

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2135

September Term, 2014

BENJAMIN HERBERT

v.

STATE OF MARYLAND

Meredith,
Leahy,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: June 23, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Benjamin Herbert, appellant, pleaded guilty, in the Circuit Court for Baltimore City, to rape in the second degree. He was sentenced to a term of twenty years' imprisonment, all but five years suspended, to be followed by three years' supervised probation. All other pending charges, arising from the same incident, were either "closed" or dismissed.

Herbert thereafter filed an application for leave to appeal from the judgment entered on that guilty plea, but the circuit court, having determined that his application was untimely, struck the application pursuant to Maryland Rule 8-203(a). Herbert then filed a motion for reconsideration, which the circuit court denied. He then noted an appeal to this Court. By order dated July 23, 2015, Chief Judge Krauser ruled that the notice of appeal was timely only with respect to the circuit court's denial of appellant's motion for reconsideration, and "ORDERED that the issues on appeal shall be limited to whether the circuit court abused its discretion when it denied Appellant's motion for reconsideration." For the reasons that follow, we are not persuaded that the circuit court abused its discretion, and we affirm that court's ruling.

BACKGROUND

In October 2012, two separate indictments were returned in the Circuit Court for Baltimore City, charging Herbert with rape and other offenses. (Both indictments appear to have originated from the same District Court Case Number 3B02177227, and Complaint Number 9I01569. In Circuit Court Case Number 11229034, Herbert was charged with rape in the first degree, rape in the second degree, sexual offense in the third degree, sexual offense in the fourth degree, and assault in the second degree. In Circuit Court Case Number

11229035, Herbert was charged with rape in the second degree, sexual offense in the third degree, sexual offense in the fourth degree, and assault in the second degree.

On May 22, 2014, Herbert pleaded guilty, in Case Number 11229035, to rape in the second degree, and on that same date, he was sentenced to a term of twenty years' imprisonment, all but five years suspended, to be followed by three years' supervised probation. The other charges in Case Number 11229035 were "closed," and all of the charges in Case Number 11229034 were dismissed.

On June 12, 2014, Herbert filed a motion for new trial and withdrawal of plea, but the caption of the motion referred only to Case Number 11229034. Four days later, he filed a motion for modification of sentence in that same case even though he had not received any sentence for any of the charges in Case Number 11229034.

On July 2, 2014, the circuit court denied Herbert's motion to withdraw his guilty plea. On the same day — *i.e.*, 41 days after sentencing — Herbert filed an application for leave to appeal, again referring to Case Number 11229034 only. Six days later, the circuit court entered a "show cause" order, directing Herbert to show why his application for leave to appeal should not be stricken as untimely, as it appeared to have been filed more than thirty days after the entry of judgment on the docket, which had occurred on May 22, 2014. Herbert did not file a response with the clerk, but mailed a document to the trial judge, purporting to explain that he had met the filing deadline because he had delivered the application to the prison's mail room prior to the expiration of thirty days. No exhibits were

attached to the response. On September 16, 2014, Herbert's application for leave to appeal was stricken as untimely.

On October 8, 2014, Herbert filed a motion for reconsideration. The motion for reconsideration argued that, under Federal Rules of Appellate Procedure 4(c), an inmate's notice of appeal is timely if deposited in the institution's mail before the expiration of the deadline for filing. Although Herbert suggested that he could prove that he met the filing deadline under the federal rule by producing a notarized statement confirming the date of deposit, it appears that he never did produce any documentation of the date he claims to have mailed his application for leave to appeal. On October 22, 2014, the circuit court denied Herbert's motion for reconsideration of the dismissal of his application.

On November 10, 2014, Herbert noted this appeal.

DISCUSSION

I.

As noted above, Herbert's appeal is timely only with respect to the denial of his motion for reconsideration of the circuit court's order striking his July 2 application for leave to appeal from his guilty plea. Consequently, as we previously ruled in the order this Court issued on July 23, 2015, the only issue before this Court is whether the circuit court abused its discretion in denying Herbert's motion for reconsideration. *See Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 675 (2008); *Wormwood v. Batching Sys., Inc.*, 124 Md. App. 695, 700 (1999).

II.

With respect to the circuit court’s authority to strike an application for leave to appeal, Maryland Rule 8-203 provides:

(a) **Generally.** On motion or **on its own initiative, the lower court may strike a notice of appeal or application for leave to appeal (1) that has not been filed within the time prescribed by Rules 8-202 or 8-204,** (2) if the clerk of the lower court has prepared the record pursuant to Rule 8-413 and the appellant has failed to pay for the record, (3) if the appellant has failed to deposit with the clerk of the lower court the filing fee required by Rule 8-201(b), or (4) if by reason of any other neglect on the part of the appellant the record has not been transmitted to the appellate court within the time prescribed in Rule 8-412.

(b) **Notice.** Before the lower court strikes a notice of appeal or application for leave to appeal on its own initiative, the clerk of that court shall serve on all parties pursuant to Rule 1-321 a notice that an order striking the notice of appeal or application for leave to appeal will be entered unless a response is filed within 15 days after service showing good cause why the notice or application should not be stricken.

(Emphasis added.)

Because Herbert’s application for leave to appeal was not docketed until July 2, 2014 — *i.e.*, more than 30 days after entry of judgment in his case (which took place when he was sentenced on May 22, 2014) — the circuit court was expressly authorized under part (a) of Rule 8-203 to strike, “on its own initiative,” the application for leave to appeal, as it was facially apparent that that application “ha[d] not been filed within the time prescribed by”

Rule 8-204(b)(2)(A), that is, “within 30 days after entry of the judgment or order from which the appeal is sought.”¹

It is beyond dispute that the circuit court complied with Rule 8-203(b) by issuing a “show cause” order directing Herbert to “show cause in writing within fifteen (15) days after service of this notice” why the application should not be stricken. Herbert apparently replied to the show cause order by sending a letter to the chambers of the circuit court judge who had issued the order, and he was then advised that he must reply to the show cause order by filing a motion with the clerk of the court in accordance with the Maryland Rules. Although Herbert, in his reply to the show cause order, asserted that his application had been timely, his claim of timeliness was based upon the federal rules, and he failed to submit any documentary evidence in support of his argument that he had made a timely filing.²

An abuse of discretion occurs when the court acts in a manner that was “manifestly unreasonable,” or exercises its discretion “on untenable grounds, or for untenable reasons,” or when “no reasonable person would take the view adopted by the [trial] court.” *Wilson-X*,

¹This facial untimeliness is antecedent to whether an application for leave to appeal would be perfected by a document, such as the one in this case, which appears to refer to the wrong case number. We therefore do not reach the question of whether the application, citing a case number in which all charges had been dismissed, rather than the companion case from which Herbert apparently intended to appeal, would have been sufficient to comply with the time limit imposed by Maryland Rule 8-204(b).

²Herbert averred that, on June 20, 2014, he had placed his application for leave to appeal in the institutional mailbox at Maryland Correctional Institute-Jessup, where he was incarcerated.

supra, 403 Md. at 675 (citations and quotations omitted). Given that the application for leave to appeal was facially untimely, that the circuit court complied with Rule 8-203, and that Herbert proffered no documentation to support his bald assertion of timeliness in filing, the circuit court did not act in a “manifestly unreasonable” manner, nor did it exercise discretion upon “untenable grounds,” nor was its denial of Herbert’s motion for reconsideration an action that “no reasonable person would take.” Because we perceive no abuse of discretion, we affirm the circuit court’s order entered October 22, 2014, denying Herbert’s motion for reconsideration.

**ORDER DENYING MOTION
FOR RECONSIDERATION
AFFIRMED. COSTS TO BE
PAID BY APPELLANT.**