

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2487

September Term, 2015

TAVON LAMONT SMITH

v.

STATE OF MARYLAND

Wright,
Graeff,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: December 7, 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.

The present case requires us to determine whether the Circuit Court for Baltimore County failed to afford Tavon Lamont Smith, Appellant, with a reasonable opportunity to prepare a defense to having violated his probation in a hearing in which he stipulated to the violation. We also are asked to determine whether the circuit court judge acted inappropriately when he revoked Smith’s probation. Smith presents two questions for our review:

- I. Did the trial court fail to give Appellant a reasonable opportunity to prepare a defense to the charges as required by Maryland Rule 4-247(e)(1)[sic]?^[1]
- II. Did the trial court abuse its discretion by: (i) erroneously construing the conditions of Appellant’s probation; (ii) making factual findings that are clearly erroneous; and (iii) acting arbitrarily or capriciously in revoking Appellant’s probation?

¹ Maryland Rule 4-347(e)(1) (2010) governs “Proceedings for revocation of probation” and provides, in relevant part:

(e) **Hearing.** (1) Generally. The court shall hold a hearing to determine whether a violation has occurred and, if so, whether the probation should be revoked. The hearing shall be scheduled so as to afford the defendant a reasonable opportunity to prepare a defense to the charges. Whenever practicable, the hearing shall be held before the sentencing judge or, if the sentence was imposed by a Review Panel pursuant to Rule 4-344, before one of the judges who was on the panel. With the consent of the parties and the sentencing judge, the hearing may be held before any other judge. The provisions of Rule 4-242 do not apply to an admission of violation of conditions of probation.

(2) Conduct of Hearing. The court may conduct the revocation hearing in an informal manner and, in the interest of justice, may decline to require strict application of the rules in Title 5, except those relating to the competency of witnesses. The defendant shall be given the opportunity to admit or deny the alleged violations, to testify, to present witnesses, and to cross-examine the witnesses testifying against the defendant. If the defendant is found to be in violation of any condition of probation, the court shall (A) specify the condition violated and (B) afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.

Following a bench trial in 2005 in the Circuit Court for Baltimore County, Smith had been convicted of first-degree assault and sentenced to five years' supervised probation before judgment. Smith's probation was revoked in 2006, and he was sentenced to twenty-five years' incarceration, with all but ten years suspended, followed by five years' probation. The conditions of Smith's probation included all of the standard conditions, including a prohibition regarding leaving the State of Maryland without permission.

Smith was released in 2011 after which he was placed on probation, but in late April of 2015 his probation officer filed a violation of probation report alleging that Smith had violated the terms of his probation by leaving Maryland without obtaining permission:

Condition #3: Get permission before: Leaving the State of Maryland. On 3/28/2015, Mr. Smith traveled to Atlanta, Georgia to attend an opening of his friend's gallery. At no time did Mr. Smith request a travel pass to travel to Atlanta, Georgia, nor was Mr. Smith given permission by this Agent to leave the State of Maryland at any time.

The report accompanying the charges also stated:

On 4/27/2015, this Agent was notified by the Intelligence Unit of the Division of Parole and Probation that Mr. Tavon Smith had been interfering with a Federal trial. Mr. Smith had contacted [a] witness involved in the Federal case. On several occasions, Federal Investigators have attempted to speak to Mr. Smith, however he has been uncooperative and not return the Federal Investigators calls.

On 3/28/2015, Mr. Smith traveled to Atlanta, Georgia to attend an opening of his friend's gallery. At no time did Mr. Smith request a travel pass to Atlanta, Georgia, nor was Mr. Smith given permission by this Agent to leave the State of Maryland at any time.

FBI Special Agent Autumn Brown, located at 2600 Lord Baltimore Drive, Baltimore, Maryland 21244 has agreed to testify at any VOP hearings if needed.

Based on the above information, this Agent respectfully requests that a warrant be issued, charging Mr. Smith with leaving the State of Maryland without the permission of his Agent.

Judge Mickey J. Norman of the Circuit Court of Baltimore County held a violation of probation hearing in June of 2015 on the charge, during which Smith initially questioned the inclusion of the witness tampering allegations in the violation of probation report:

[SMITH'S COUNSEL]: Your Honor, preliminarily after speaking with [the State], I don't know if the Court has had an opportunity to review [the] violation of probation report, but there is -- it's not quite an allegation, but there's some information, some information in there that would --

THE COURT: Well, maybe I'm unclear because I did review the report. One of the specific allegations, he left the State of Maryland without getting permission.

[SMITH'S COUNSEL]: Your Honor, that is the only allegation, but there was some information in there about him traveling -- there's a belief that he traveled to Atlanta to intimidate a witness in a federal case. From what I understand, there is a federal agent here prepared to testify with respect to that. It is not a formal allegation. It's a violation of any specific probation, order of probation, and from what I understand, he's also still not been actually charged; and it just sort of from what I understand is evidence. There's tape. There's --

[THE STATE]: Your Honor, the Defendant did. There's evidence he traveled down to Georgia. There's tapes. When he was in Georgia, he made several phone calls. We have recordings of those phone calls. In those phone calls, he was in contact with an individual who's in federal custody and [o]n federal robbery charges.

I think it's Mr. Paul Chance who initially had the case here in Baltimore County before it was indicated federally. He then contacted that person and then put that person, Mr. Chance, on the phone with an individual he had traveled to Georgia to meet, and it is the State's belief that the content of those calls would indicate that he was there to intimidate him and to keep him from testifying in those federal cases.

I have no idea whether or not he will ultimately be charged with federal witness tampering whatever the federal statute is for that. I do know that he traveled out of State. The State believes that we can prove that matter, and then in sentencing, the State would ask the Court to consider the reasons why he traveled out of State.

THE COURT: All right. Well, that fairly clears it up for me. So the allegation is he traveled out of State without permission. Is that what your allegation is?

[THE STATE]: Yes, Your Honor.

THE COURT: Does he admit or deny the allegation?

[SMITH'S COUNSEL]: Your Honor, if I may beg the Court's indulgence, one of the other things is that the State's Attorney has indicated to me that he was going to be presenting evidence to that effect either at a hearing or at sentencing.

Judge Norman asked again if Smith admitted the violation that he did leave Maryland without permission, which Smith did:

THE COURT: Does he admit or deny the allegation?

[SMITH'S COUNSEL]: Just one moment.

* * *

[SMITH'S COUNSEL]: Your Honor, it is my understanding after speaking with Mr. Smith that it is his decision to waive a right to a hearing and proceed by way of an admission that he did leave the State, Your Honor, without permission.

Following a colloquy with Smith regarding the voluntariness of his admission, Judge Norman heard from the State regarding the facts it would have presented at trial, the relevant portion of which was:

[THE STATE]: Your Honor, the Defendant did serve that sentence, was released from that sentence, and was placed -- and was then placed upon the five years of supervised probation. When he was released, he was, in fact, explained all the terms and conditions of probation.

One of those terms and conditions of probation is the Defendant not leave the State without permission to do so. Your Honor, it is alleged while the Defendant

was on probation, he did, in fact, leave the State of Maryland, travel down to Atlanta, Georgia without permission to do so from his agent. Those would be the facts in support of the Defendant's admission at this time.

THE COURT: Any additions, corrections, or modifications to those facts, [defense counsel]?

[DEFENSE COUNSEL]: No, Your Honor.

Thereafter, Judge Norman found Smith guilty of violating his probation:

THE COURT: The Court is persuaded having had a discussion with Mr. Smith that he has knowingly, intelligently, and voluntarily waived his right to a contested hearing and has admitted to violation of probation.

Specifically the Court finds as a fact by a preponderance of the evidence that the Defendant left the State of Maryland without the -- which was a condition of his -- of the probation, left the State of Maryland without getting permission. The condition of his probation is he's not to leave the State without getting permission. The Court finds as a fact that he did, in fact, leave the State without getting permission, so I find him guilty of violating his probation.

Smith's counsel then requested a postponement of disposition to permit her to review the witness tampering evidence and prepare mitigation. Judge Norman acquiesced, but also permitted the State to immediately present disposition testimony from three witnesses, including Special Agent Autumn Brown of the Federal Bureau of Investigation as well as Smith's probation agent and a detective from the Baltimore County Police Department. Counsel for Smith did not object to the procedure nor the testimony and, in fact, had the opportunity to cross-examine the witnesses.

Smith's sentencing occurred fifteen weeks later. Before putting on mitigation evidence, new counsel for Smith argued that Judge Norman should not take into consideration any testimony related to the witness tampering, but Judge Norman reminded Smith's counsel that the hearing was about disposition:

THE COURT: Counsel, look, with all due respect, we're not going to relitigate the specific allegation that he left the State of Maryland. He was -- he had a trial -- and the attorney at the time could have objected to all that. The attorney could have said Judge, all that other information is irrelevant.

The only relevant issue is whether or not he left the State since that's the allegation, but he didn't. All that information came out. All that information is available to you. To present whatever factual mitigation to that that you wish, I'm prepared to hear that. This is disposition, but with all due respect, counsel, we're not going to relitigate the allegation that he violated probation.

During mitigation, Smith's counsel presented Quinn Central, the witness who had been allegedly tampered with; he testified that Smith never intimidated, influenced, or caused him to change his testimony. Counsel for Smith also allocuted that Smith was in compliance with all the other terms of the probation and had completed a workforce program, anger management course and consistently had tested negative for drugs. Smith addressed the court about his maturation since his original 2005 conviction when he was seventeen, that he was in school and had a job, as well as a relationship and a daughter, and that he had a good relationship with his probation officer and should have told her he was leaving the State.

Judge Norman then sentenced Smith to ten years' incarceration and reasoned:

I find Mr. Central's testimony to not be credible. He remembers what he wants to remember, doesn't remember things. I don't find him credible at all. At the same time, the Defendant has done some things successfully on probation, and I think that's something the Court has to consider; but what he did was this.

He violated very shortly after he was put on probation as a result of the binding plea. Court imposed 25 years, suspending all but ten years. You would have thought that that would have had an impact on an individual, but apparently it didn't.

For whatever reasons, he travels to Atlanta. He left the State of Maryland without getting permission. By your own client's allocution, he had apparently a pretty

good working relationship with the agent. Why wouldn't you ask to go? I'm not real sure.

Maybe it's because he went down there to influence a witness or attempt to or maybe not even so much influence by threatening, but just begging him not to testify. I don't know for absolute certainty, but the Court doesn't have to know for absolute certainty at disposition.

What I do know is that the ten-year sentence that he did in jail with a portion before they let him out did not have a significant impact on him. He should have known better. If all that he says is true, he should have asked permission, but he didn't. He went out of the State of Maryland for a brief period of time.

I'm going to give him some credit for the fact that he's done somewhat better on probation this time than his first go around. It's the judgment and sentence of the Court that you be incarcerated with the Maryland Division of Corrections for ten years. That's the sentence.

Smith thereafter filed an Application for Leave to Appeal with the Court of Special Appeals, which was granted. The sole question in the application asked: "Did the Trial Court Abuse its Discretion in Revoking Petitioner's Probation?"

The State initially raises the issue of whether we should consider the first question presented in Smith's brief regarding whether Judge Norman failed to give him adequate time to prepare a defense to the charges against him, because Smith did not raise nor discuss the first question in his application for leave to appeal. Although the issue posed is interesting, it is not one that we will address, because we will affirm the trial court on both issues presented.

With respect to the first issue, Smith argues in his brief that Judge Norman considered the witness tampering allegations in violating his probation and that he did not have an opportunity to prepare to address that allegation. At oral argument, however, Smith's counsel conceded that Smith's probation was revoked by Judge Norman after

Smith admitted the violation and before any testimony about witness tampering was taken; the testimony about witness tampering was adduced only in disposition to which there was no objection and about which Smith’s counsel had the opportunity to cross-examine and/or recall the witnesses, when sentencing reconvened fifteen weeks later.

As such, Judge Norman complied with Rule 4-347, which governs “Proceedings for revocation of probation.” Subsection (a) provides: “[t]he petition, or order if issued on the court’s initiative, shall state each condition of probation that the defendant is charged with having violated and the nature of the violation.” Subsection (e)(1) provides that, “[t]he hearing shall be scheduled so as to afford the defendant a reasonable opportunity to prepare a defense to the charges” and under subsection (e)(2), “[t]he defendant shall be given the opportunity to admit or deny the alleged violations, to testify, to present witnesses, and to cross-examine the witnesses testifying against the defendant.” Under Rule 4-347(e)(2), once the trial court has found that the defendant violated probation, “the court shall (A) specify the condition violated and (B) afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.” We, thus, determine that Judge Norman did not err in his adherence with Rule 4-347.

Smith’s counsel, however, argues, without reliance on any statutes, rules, or cases, that the witness tampering evidence could have been adduced during sentencing only if it had been explored during the revocation hearing. There is simply no basis for this argument.

With respect to his second question, Smith again frames this question as though the violation of probation stage encased the relevant context, which it did not. As a result, we shall consider question two with regard to what happened during disposition.

The ten year sentence that Smith received was permissible because it was within the fifteen year suspended sentence imposed upon Smith during sentencing on his first probation violation in 2006. In *Benedict v. State*, 377 Md. 1 (2003), the Court of Appeals recognized that when a convicted person’s sentence included a portion that had been suspended as well as a probationary period, and probation is violated, a judge may sentence the probationer to the portion of the sentence that had been suspended. The Court concluded, “[w]hen dealing with a split sentence, the court, in revoking probation, may direct execution of all or part of the previously suspended part of the sentence, but not of any part of the sentence that the court initially directed to be served in prison.” *Id.* at 12.

Smith, however, contends that Judge Norman abused his discretion by considering the allegations of witness tampering during sentencing. We disagree.

In *Smith v. State*, 308 Md. 162, 169 (1986), the Court of Appeals analyzed the extent to which a judge may consider uncharged criminal conduct at sentencing and determined that the judge “may consider the criminal conduct of a defendant even if there has been no conviction.” The Court expressed the almost boundless discretion that is afforded to a sentencing judge:

At the outset we note that “a sentencing judge is vested with virtually boundless discretion.” *Logan v. State*, 289 Md. 460, 480, 425 A.2d 632 (1981); *see also Reid v. State*, 302 Md. 811, 819, 490 A.2d 1289 (1985) and cases cited therein. The

sentencing judge is accorded this broad latitude to best accomplish the objectives of sentencing—punishment, deterrence and rehabilitation. *Johnson v. State*, 274 Md. 536, 540, 336 A.2d 113 (1975). A sentence should be premised upon both the facts and circumstances of the crime itself and the background of the individual convicted of committing the crime. *Reid, supra*, 302 Md. at 820, 490 A.2d 1289 (citing *Henry v. State*, 273 Md. 131, 150, 328 A.2d 293 (1974)). The strict rules of evidence do not apply at a sentencing proceeding for reasons explicated by the Supreme Court in *Williams v. New York*, 337 U.S. 241, 246-47, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949).

Id. at 166. With respect to any limitation regarding allegations of uncharged violations, the Court rejected the notion of “bald allegations” and posited that only “reliable evidence of conduct” would be considered:

The testimony at issue constituted more than a bald allegation; rather, it contained specific facts concerning an encounter between Smith and the witness. The admission of this testimony was, in the circumstances of this case, permissible for consideration by the sentencing court as “opprobrious conduct not amounting to a crime” or of facts amounting to a crime “of which the [defendant] may, or may not, thereafter be convicted.” *Purnell, supra*, 241 Md. at 585, 217 A.2d 298; *see also Henry v. State, supra*, 273 Md. at 147-48, 328 A.2d 293 (“sentencing judges are permitted to consider reliable evidence of conduct which may be opprobrious although not criminal, as well as the details and circumstances of criminal conduct for which the person has not been tried”). Of course, a sentencing judge may obtain relevant information through live witness testimony at a sentencing hearing. *Lodowski v. State*, 302 Md. 691, 748-49, 490 A.2d 1228 (1985), *vacated and remanded on other grounds*, [475] U.S. [1078], 106 S.Ct. 1452, 89 L.Ed.2d 711 (1986).

Id. at 171. In the present case, the testimony adduced from Special Agent Brown regarding her investigation into the witness tampering allegations was accepted by Judge Norman as reliable, and we shall not tinker with that assessment.

Smith, though, argues that Judge Norman erred when he found Central’s testimony that he had not been tampered with to be incredible. We shall not overturn Judge Norman’s determination because “questions of the credibility of witnesses and the

weight of their testimony are left to the sound discretion of the trial court.” *Smith*, 308 Md. at 170-71 (*quoting United States v. Oxford*, 735 F.2d 276 (7th Cir. 1984)).

Smith’s final argument is that Judge Norman acted arbitrarily and capriciously in sentencing him to ten years’ incarceration and by not weighing the evidence of mitigation. Clearly, the maximum sentence to which Smith could have been sentenced would have been fifteen years. Judge Norman considered the evidence of mitigation offered by Smith and gave Smith credit because he had “done somewhat better on probation this time than his first go around” as well as because Smith “has done some things successfully on probation.”

As a result, we affirm the judgment of the Circuit Court for Baltimore County.

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