UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2049

September Term, 2015

CARLOS JOEL SANTOS

v.

MARYLAND DEPARTMENT OF PUBLIC SAFETY & CORRECTIONAL SERVICES, et al.

Woodward,
Berger,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: December 15, 2016

This is an appeal from a grant of summary judgment by the Circuit Court of Baltimore City to the Maryland Department of Safety and Correctional Services in a declaratory action brought by appellant Carlos Santos. Appellant sought a declaration that he was no longer required to register as a sex offender for life. He argued that a 2010 amendment to the Maryland Sex Offender Registration Act extended his original term of registration, and as such constituted an ex post facto law in violation of the United States Constitution and Maryland Declaration of Rights. The Department, in its Answer, contended that the amendment did not affect his term of registration and subsequently filed a Motion for Summary Judgment. Appellant failed to respond to either.

On appeal, appellant presents the following questions for our review:

1. Whether the lower court erred in granting appellees motion for summary judgment?
2. Has Mr. Santos been denied his constitutional right to due process when appellees, without any notice, review or ability to contest, classify him as a lifetime Tier III sex offender based on an out-of-state conviction?

For the reasons set forth below, we shall affirm the order of the circuit court.

BACKGROUND

On December 1, 2004, appellant pled guilty in the Circuit Court for Salem County, Virginia, to the crime of aggravated sexual battery. The Code of Virginia, Section 18.2-67.3 provides that "[a]n accused shall be guilty of aggravated sexual battery" if they "sexually abus[e] the complaining witness, and" "[t]he act is accomplished through the use of the complaining witness's…*physical helplessness*." The court sentenced appellant to five years imprisonment, with all five years suspended, and five years of probation, to commence upon sentencing. Virginia's Code further compels individuals convicted of a

sexually violent offense, such as aggravated sexual battery, to register for life on their sex offender registry.[1] At the time, appellant resided in Maryland. His requisite probation supervision was subsequently transferred to this state.

Maryland Code, Criminal Procedure Article, Section 11-704 mandates "a sex offender who" enters Maryland to "resid[e] or to habitually live" and "is required to register [as a sex offender] by another jurisdiction" to register with the supervising authority of the state. On December 17, 2004, appellant complied and registered as a sexually violent offender in Maryland. Although his initial registration form erroneously listed his registration term as 10 years, the Department contends he was subsequently notified of the error.

On October 6, 2014, appellant filed a Complaint for Declaratory Judgment in the Circuit Court for Baltimore City, arguing that a 2010 amendment in the Maryland Code recategorized him as a Tier III offender and increased his required registration term from 10 years to a lifetime registration. Appellant contended that the Department's requirement that he now register for life was an ex post facto increase of the consequences of his conviction in violation of his procedural and due process rights under the Fourteenth Amendment to the U.S. Constitution and Article 24 of the Maryland Declaration of Rights. The Department, in Answer, denied appellant's contentions and thereafter filed a Motion

[1] Va. Code Ann. § 9.1-902(A)(4) (defining a "sexually violent offense" as an "[o]ffense for which registration is required); § 9.1-902(E)(1) (defining a violation of § 18.2-67.3 as a "sexually violent offense"); § 9.1-908 (requiring "any person who has been convicted of (i) any sexually violent offense….shall have the continuing duty to reregister for life.").

for Summary Judgment on August 10, 2015, arguing that, as a sexually violent offender, appellant had always been required to register for life.

The Department averred that although appellant's original registration erroneously stated that he need only register for 10 years, it correctly categorized him as a sexually violent offender and 'sexually violent offenders,' now titled as Tier III offenders, were required to register for life. The change in titling in the 2010 amendment, therefore, did not affect appellant's registration requirements. Appellant did not oppose the Department's Motion for Summary Judgment, and the Circuit Court for Baltimore City subsequently granted the motion on September 21, 2015.

This appeal followed.

STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Maryland Rule 2-501. We, therefore, determine whether the trial court was legally correct. *Windesheim v. Larocca*, 443 Md. 312, 326 (2015) (citing *Goodwich v. Sinai Hosp. of Balt., Inc.*, 343 Md. 185, 204 (1996)). However, "[b]efore determining whether the Circuit Court was legally correct in entering judgment as a matter of law," "we independently review the record to determine whether there were any genuine disputes of material fact." *Windesheim*, 443 Md. at 326 (citing *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 294 (2007)). "Moreover, an appellate court ordinarily may uphold the grant of summary judgment only on the grounds relied on by the trial court." *Ashton v. Brown*, 339 Md. 70, 80 (1995).

DISCUSSION

The lower court did not err in granting appellees motion for summary judgment.

Appellant's original complaint for declaratory judgment sought to have the Department remove him from the sex offender registry on or about December 1, 2014. He claimed that the retroactive application of the 2010 amendment was unconstitutional as applied to him because it ex post facto increased his required registration term. In this appeal, appellant now contends that the circuit court erred in granting the Department's motion for summary judgment because there is a dispute of material fact regarding what Maryland offense is equivalent to the Virginia offense he pled guilty to. Appellant also asserts that the Department's determination of the equivalent Maryland crime, without notice or chance for a hearing, is violative of his procedural and due process rights, and that the Maryland Sex Offender Registry ("MSOR") statutes are unconstitutionally vague.

The Department contends that because appellant did not contest the equivalent conviction or his status as a sexually violent offender below, nor address any of the constitutional questions he now presents, these claims are not proper for our review. Moreover, the Department argues, even absent the impropriety, appellant's claims are otherwise without merit.

Maryland Rule 8-131(a) defines the scope of appellate review.

> "Ordinarily, the appellate court will not decide any [issue other than jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such issues if necessary or desirable to guide the trial court or to avoid expense and delay of another appeal."

To be sure, there is no "fixed formula" for determining when the exercise of appellate discretion to consider unpreserved issues is proper. However, the Court of Appeals has laid out guiding principles that appellate courts should follow. *Jones v. State*, 379 Md. 704, 713 (2004) (citing *State v. Hutchinson*, 287 Md. 198, 202 (1996)).

Noting that "[t]he primary purpose of Rule 8-131(a) is to ensure fairness for all parties and to promote the orderly administration of law," *Jones*, 379 Md. at 713, the Court has stated that "appellate courts should make two determinations" before exercising their discretionary review. *Id.* at 714; *see also State v. Bell*, 334 Md. 178, 191 (1994). "First, the appellate court should consider whether the exercise of its discretion will work unfair prejudice to either of the parties" or "to the lower court so that that court can pass upon and correct any errors in its own proceedings." *Id.* "Second, the appellate court should consider whether the exercise of its discretion will promote the orderly administration of justice." *Id.* "Although the interests of fairness generally are furthered by requiring the issues to be brought first to the attention of the trial court so that the trial court may pass upon it in the first instance," *Jones v. State*, 379 Md. 704, 714 (2004), the Court of Appeals has made clear that if an unpreserved issue is "sufficiently interrelated" to a preserved issue, exercising this discretionary review would not work unfair prejudice to either of the parties. *State v. Hart*, 449 Md. 246, 268 (2016).

In the case at bar, appellant's new basis for relief questions the constitutionality of the MSOR statutes, both as applied to him and as unconstitutionally vague. The lower court was not asked to consider these issues, and thus, the Department had no reason to rebut these claims below. Appellate consideration would, therefore, work an unfair

prejudice to both the lower court and the Department. Furthermore, it would neither ensure nor advance the orderly administration of law. We, thus, decline to address the unpreserved constitutional issues claiming his procedural and substantive due process rights were violated and that the MSOR statues are unconstitutionally vague.

We will address the issue presented to the lower court – *i.e.* whether the 2010 amendment constitutes an ex post facto increase in appellant's conviction. We will also determine the equivalent Maryland conviction, as it is a sufficiently interrelated question to the issue of appellant's required registration.

Appellant's registration requirement was not affected by the 2010 amendment.

Before the Circuit Court for Baltimore City, appellant contended that "solely" as a result of the 2010 amendment to the sex offender registration statute, he was "re-categorized as a Tier III offender," instead of a "sexually violent offender." Appellant continued that this recategorization "severely altered" the consequences of his conviction by increasing his required registration term from 10 years to a lifetime registration, and thereby violated the prohibition against ex post facto laws. Appellant argued specifically that the application of the 2010 amendment denied him his procedural and substantive due process rights under the Fourteenth Amendment of the U.S. Constitution and the Maryland Declaration of Rights. Appellant, however, did not contest his status as a "sexually violent offender." Appellant also did not oppose the Department's subsequent motion for summary judgment.

In his Complaint for Declaratory Judgment, appellant relied on *Doe v. Dept. of Public Safety and Corrections*, in which the Court of Appeals addressed the

constitutionality of the 2010 amendment's retroactivity provision as applied to an offender whose offense occurred before the Maryland sex offender registry existed. *Doe v. Dept. of Public Safety and Correctional Services*, 430 Md. 535 (2013). In *Doe*, the offender pled guilty to child sexual abuse, based on his inappropriate contact with a child that occurred in 1983-1984. No charges were filed until 2005, and Doe was not sentenced until 2006. As part of his sentencing, the judge required that Doe register as a sex offender. Doe filed a motion to correct an illegal sentence, challenging the requirement that he register. Doe noted that the Maryland sex offender registration statute in effect at the time applied retroactively only to a child sex offender who committed their offense on or before October 1, 1995 *if* the offender was "under the custody or supervision of the supervising authority on October 1, 2001." Doe "contended that he could not be required to register because '[t]here was no registry at the time of the instant offense and the law, as written, [did] not apply retroactively to'" him because he was "not under the custody or supervision of the supervising authority on October 1, 2001." *Doe*, 430 Md. at 540.

The Court agreed and held the "prohibition against ex post facto laws is rooted in a based sense of fairness, namely that a person should have 'fair warning' of the consequences of his or her actions." *Doe*, 430 Md. at 552. Because the registry did not come into existence until a decade after his offense, and the amendment which required Doe to register did not come into effect until 2010, the Court held that Doe "could not have had fair warning that he would be required to register." *Id.* at 553. "Based on principles of fundamental fairness and the right to a fair warning within the meaning of Article 17 [of

the Maryland Declaration of Rights], retrospective application of the sex offender registration statute to Petitioner is unconstitutional." *Id.*

The case before us is quite different. At the time of appellant's offense, conviction, sentencing, and registration, the registration requirements for sex offenders were defined in Section 11-707 of the Criminal Procedure Article. The length of registration was determined by the offender's classification – as either a child sexual offender, an offender, a sexually violent offender, or a sexually violent predator. Under Section 11-707(a)(4)(ii)(2), "sexually violent offenders,"[2] such as appellant, were required to register for life.[3]

[2] At the time of appellant's offense and conviction, "sexually violent offender" was defined as "a person who" "has been convicted of a sexually violent offense" or "has been convicted of an attempt to commit a sexually violent offense." Md. Code Ann. Crim. Proc. § 11-701(f) (West 2001 Supp.). "Sexually violent offense" was defined in § 11-701(g) as:

> (1) **A violation of §§ 3-303 through 3-307** or §§ 3-309 through 3-312 of the Criminal Law Article;
> (2) Assault with intent to commit rape in the first or second degree or a sexual offense in the first or second degree as prohibited on or before September 30, 1996, under former Article 27, § 12 of the Code; or
> (3) A crime committed in another state or in a federal, military, or Native American tribal jurisdiction that, if committed in this State, would constitute one of the crimes listed in (1) or (2) of this subsection.

Md. Code Ann. Crim. Proc. § 11-701(f) (West 2001 Supp.).

[3] In 2004, Md. Code Ann. Crim. Proc. § 11-707(a)(4) stated: "The term of registration is:

> (i) 10 years; or
> (ii) Life, if:
> 1. The registrant is a sexually violent predator;
> **2. The registrant has been convicted of a sexually violent offense;**
> 3. The registrant has been convicted of a violation of § 3-602 of the Criminal Law Article for commission of a sexual act involving penetration of a child under the age of 12 years; or
> 4. The registrant has been convicted of a prior crime as a child sexual offender, an offender, or a sexually violent offender." (continued…)

In 2010, the Maryland General Assembly amended the sex offender registration statute, changing the word categorizations into 'tiers.' Terms of registration are now based on the 'tier' of the offender – either Tier I, Tier II, or Tier III – and the definitions for the tiers are found in § 11-701. Appellant, who was previously categorized as a sexually violent offender, is now titled a Tier III sex offender. Section 11-707 requires anyone classified as a Tier III sex offender, who committed a sexually violent offense, to register for life.

The 2010 amendment, therefore, changed the titling of appellant's classification but did not affect his registration term. In fact, had appellant remained in Virginia, he would also have been subject to the same registration requirement, as § 18.2-67.3 is categorized as a sexually violent offense requiring lifelong registration.[4]

The equivalent Maryland statute is § 3-307, sexual offense in the third degree.

Although appellant contends now for the first time that the Department incorrectly determined which Maryland statute is equivalent to the Virginia statute he was convicted under, this issue is "sufficiently interrelated" to appellant's ex post facto claim to merit our review.

Though the statutes changed, this required registration period has been true since 1999. *See* Md. Code Ann. Art. 27, § 792(d)4(ii)(i) (West 1999 Supp.).

[4] Va. Code Ann. § 9.1-902(A)(4) (defining a "sexually violent offense" as an "[o]ffense for which registration is required); § 9.1-902(E)(1) (defining a violation of § 18.2-67.3 as a "sexually violent offense"); § 9.1-908 (requiring "any person who has been convicted of (i) any sexually violent offense….shall have the continuing duty to reregister for life.").

Appellant argues that the correct equivalent offense is a fourth degree sexual offense,[5] which constitutes a Tier I offense and requires registration for only 15 years. He contends, therefore, that the circuit court was incorrect in granting summary judgment given that there was a "material fact at issue." The Department avers that because appellant did not contest the equivalent conviction or his categorization as a sexually violent offender below, his claims are not proper for our review. Moreover, the Department argues, even absent the impropriety, appellant's claim is otherwise without merit.

Appellant was convicted in 2004 of aggravated sexual battery, a felony, in violation of Code of Virginia § 18.2-67.3, which states:

> A. An accused shall be guilty of aggravated sexual battery if he or she sexually abuses the complaining witness, and
>
> 1. The complaining witness is less than 13 years of age, or
> 2. The act is accomplished through the use of the complaining witness's mental incapacity or physical helplessness, or…

Va. Code Ann. § 18.2-67.3.[6] "Sexual abuse" is defined in § 18.2-67-10 as "an act committed with the intent to sexually molest, arouse, or gratify any person, where" "the

[5] Md. Code Ann. Crim. Law § 3-308.

[6] Va. Code Ann. § 18.2-67.3 reads in its entirety:

A. An accused shall be guilty of aggravated sexual battery if he or she sexually abuses the complaining witness, and
   1. The complaining witness is less than 13 years of age, or
   2. The act is accomplished through the use of the complaining witness's mental incapacity or **physical helplessness**, or
   3. The offense is committed by a parent, step-parent,
   4. The act is accomplished against the will of the complaining witness by force, threat or intimidation, and
      a. The complaining witness is at least 13 but less than 15 years of age, or
      b. The accused causes serious bodily or mental injury to the complaining witness, or

accused intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts."[7]

Appellant contends the equivalent offense in Maryland is a Tier I offense,[8] sexual offense in the fourth degree, a misdemeanor, which provides:

> (b) A person may not engage in:
>
> (1) sexual contact with another without the consent of the other…

Md. Code Ann. Crim. Law § 3-308.[9] "Sexual contact" is defined in § 3-301 as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party."

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c. The accused uses or threatens to use a dangerous weapon.

B. Aggravated sexual battery is a **felony** punishable by confinement in a state correctional facility for a term of not less than one nor more than 20 years and by a fine of not more than $100,000.

[7] Va. Code Ann. § 18.2-67.10 states: "6. 'Sexual abuse' means an act committed with the intent to sexually molest, arouse, or gratify any person, where:

a. The accused intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts;

b. The accused forces the complaining witness to touch the accused's, the witness's own, or another person's intimate parts or material directly covering such intimate parts;

c. If the complaining witness is under the age of 13, the accused causes or assists the complaining witness to touch the accused's, the witnesses' own, or another person's intimate parts or material directly covering such intimate parts; or

d. The accused forces another person to touch the complaining witness's intimate parts or material directly covering such intimate parts."

[8] Md. Code Ann. Crim. Proc. § 11-701(o)(1) states "'Tier I sex offender' means a person who has been convicted of:

(1) Conspiring to commit, attempting to commit, or committing a violation of § 3-308 of the Criminal Law Article…"

[9] Md. Code Ann. Crim. Law § 3-308. It reads in its entirety:

(b) A person may not engage in: (continued…)

The Department, conversely, argues that the equivalent offense is sexual offense in the third degree, a Tier III offense and felony,[10] which provides:

> (a) A person may not:
>
> (2) engage in sexual contact with another if the victim is….a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a…physically helpless individual;…

Md. Code Ann. Crim. Law § 3-307(a)(2).[11] The definition of "sexual contact" found in § 3-301 is also applicable to § 3-308.

Appellant does not dispute that he pled guilty to the crime of aggravated sexual battery, nor does he contest the facts underlying his conviction. Yet, he contends that

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> (1) sexual contact with another without the consent of the other;
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> …
>
> (d)(1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of the misdemeanor of sexual offense in the fourth degree and on conviction is subject to imprisonment not exceeding 1 year or a fine not exceeding $1,000 or both.

[10] Md. Code Ann. Crim. Proc. § 11-701(q)(1)(ii) defines a "Tier III sex offender" as "a person who has been convicted of:

> (1) Conspiring to commit, attempting to commit, or committing in violation of:
>
> ...
>
> (iii) § 3-303, § 3-304, § 3-305, § 3-306, **§ 3-307(a)(1) or (2)**, § 3-309, § 3-310, § 3-311, § 3-312, § 3-315, § 3-323, or § 3-602 of the Criminal Law Article…"

[11] Md. Code Ann. Crim. Law § 3-307(a)(2) reads in its entirety:

> (a) A person may not:
>
> (2) engage in sexual contact with another if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a **physically helpless individual**, and the person performing the act knows or reasonably should know the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual;
>
> …
>
> (b) A person who violates this section is guilty of the **felony** of sexual offense in the third degree and on conviction is subject to imprisonment not exceeding 10 years.

In 2004, the statute read exactly as it currently does. Md. Code, Crim. L. § 3-307 (2002 Supp.).

Maryland's fourth degree sexual offense "mirrors" Virginia's aggravated sexual battery offense. As previously noted, Virginia's aggravated sexual battery offense is a felony, and is defined in the Code of Virginia as a "sexually violent offense."[12] Maryland's fourth degree sexual offense is a misdemeanor and is not categorized as a "sexually violent offense." The elements of a fourth degree sexual offense do not include any aggravating victim circumstances, such as mental incapacity or physical helplessness, which are required elements of the Virginia statute appellant pled guilty to.

Maryland's third degree sexual offense, on the other hand, is a felony and a sexually violent offense. Its elements include the aggravating circumstances of the victim's mental incapacity or physical helplessness.[13] Thus, in our view, Maryland's third degree sexual offense directly parallels the Virginia offense of aggravated sexual battery.

Further, the facts in appellant's case, where "he had sexual intercourse with a [20 year old] woman who was *physically helpless* as she was under the influence of both alcohol and cocaine," satisfy the elements of a third degree sexual offense in Maryland. Finally, appellant has never, in the proceedings below or in this appeal, contested his categorization as a sexually violent offender. As such, we find no error in the Department's determination.

[12] Va. Code Ann. § 18.2-67.3 ("Aggravated sexual battery is a **felony**"). Va. Code Ann. § 9.1-902 states: "'Sexually violent offense' means a violation of…§ 18.2-67.3." Va. Code Ann. § 9.1-908 states: "…except that any person who has been convicted of (i) any sexually violent offense…shall have a continuing duty to reregister for life."

[13] Md. Code Ann. Crim. Proc. § 3-307 ("A person who violates [§ 3-307] is guilty of the **felony** of sexual offense in the third degree…").

Appellant's claim, therefore, that there is a genuine dispute of material fact regarding what Maryland offense is equivalent to the Virginia offense appellant pled guilty to, is without merit.

Appellant's constitutional challenges are unpreserved.

As previously noted, we decline to address appellant's remaining challenges because they were not properly preserved.

In sum, the circuit court's grant of summary judgment was not error either as to appellant's claim of an ex post facto increase in the consequences of his sentence or as to whether there is a dispute of a material issue of fact. We, therefore, affirm the circuit court's grant of the Department's motion for summary judgment. We shall remand this matter for the entry of an appropriate declaratory judgment by the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.