UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2461

September Term, 2013

VINCENT WHALEY

v.

STATE OF MARYLAND

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: July 7, 2015

On July 20, 2007 and August 8, 2007, Vincent Whaley, appellant, sold small amounts of cocaine to an undercover police officer. The State filed separate indictments for each transaction, and on June 15, 2009, appellant appeared in the Circuit Court for Dorchester County and entered a guilty plea to two counts of possession of a controlled dangerous substance with intent to distribute. Prior to appellant pleading guilty, the parties entered into a plea agreement, which stated that appellant would provide confidential services to law enforcement in exchange for his charges being dismissed. At the time of the plea, the State informed appellant that if he were unable to meet the terms of the agreement, the State would seek an enhanced sentence because he qualified as a subsequent offender under Maryland Code (2002), Criminal Law Article ("CL"), § 5-905. At his sentencing hearing on January 11, 2010, appellant attempted to withdraw his guilty plea, alleging that his instructions from law enforcement had been deficient and that he had made a good faith effort to fulfill his obligations under the plea agreement. The court declined to permit appellant to withdraw his plea, and he was sentenced to 40 years' incarceration with all but 20 years suspended under case number K-08-13187, and sentenced to a consecutive 40 year term of imprisonment with all but 20 years suspended under case number K-08-13188.

In this appeal, appellant challenges the circuit court's denial of his motion to withdraw his guilty plea and the legality of his enhanced sentencing.

QUESTIONS PRESENTED

Appellant presented two questions for our review, which are as follows:

> 1. Did the trial court abuse its discretion when it denied appellant's motion to withdraw his guilty pleas?

2. Did the trial court err in sentencing appellant under Md. Crim. Law Art. § 5-905 to two terms of 40 years' incarceration?

Because we conclude that it was not clear error for the circuit court to find that justice would not be served by permitting appellant to withdraw his guilty plea, we will affirm both the circuit court's denial of appellant's motion to withdraw his guilty plea and the enhanced sentencing pursuant to CL § 5-905.

BACKGROUND

On June 15, 2009, appellant appeared in the Circuit Court for Dorchester County in connection with two charges that he possessed a controlled dangerous substance with intent to distribute. Appellant waived his right to a trial by jury and entered a plea of guilty to the charges. Appellant admitted that on July 20, 2007, he possessed cocaine in sufficient quantity to indicate an intent to distribute, and also admitted that on August 8, 2007, he again possessed cocaine in sufficient quantity to indicate an intent to distribute; both pleas were accepted. According to the agreement entered into in connection with the plea, the two charges would be dismissed if appellant cooperated as a confidential informant in arrests which led to between two and four felony convictions. The prosecutor indicated to the court that, if appellant fulfilled his agreement to cooperate with the Narcotics Task Force, there would be a subsequent hearing at which appellant would move to have his guilty pleas withdrawn and the charges vacated.

On January 11, 2010, the court held a hearing on appellant's motion to withdraw the guilty plea, and also on sentencing. Trooper Kevin Marshall testified to the terms of the agreement that had been entered into with the State's Attorney's Office and the Maryland

State Police in February 2009 by which appellant would work for Marshall and "work off his charges" as a confidential informant. Marshall explained that appellant was to engage in at least four controlled purchases of narcotics under his supervision in Dorchester County and would get credit for these acts if the arrests resulted in felony convictions. Marshall testified that he "explained to Mr. Whaley what needs to be done and how we have to do it." Marshall testified that he told appellant that it was his job to keep in contact with him, that his phone was on "24/7." Appellant agreed to these terms and was released on bail to work with Marshall.

Marshall then testified that appellant's communications with him were "hit and miss," and that appellant had "phone issues." Marshall acknowledged that appellant was present at all meetings Marshall set up, and that appellant never told him he was not interested in participating in controlled purchases. But Marshall also stated that every time he wanted to make a controlled buy with appellant, some issue, such as work obligations or transportation problems, would come up. Marshall asserted that, although he could not recall the dates, the attempts Marshall made to effect these controlled buys all failed. During the almost one-year-period of the cooperation agreement, appellant made only a few attempts to engage in activities with Trooper Marshall. On one particular occasion in August 2009, appellant offered up a wanted fugitive for credit against his cooperation requirements. Trooper Marshall set up a plan for appellant to bring the fugitive into Maryland for apprehension, but that never occurred.

Appellant also failed to appear in court for a sentencing hearing scheduled for August 25, 2009. The court issued a bench warrant, which was executed on December 23, 2009.

On January 11, 2010, the court again held a sentencing hearing. At the hearing, appellant moved to withdraw his prior guilty pleas. The circuit court considered the testimony of Marshall, appellant, and appellant's wife, and the court found that appellant had not made good faith effort to adhere to the cooperation agreement. For eleven months, appellant had failed to keep consistent contact with Trooper Marshall and failed to participate as a confidential informant as agreed.

The court was not persuaded that the interests of justice would be served by permitting appellant to withdraw his guilty pleas. The court commented that one could easily conclude that, "for lack of a better term, [appellant] was jerking around the authorities." The court opined: "I think he was conning the authorities. . . ." The court summarized its view of appellant's conduct:

> [H]e elected to cut a deal, and then he didn't fulfill his end of the deal. That does not serve the interest of justice to allow him now to withdraw a plea[;] that frustrates justice. It frustrates the operation of this court[;] it frustrates the interest we all have in seeing that justice is not delayed.

Consequently, the court found no good cause to grant the motion to withdraw the plea. The court proceeded to sentence appellant to 40 years' incarceration with 20 years suspended in K-08-13187, and to 40 years' incarceration with 20 years suspended in K-08-13188, to be served consecutively. This timely appeal followed.

STANDARD OF REVIEW

Maryland Rule 4-242(h) gives a court the authority to "permit a defendant to withdraw a plea of guilty" at any time before sentencing "when the withdrawal serves the interest of justice." In addition to hearing argument from the parties, the court may, in its discretion, take evidence with respect to the detriment to the State and the victim, if withdrawal of the guilty plea would be permitted, and the detriment to the appellant if withdrawal of the guilty plea would be denied. *Dawson v. State*, 172 Md. App. 633, 645 (2007). The grant or denial of a motion to withdraw a guilty plea lies within the sound discretion of a trial judge, and that decision will not be overturned unless a clear abuse of discretion is shown. *Harris v. State*, 299 Md. 511, 515 (1984) (citing *Paracorolle v. State*, 239 Md. 416, 420 (1965)).

Because appellant's challenge to the legality of his sentence under CL § 5-905 concerns application of the law, we apply the standard of *de novo* review to determine whether the circuit court's conclusions of law are legally correct with respect to appellant's enhanced sentencing as a subsequent offender. Maryland Rule 8-131(c); *State v. Neger*, 427 Md. 582, 595 (2012).

DISCUSSION

I.

Appellant contends that the circuit court abused its discretion when it denied his motion for withdrawal of his guilty plea. More specifically, appellant argues that the court erroneously concluded both that appellant knew what was expected of him in the plea agreement and that his reasons for failing to participate in the controlled buys were not

"legitimate." But the record includes evidence that was sufficient for the circuit court to find that the interest of justice would not be served by allowing appellant to withdraw his guilty plea in the instant case.

To be valid, a plea of guilty must be made voluntarily and intelligently, with knowledge of the direct consequences of the plea. Rule 4-242(c). We are satisfied that appellant knowingly and intelligently entered into the plea agreement on June 15, 2009. The record indicates that the judge, prosecutor, and defense counsel thoroughly informed appellant that, in the event that he did not cooperate with law enforcement under the terms of his agreement, the State would be seeking a sentence of up to eighty years as permitted under the subsequent offender sentencing guidelines. Before finally accepting appellant's plea, the judge again asked him if he understood everything that had been explained to him, including the maximum penalties, to which appellant answered in the affirmative.

Trooper Marshall testified at the hearing on the motion to withdraw that he explained to appellant the expectations and terms of the plea agreement in great detail, including a specific communication plan and how the controlled buys would occur. Marshall further testified that appellant would make excuses for not wanting to participate in the controlled buys or would simply ask for money to do his own uncontrolled buys. The circuit court found appellant's excuses for failing to participate — he had to work late, he had child care issues, or phone problems — unpersuasive. When considering that appellant's plea agreement would have allowed appellant to avoid a number of serious charges and a lengthy prison sentence, the circuit court found that none of the excuses that appellant gave were

legitimate barriers to his participation in satisfaction of his commitment under the agreement. As the court explained:

> Mr. Whaley had the free choice to stand trial and he elected to cut a deal, and then he didn't fulfill his end of the deal . . . [He] had competent counsel throughout, understood what he was getting into, understood what it was that he plead guilty to, and understood the potential sentence and apparently understood how perhaps he could help himself and he just chose not to do it. And that is not a good cause for withdrawing the plea. . . . That does not serve the interest of justice . . . .

Because evidence supported the circuit court's findings, there was no abuse of discretion in denying appellant's motion to withdraw his guilty plea.

II.

Appellant next takes issue with his sentences because he received an enhanced sentence of 40 years' incarceration in each of his cases that were pending before the circuit court. The language of CL § 5-905 provides in relevant part:

> (a) A person convicted of a subsequent crime under this title is subject to:
>
> (1) A term of imprisonment twice that otherwise authorized;
> (2) Twice the fine otherwise authorized; or
> (3) Both.
>
> (b) For purposes of this section, a crime is considered a subsequent crime, if, before the conviction for the crime, the offender has ever been convicted of a crime under this title or under any law of the United States or of this or another state relating to other controlled dangerous substances.

Appellant's prior qualifying convictions for enhanced penalties under CL § 5-905 were for unlawful delivery of a non-controlled substance represented to be a controlled substance in 1994, possession of marijuana in 1999, and possession of paraphernalia in 2004

and 2009. Based on those prior convictions, the plain language of CL § 5-905(a) permitted the circuit court to impose the sentences that it did; that is, with respect to the cocaine possession on July 20, 2007, and August 8, 2007, appellant was a "person convicted of a subsequent crime." Therefore, the imposition of a term of imprisonment twice that otherwise authorized was proper. There is nothing in the plain language of the statutory provision that somehow limits the court's sentencing power just because two separate cases were presented within the same court proceeding. Appellant cites no cases in support of this argument.

Contrary to the appellant's contentions, the instant case is not analogous to the circumstances in *Price v. State*, 405 Md. 10 (2008), where there were multiple counts and sentences stemming from the same criminal transaction. In *Price*, defendant was charged with three counts of possession of heroin, cocaine, and marijuana. Price's convictions for possession of heroin and cocaine each carried a maximum of four years' imprisonment or a fine not exceeding $25,000, or both. His possession of marijuana conviction subjected Price to a maximum sentence of one year in prison or a fine not exceeding $1000, or both. Because Price had a previous conviction, the trial court judge sentenced Price to the maximum imprisonment penalty for each of his possession convictions and then doubled each sentence under the apparent authority of CL § 5-905. The Court of Appeals, however, concluded that an enhanced penalty of doubling sentences could not be imposed on *each count* of possession of heroin, cocaine, and marijuana that arose out of a single course of conduct. *Id.* at 29 (emphasis added). There is nothing, however, in the language of CL § 5-905 that limits the circuit court's sentencing discretion to impose an enhanced sentence

on a subsequent offender in two pending cases based on separate incidents. Additionally, when appellant pled guilty to the two counts of possession, he was fully aware that the State could pursue an enhanced sentence if he failed to comply with the plea agreement.

Because we conclude that it was not clear error for the circuit court to find that justice would not be served by permitting appellant to withdraw his guilty plea, and because we conclude that the enhanced sentence was permissible pursuant to CL § 5-905, we will affirm the judgment of the circuit court.

JUDGMENTS OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.