

IN THE COURT OF APPEALS OF MARYLAND

No. 104

September Term, 1995

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ROBERT LEE GARDNER

v.

STATE OF MARYLAND

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\*Murphy, C.J.  
Eldridge  
Rodowsky  
Chasanow  
Karwacki  
Bell  
Raker,

JJ.

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Dissenting Opinion by Raker, J.,  
in which Rodowsky, J., joins.

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Filed: February 21, 1997

\*Murphy, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section

3A, he also participated in the decision and adoption of this opinion.

I would affirm the judgment of the Court of Special Appeals. I believe the intermediate appellate court was correct in finding that Petitioner's sentence for distribution of heroin may be enhanced under § 286(c) and § 293(a) of Article 27.

Gardner reasons that it is highly unlikely that the Legislature intended enhanced penalties under both sections to apply to a single count in the absence of history or explicit language in either § 286(c) or § 293 indicating such an intent. Relying on the proposition that penal statutes must be strictly construed, he urges this Court to resolve any doubt in his favor. He constructs his argument as follows: Section 286(c) makes no reference to § 293. Section 286(g)(5), part of the drug kingpin statute, specifically refers to § 293 and authorizes imposition of enhanced penalties under both statutes. Since § 286(c) does not refer to § 293, the Legislature did not intend to authorize enhanced penalties under both sections.

I would reject this argument on grounds of logic and policy. The absence of specific language in either section has no bearing on whether a judge may properly enhance the penalty for a repeat offender under § 293 and, on the same count, apply the mandatory minimum sentence of ten years in prison under § 286(c). Petitioner's argument overlooks the fact that § 286(g)(2)(i) limits the sentence that can be imposed on a drug kingpin to imprisonment

for not more than 40 years.<sup>1</sup> Without the specific reference to § 293 in § 286(g)(5), the 40-year maximum term in § 286(g)(2)(i) arguably would have been inconsistent with, and might have been construed to take precedence over, § 293.

The provisions of § 286(c) and § 293 each enhance a repeat drug offender's sentence in different ways. Section 286(c) enhances the minimum sentence by requiring that a repeat offender receive no less than 10 years without the possibility of parole. Section 293, on the other hand, addresses the permissible maximum sentence by permitting the imposition of twice the otherwise allowable sentence for those who are subsequent offenders. The Court of Special Appeals found no inconsistency between § 286(c)

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<sup>1</sup> The penalties for a "drug kingpin" are set out in Article 27, § 286(g)(2)(i). Article 27, § 286(g) provides, in pertinent part:

(2) A drug kingpin who conspires to manufacture, distribute, dispense, bring into, or transport in the State controlled dangerous substances in one or more of the amounts described under subsection (f) of this section is guilty of a felony and on conviction is subject to:

(i) Imprisonment for not less than 20 nor more than 40 years without the possibility of parole, and it is mandatory on the court to impose no less than 20 years imprisonment, no part of which may be suspended . . . .

\* \* \*

(5) Nothing contained in this subsection prohibits the court from imposing an enhanced penalty under § 293 of this article. This subsection may not be construed to preclude or limit any prosecution for any other criminal offense.

and § 293 and refused to read into either section any legislative intent that the application of one thereby precludes the application of the other. I agree. There is no inconsistency in the application of both of these sections to the same count.

The majority concludes that "on their face, viewed independently, [§ 286(c) and § 293 are] clear and unambiguous." Maj. op. at 6. The majority reasons, however, that because § 286(c) is a part of § 286, that section and § 293(a) must be construed together with § 286(g). The majority then concludes that because § 286(g) expressly authorizes the enhancement of that sentence pursuant to § 293(a), and that language is absent from § 286(c), the statute is ambiguous as to the Legislature's intent. Maj. op. at 8.

The foundation of the majority's opinion is the rule of lenity. The rule of lenity is a principle of statutory construction which applies to interpretations of criminal prohibitions and penalties. *Albernaz v. United States*, 450 U.S. 333, 345, 101 S. Ct. 1137, 1144, 67 L. Ed. 2d 275, 283-84 (1981). The rule applies "only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States v. Shabani*, U.S. , 115 S. Ct. 382, 386, 130 L. Ed. 2d 225, 231 (1994); see also *Lewis v. United States*, 445 U.S. 55, 64, 100 S. Ct. 915, 920-21, 63 L. Ed. 2d 198, 209 (1980). The rule serves as an aid for resolving an ambiguity, and is not to be

used to create an ambiguity where none exists. When the statute is unambiguous, the rule of lenity has no application. See *Lewis*, 445 U.S. at 65, 100 S. Ct. at 921, 63 L. Ed. 2d at 209. In this case, the statutory language is clear and unambiguous; therefore, the rule of lenity has no application. See *Jones v. State*, 336 Md. 255, 263, 647 A.2d 1204, 1208 (1994).

Petitioner argues that enhanced penalties provided for in § 286(c) and § 293(a) are harsh. Admittedly, all mandatory and enhanced sentences are harsh. Nonetheless, the Legislature, not this Court, is the proper body to determine appropriate sentences for crimes. The General Assembly has embraced the proposition that enhanced penalties will deter the future commission of criminal offenses. See *Gargliano v. State*, 334 Md. 428, 443, 639 A.2d 675, 682 (1994); *Jones v. State*, 324 Md. 32, 38, 595 A.2d 463, 466 (1991); *Montone v. State*, 308 Md. 599, 606, 521 A.2d 720, 723 (1987). The meaning we have given § 286(c) and § 293 is consistent with the intent of the Legislature to punish repeat drug offenders more severely. As we stated in *State v. Kennedy*, 320 Md. 749, 754, 580 A.2d 193, 195 (1990): "A rule [of construction] should not . . . be invoked to subvert the purposes of the statute." Prohibiting application of both § 286(c) and § 293 to determine a subsequent offender's sentence subverts the intent of the Legislature.

We granted certiorari to address a second issue presented by

Petitioner, namely, whether the Court of Special Appeals erred in holding that the State did not withdraw its "Notice of Additional Penalties," notifying Petitioner of the State's intent to pursue additional penalties. I would answer that question in the negative and hold that the Court of Special Appeals was correct in concluding that the prosecutor did not withdraw the notice of additional penalties.

Petitioner received the requisite notice of additional and mandatory penalties. Assuming, without deciding, that the State may withdraw the required notice under Rule 4-245, I find that it was not withdrawn before the court imposed sentence.<sup>2</sup>

In concluding that the prosecutor did not withdraw the Notice of Additional Penalties before Judge Prevas imposed the sentence, the Court of Special Appeals stated:

[W]e find that the prosecutor did not withdraw the Notice

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<sup>2</sup> Under Maryland Rule 4-245, Subsequent Offenders, a defendant may not be sentenced as a subsequent offender unless the State's Attorney serves notice of the alleged prior conviction on the defendant or counsel before the acceptance of a plea of guilty or *nolo contendere* or at least 15 days before trial in the circuit court or five days before trial in the district court, whichever is earlier. When the law prescribes a mandatory sentence because of a specified previous conviction, the State's Attorney shall serve a notice of the alleged prior conviction on the defendant or counsel at least 15 days before sentencing in the circuit court or five days before sentencing in the district court. The obvious purpose behind this rule is to implement the due process requirement that a defendant have fair notice of the penalties he is facing. See *Robinson v. Lee*, 317 Md. 371, 379-80, 564 A.2d 395, 399 (1989) (stating that "[f]undamental fairness dictates that the defendant understand clearly what debt he must pay to society for his transgressions.").

of Additional Penalties prior to the imposition of sentence. Appellant argues that when the prosecution said, "Judge, I am just going to call the mandatory. I believe that's an appropriate sentence in this case" the State was withdrawing its notice. He contends, therefore, that the court was without authority to sentence him under § 293(a).

We disagree. The State exhibited no intention of withdrawing either of its notices of additional penalties. When the court questioned appellant as to whether he received timely notice of the enhanced and mandatory sentence, and concluded that there was sufficient evidence to support it, the State did not withdraw its notice. The court found that the State had proved that appellant was a subsequent offender for purposes of both enhancement and mandatory penalties. We interpret the prosecutor's comments as merely recommending a sentence less than the statutory maximum; it did not constitute a withdrawal of the subsequent offender notice.

The Court of Special Appeals was correct.

The sentencing proceeding immediately followed the hearing on Gardner's motion for a new trial. The following colloquy took place between the court and defense counsel:

[DEFENSE COUNSEL]: In any case, your honor, [the prosecutor] appropriately filed the mandatory penalty in this case. My client has a major record. [The prosecutor] said at the end of the trial, prior to the request for the presentence report, that he was going to ask for the ten years mandatory, although technically he's facing forty years with the first ten without parole.

After a short recess, the discussion continued:

COURT: All right, now, the next proceeding is the State advised us that they were filing for an enhanced and a mandatory sentence, and I think at the time of the verdict you indicated that you had been given timely notice of those, is that correct?

[DEFENSE COUNSEL]: That's true, your honor.

COURT: All right, then the State offered as evidence, for you to consider, a certified copy of a docket entry in charging document 58934914 . . . . Do you concede that that is sufficient evidence to make him both a subsequent offender and a mandatory offender?

[DEFENSE COUNSEL]: Yes, your honor.

COURT: All right, Madam Clerk, make the following docket entries: I find as a fact, that pursuant to Article 27 section 293 and Maryland Rule 4-245, that the State has proved that the defendant is a subsequent offender for purposes of both enhancement and mandatory penalty. Is there anything else that you wanted to say or prove in that phase . . . ?

[DEFENSE COUNSEL]: No, Judge.

Following this discussion, defense counsel and Petitioner each addressed the court. The judge then addressed the State:

COURT: Anything from the State?

[PROSECUTOR]: Judge, I am just going to call the mandatory. I believe that's an appropriate sentence in this case.

COURT: We have already done that.

[PROSECUTOR]: Right

COURT: In the proceeding before disposition, when I asked [defense counsel] whether he got timely notice and whether he accepted your evidence, that is when we did that.

[PROSECUTOR]: The State's recommendation is ten years to the Division of Correction without parole.

Petitioner's entire argument that the State "withdrew" the Rule 4-245 notice is based on the prosecutor's comment "I am just going to call the mandatory. I believe that's an appropriate sentence in this case." His interpretation is not supported by a fair reading of the record and a review of the comment in context.

The conduct of the prosecutor in establishing the predicate for the mandatory and enhanced penalty and the prosecutor's silence when the judge caused the courtroom clerk to make appropriate docket entries in regard to the mandatory and enhanced penalties are inconsistent with an intent to withdraw the notice. The State interprets the prosecutor's comment as the State's recommendation to the trial court that Gardner receive a sentence less than the maximum. This interpretation is supported by the defense counsel's earlier comment in response to the court's suggestion for a pre-sentence investigation. Counsel said:

Quite frankly, I don't see the point in it in that it is the -- going to be the State's recommendation, ten years without parole, and that is it.

The State merely exercised its discretion and recommended a sentence less than the statutory maximum. *See Kohler v. State*, 88 Md. App. 43, 49, 591 A.2d 907, 910 (1991) (stating that "[n]either Rule 4-245(b) nor any other authority requires that a recommendation for a sentence less than the statutory maximum be treated as a withdrawal of notice of exposure to the risk of an enhanced sentence." ).

Judge Rodowsky has authorized me to state that he joins in the views expressed in this dissenting opinion.