began questioning petitioner about the backpack and informed him that if he had "a Suboxone strip or a little bit of marijuana" then he would issue petitioner a citation and allow him to "go on [his] way." Petitioner then admitted that the backpack contained a Suboxone strip. Patrolman Ellis retrieved the backpack and found "a few small plastic

baggies labeled 420,” “a bowl commonly used for the smoking of marijuana,” and “a Smith [and] Wesson handgun wrapped in a waistband holster” along with .380 caliber ammunition. Patrolman Ellis testified that an assisting officer placed petitioner in handcuffs for their safety while Patrolman Ellis acquired petitioner’s criminal history. Patrolman Ellis later arrested petitioner for being a prohibited person in possession of a firearm after learning of his prior felony conviction in 1997 for delivery of a controlled substance. The State also presented evidence that the handgun was operative and “capable of firing a loaded cartridge.” Ultimately, the jury convicted petitioner of one felony count of possession of a firearm by a prohibited person.

Later in March of 2018, the State filed a recidivist information alleging that petitioner was convicted of two prior felony counts of delivery of a controlled substance, in 1997 and 2002. Further, the State alleged that petitioner’s second delivery of a controlled substance was within one-thousand feet of an elementary school. The State requested that the circuit court sentence petitioner to life imprisonment pursuant to West Virginia Code § 61-11-18(c).¹

The circuit court arraigned petitioner on the recidivist information in April of 2018. Petitioner waived his right to a jury trial and admitted to the allegations in the information. The circuit court ordered the parties to provide written argument as to whether petitioner’s prior convictions qualified as crimes of violence for the purposes of determining whether the imposition of a recidivist life sentence would violate constitutional proportionality principles.

In May of 2018, the circuit court held petitioner’s sentencing hearing, heard argument related to sentencing, and heard petitioner’s allocution. In accordance with this Court’s holding in *Redman v. Ballard*, No. 14-0894, 2014 WL 5125826 (W. Va. Aug. 31, 2015)(memorandum decision), the circuit court found that petitioner’s conviction of possession of a firearm by a prohibited person was a crime of “anticipated violence” and a valid and sufficient conviction to support a recidivist life sentence. The circuit court further found that petitioner’s prior convictions for delivery of cocaine were crimes of violence, as illustrated by this Court’s holding in *State ex rel. Daye v. McBride*, 222 W. Va. 17, 658 S.E.2d 547 (2007) and footnote 14 of *State v. Harris*, 226 W. Va. 471, 702 S.E.2d 603 (2010). The circuit court considered this Court’s recent decision that driving under the influence was a crime of violence for recidivist life sentence purposes because it “inherently creates a grave risk of injury to person and property and raises very significant concerns for public safety.” *State v. Kilmer*, 240 W. Va. 185, 189, 808 S.E.2d 867, 871 (2017) (quoting *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 583 S.E.2d 800 (2002)). The circuit court reasoned that “the threat of violence was always present during drug deals and during times when convicted felons chose to arm themselves in direct violation of the law.” Therefore, similar to driving under the influence, the court found that felons in possession of firearms and delivery of controlled substances near schools also created a risk of injury to persons and property and raised very significant concerns for public safety. By its May 30, 2018, order, the circuit court sentenced petitioner to a life term of incarceration with the possibility of parole after fifteen years pursuant to West Virginia Code § 61-11-18(c). Petitioner now appeals this order.

¹West Virginia Code § 61-11-18(c) provides that “[w]hen it is determined . . . that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the state correctional facility for life.”

We have previously held that

“‘[t]he Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.’ Syllabus point 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997).” Syllabus Point 1, *State v. Booth*, 224 W.Va. 307, 685 S.E.2d 701 (2009).

Syl. Pt. 1, *State v. Kilmer*, 240 W. Va. 185, 808 S.E.2d 867 (2017). Petitioner asserts that his recidivist life sentence violates the proportionality principle of the West Virginia Constitution:

“Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: ‘Penalties shall be proportioned to the character and degree of the offence.’” Syllabus Point 8, *State v. Vance*, [164 W. Va. 216], 262 S.E.2d 423 (1980).

Syl. Pt. 3, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). Further, “[w]hile our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.” *Id.* at 523, 276 S.E.2d at 207, syl. pt. 4.

In determining the constitutionality of a recidivist life sentence, we have set forth the following framework:

“The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute.” Syllabus Point 7, *State v. Beck*, 167 W.Va. 830, 831, 286 S.E.2d 234 (1981).

Kilmer, 240 W. Va. at 186, 808 S.E.2d at 868, syl. pt. 3. We most recently held that

[f]or purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c), two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. If this threshold is not met, a life recidivist conviction is an unconstitutionally disproportionate punishment under Article III, Section 5 of the West Virginia Constitution.

Syl. Pt. 12, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019).

Petitioner challenges the circuit court's finding that the "triggering" crime, possession of a firearm by a prohibited person, was a crime of "anticipated violence" and cites to this Court's holding in *State v. Wilson*, No. 11-0432, 2012 WL 3031065 (W. Va. March 12, 2012)(memorandum decision) in support. In *Wilson*, a defendant was convicted of conspiracy in relation to a drug charge and had two prior felonies, which included grand larceny and possession of a firearm by a prohibited person. *Id.* at *2. Specifically, we noted that the defendant's possession of a firearm charge "did not allege the possession of the firearm for any nefarious purpose." *Id.* On appeal, the State conceded that none of the three felonies involved any actual or threatened violence, and we reversed and remanded for resentencing. *Id.* Although petitioner acknowledges this Court's holding in *Redman* that a conviction for possession of a firearm by a prohibited person does qualify as a crime of actual or threatened violence when determining whether a recidivist life sentence is proportionate, he argues that his triggering crime is possession of a firearm by a prohibited person, rather than one of his predicate felonies as in *Redman*. However, we find that this distinction yields the same result.

Petitioner's recidivist life sentence is proportionate because his triggering crime involved a threat of violence and his prior convictions involved substantial impact upon their victims such that harm results. First, giving emphasis to the "triggering" crime, the facts surrounding petitioner's possession of a firearm by a prohibited person implies the firearm was to be used for a nefarious purpose, which is contrary to the factual findings of *Wilson*. Petitioner's firearm was found in a backpack and wrapped in a "waistband holster," which indicates the firearm could be easily concealed and carried on petitioner's person. Likewise, the firearm was found along with drug paraphernalia, plastic bags, and ammunition, which are all common to the drug trade. Further, as we held in *Redman*, possession of a firearm by a prohibited person is certainly a crime that involves a threat of violence. Second, petitioner's prior convictions of delivery of a controlled substance, specifically cocaine, has a substantial impact on the victim of the crime. *See State v. Norwood*, 242 W. Va. 149, 832 S.E.2d 75 (2019) (holding that, due to heroin's often fatal nature to its users, heroin trafficking was a crime of violence for a recidivist life sentence proportionality analysis). Accordingly, we find that petitioner's triggering crime and his prior convictions are sufficient for the application of the recidivist life sentence pursuant to West Virginia Code § 61-11-18(c).

For the foregoing reasons, the circuit court's May 30, 2018, order sentencing petitioner to a recidivist life sentence is hereby affirmed.

Affirmed.

ISSUED: June 25, 2020

CONCURRED IN BY:

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

Appendix B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 9th day of October, 2020, the following order was made and entered:

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 18-0575

Olin Matice Gaskins,
Defendant Below, Petitioner

ORDER

The Court, having maturely considered the petition for rehearing filed by the petitioner, Olin Matice Gaskins, by Matthew T. Yanni, his attorney, is of the opinion to and does hereby refuse said petition for rehearing. Justice Hutchison would grant the petition.

A True Copy

Attest: /s/ Edythe Nash Gaiser
Clerk of Court



Appendix C

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Enrolled

Senate Bill 765

BY SENATORS WELD AND WOELFEL

[Passed March 7, 2020; in effect 90 days from passage]

2020 MAR 25 2 46 09
ENROLLED
CLERK OF SENATE

1 AN ACT to amend and reenact §61-11-18 and §61-11-19 of the Code of West Virginia, 1931, as
2 amended, all relating to provisions of the Habitual Offender statute; modifying provisions
3 addressing eligibility of certain crimes for consideration; listing offenses which qualify to
4 enhance a sentence; maintaining penalty for persons having two or more prior qualifying
5 offenses; treating crimes arising from the same transaction or series of transactions as
6 one offense; requiring the most recent prior conviction to be less than 20 years old to be
7 counted; and requiring plea agreements to address applicability of habitual offender
8 provisions.

Be it enacted by the Legislature of West Virginia:

ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.

§61-11-18. Punishment for second or third offense of felony.

1 (a) For purposes of this section, "qualifying offense" means any offenses or an attempt or
2 conspiracy to commit any of the offenses in the following provisions of this code:

3 (1) §60A-4-401(i) and §60A-4-401(ii);

4 (2) §60A-4-406;

5 (3) §60A-4-409(b)(1), §60A-4-409(2), and §60A-4-409(3);

6 (4) §60A-4-411;

7 (5) §60A-4-414;

8 (6) §60A-4-415;

9 (7) §60A-4-416(a);

10 (8) §61-2-1;

11 (9) §61-2-4;

12 (10) §61-2-7;

13 (11) §61-2-9(a);

14 (12) §61-2-9a(d) and §61-2-9a(e);

- 15 (13) §61-2-9b;
- 16 (14) §61-2-9d;
- 17 (15) §61-2-10;
- 18 (16) §61-2-10b(b) and §61-2-10b(c);
- 19 (17) Felony provisions of §61-2-10b(d);
- 20 (18) §61-2-12;
- 21 (19) Felony provisions of §61-2-13;
- 22 (20) §61-2-14;
- 23 (21) §61-2-14a(a) and §61-2-14a(d);
- 24 (22) §61-2-14c;
- 25 (23) §61-2-14d(a) and §61-2-14d(b);
- 26 (24) §61-2-14f;
- 27 (25) §61-2-14h(a), §61-2-14h(b), and §61-2-14h(c);
- 28 (26) §61-2-16a(a) and §61-2-16a(b);
- 29 (27) Felony provisions of §61-2-16a(c);
- 30 (28) §61-2-28(d);
- 31 (29) §61-2-29(d) and §61-2-29(e);
- 32 (30) §61-2-29a;
- 33 (31) §61-3-1;
- 34 (32) §61-3-2;
- 35 (33) §61-3-3;
- 36 (34) §61-3-4;
- 37 (35) §61-3-5;
- 38 (36) §61-3-6;
- 39 (37) §61-3-7;
- 40 (38) §61-3-11;

- 41 (39) §61-3-13(a);
- 42 (40) §61-3-27;
- 43 (41) §61-3C-14b;
- 44 (42) §61-3E-5;
- 45 (43) §61-5-17(b), §61-5-17(f), §61-5-17(h), and §61-5-17(i);
- 46 (44) §61-5-27;
- 47 (45) §61-6-24;
- 48 (46) Felony provisions of §61-7-7;
- 49 (47) §61-7-12;
- 50 (48) §61-7-15;
- 51 (49) §61-7-15a;
- 52 (50) §61-8-12;
- 53 (51) §61-8-19(b);
- 54 (52) §61-8B-3;
- 55 (53) §61-8B-4;
- 56 (54) §61-8B-5;
- 57 (55) §61-8B-7;
- 58 (56) §61-8B-10;
- 59 (57) §61-8C-2;
- 60 (58) §61-8C-3;
- 61 (59) §61-8C-3a;
- 62 (60) §61-8D-2;
- 63 (61) §61-8D-2a;
- 64 (62) §61-8D-3;
- 65 (63) §61-8D-3a;
- 66 (64) §61-8D-4;

(65) §61-8D-4a;

(66) §61-8D-5;

(67) §61-8D-6;

(68) §61-10-31;

(69) §61-11-8;

(70) §61-11-8a;

(71) §61-14-2; and

(72) §17C-5-2(b), driving under the influence causing death.

(b) Except as provided by subsection (c) of this section, when any person is convicted of a qualifying offense and is subject to confinement in a state correctional facility therefor, and it is determined, as provided in §61-11-19 of this code, that such person had been before convicted in the United States of a crime punishable by confinement in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, the minimum term shall be twice the term of years otherwise provided for under such sentence.

(c) Notwithstanding any provision of this code to the contrary, when any person is convicted of first degree murder or second degree murder or a violation of §61-8B-3 of this code and it is determined, as provided in §61-11-19 of this code, that such person had been before convicted in this state of first degree murder, second degree murder, or a violation of section three, §61-8B-3 of this code or has been so convicted under any law of the United States or any other state for an offense which has the same elements as any offense described in this subsection, such person shall be punished by confinement in a state correctional facility for life and is not eligible for parole.

(d) When it is determined, as provided in §61-11-19 of this code, that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a

93 penitentiary which has the same elements as a qualifying offense, the person shall be sentenced
 94 to imprisonment in a state correctional facility for life: *Provided*, That prior convictions arising from
 95 the same transaction or series of transactions shall be considered a single offense for purposes
 96 of this section: *Provided, however*, That an offense which would otherwise constitute a qualifying
 97 offense for purposes of this subsection and subsection (b) of this section shall not be considered
 98 if more than 20 years have elapsed between that offense and the conduct underlying the current
 99 charge.

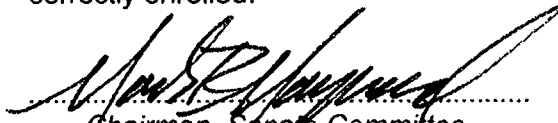
§61-11-19. Procedure in trial of persons for second or third offense.

1 A prosecuting attorney, when he or she has knowledge of a former sentence or sentences
 2 to the penitentiary of any person convicted of an offense punishable by confinement in the
 3 penitentiary, may give information thereof to the court immediately upon conviction and before
 4 sentence. Said court shall, before expiration of the next term at which such person was convicted,
 5 cause such person or prisoner to be brought before it, and upon an information filed by the
 6 prosecuting attorney, setting forth the records of conviction and sentence, or convictions and
 7 sentences, as the case may be, and alleging the identity of the prisoner with the person named
 8 in each, shall require the prisoner to say whether he or she is the same person or not. If he or she
 9 says he or she is not, or remains silent, his or her plea, or the fact of his or her silence, shall be
 10 entered of record, and a jury shall be impaneled to inquire whether the prisoner is the same person
 11 mentioned in the several records. If the jury finds that he or she is not the same person, he or she
 12 shall be sentenced upon the charge of which he or she was convicted as provided by law; but if
 13 they find that he or she is the same, or after being duly cautioned if he or she acknowledged in
 14 open court that he or she is the same person, the court shall sentence him or her to such further
 15 confinement as is prescribed by §61-11-18 of this code on a second or third conviction as the
 16 case may be: *Provided*, That where the person is convicted pursuant to a plea agreement, the
 17 agreement shall address whether or not the provisions of this section and §61-11-18 of this code
 18 are to be invoked.

19 The clerk of such court shall transmit a copy of said information to the Commissioner of
20 the Division of Corrections and Rehabilitation, together with the other papers required by the
21 provisions of §62-8-10 of this code.

22 Nothing contained herein shall be construed as repealing the provisions of §62-8-4 of this
23 code, but no proceeding shall be instituted by the warden, as provided therein, if the trial court
24 has determined the fact of former conviction or convictions as provided herein.


The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


Chairman, Senate Committee

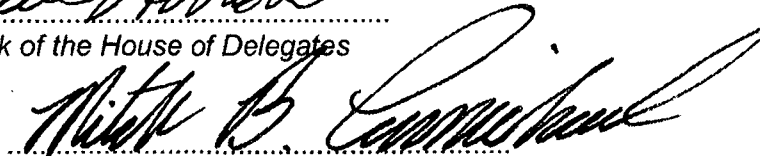

Chairman, House Committee

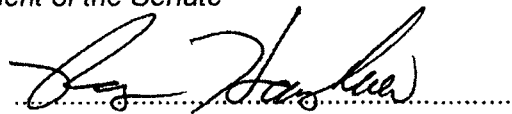
Originated in the Senate.

In effect 90 days from passage.

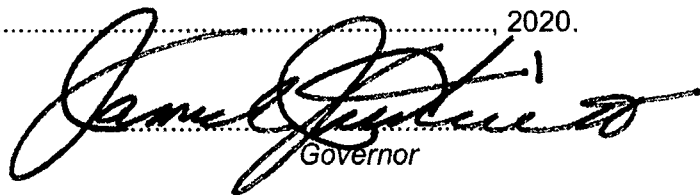

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker of the House of Delegates

The within is approved this the 25th
Day of March, 2020.


Governor

FILED
2020 MAR 25 10 09
CLERK OF THE HOUSE OF DELEGATES

PRESENTED TO THE COVERNDP

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Time 9:50am