Circuit Court for Calvert County
Case No. 04-K-16-000060

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 414

September Term, 2017

JAMES STEWART BROWN, III

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Beachley,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: March 7, 2018

On November 2, 2016, appellant, James Stewart Brown III, pled guilty to one count of sexual abuse of a minor in the Circuit Court for Calvert County. Pursuant to a plea agreement, he was sentenced to twenty years, with all but ten years suspended, and five years of supervised probation. He subsequently filed a motion for appropriate relief on the ground that the evidence was insufficient to find that he committed a crime of violence. Following a hearing, the court denied the motion. Appellant noted an appeal on April 26, 2017, and raises the following question for our review:

> I. Did the circuit court err in denying appellant's motion for appropriate relief and finding that he committed a crime of violence beyond a reasonable doubt?

For the reasons to follow, we shall grant the State's motion to dismiss.

BACKGROUND

On February 17, 2016, appellant was charged with the following crimes in connection with the alleged molestation of H.G., his ten-year-old step-daughter: three counts of sexual abuse of a minor; three counts of third-degree sexual offense; fourth-degree sexual offense; and second-degree assault. Appellant was also charged with a number of traffic offenses that occurred during the course of the arrest.

On May 5, 2016, appellant pled guilty to one count of sexual abuse of a minor. Under the terms of the plea agreement, the court would impose a maximum sentence of ten years executed time but the prosecutor and defense counsel were free to argue for or against an additional suspended sentence. In support of the plea, the prosecutor proffered that the victim told a detective that in January 2016, appellant "had asked her to touch his penis with her hand. She further advised that she told her stepfather that this made her

uncomfortable. He then apologized [to] her and told her he was just horny." The prosecutor also proffered that on another occasion, appellant "put his hands down [the victim's] pants when he was rubbing her and actually rubbed the vaginal lips of her vagina and stated when he was doing this, he would masturbate and that white stuff would come out."

At the conclusion of the hearing, the court asked if there were any challenges to the evidence. The prosecutor responded that appellant "admits to touching the victim's buttocks over her clothing but denies that he touched her under her clothing." Defense counsel also added that appellant had attempted to take his own life multiple times before the police were able to locate him. The court found that the proffer more than amply supported a conviction for sexual abuse of a minor, and it found him guilty of that charge.

The court deferred sentencing until September 2, 2016, pending a presentence investigation and mental health assessment of appellant. Before the court imposed a sentence, defense counsel approached the bench to discuss a "procedural issue." The bench conference was not transcribed, but after the conference the court commented:

> [T]here was discussion at the bench about the crime of violence. As counsel knows, at sentencing, the Court reviews the guidelines. If the Court goes above or below the guidelines, he or she should give reasons for it, and if this was a crime of violence, the Court should announce on the record that Mr. Brown in this case must serve 50 percent of his time before any possibility of parole.

The court then noted that appellant's objection was preserved; it sentenced him to twenty years, with all but ten years suspended, and five years of supervised probation; and it announced that he would be required to serve fifty percent of his sentence before becoming

eligible for parole because he was convicted of a crime of violence. At the conclusion of the hearing, the court explained the conditions of probation and appellant's post-trial rights, including his right to file an application for leave to appeal.

On November 2, 2016, appellant filed a motion for appropriate relief on the ground that the evidence was insufficient to find that he committed a crime of violence as defined in section 14-101 of the Criminal Law Article. The court held a hearing on the motion on April 3, 2017. During the hearing, the prosecutor argued that aside from the contested fact that appellant denied touching the victim under her clothing, the State's proffer demonstrated that the victim touched appellant's penis at his request, and appellant did not deny this fact. Defense counsel maintained that the proffer did not support such a finding. The court denied appellant's motion, stating the uncontested evidence supported the finding that the victim touched his penis. As a result, it found that appellant committed a crime of violence. This appeal followed.

DISCUSSION

I. State's Motion to Dismiss

In its motion to dismiss, the State argues that appellant's appeal is not properly before this Court. The State notes that even if the circuit court's announcement that appellant was convicted of a crime of violence was in error, he was required to raise this issue in an application for leave to appeal within thirty days after sentencing. Next, appellant's sentence was not illegal because it was within the statutory maximum penalty for sexual abuse of a minor, and it was within the terms of the binding plea agreement. Finally, the determination of whether appellant is required to serve half of his sentence is

not an issue that is ripe for review because parole eligibility is determined by the parole commission, and the commission has yet to determine appellant's parole status.

Appellant responds that he is not contesting any decisions made by the parole commission but rather "the illegality in the trial court's conviction for a crime of violence and resulting parole requirement associated therewith." In order to be convicted of a crime of violence, Crim. Law § 14-101(a)(16) requires that the State prove, beyond a reasonable doubt, that a defendant committed "intentional touching, not through the clothing, of the victim's or the offender's genital, anal, or other intimate area for sexual arousal, gratification, or abuse[.]" Since neither the plea agreement nor the State's proffer established that he intentionally touched the victim under her clothing, and an illegal sentence may be challenged at any time, appellant contends that the court erred in finding that he committed a crime of violence.

Maryland Rule 8-204 sets forth the procedures that apply to applications for leave to appeal to this Court. Rule 8-204(b)(2)(A) states that "the application shall be filed within 30 days after entry of the judgment or order from which the appeal is sought."[1] Section 12-302(e) of the Courts and Judicial Proceedings Article also contains a provision relating to final judgments following guilty pleas. It provides that "§ 12-301 of this subtitle does not permit an appeal from a final judgment entered following a plea of guilty in a circuit court. Review of such a judgment shall be sought by application for leave to appeal."

[1] Though inapplicable here, Rule 8-204(b)(2)(B) also contains an exception for victims of a crime to file a belated application for leave to appeal.

We have held that fundamental rights, such as the right to appeal a guilty plea, must be affirmatively waived by defendants. *See State v. Gutierrez*, 153 Md. App. 462, 470–75 (2003). Non-fundamental rights, by contrast, may be waived without an affirmative acknowledgement of waiver by the defendant to the court. *Id.* Nevertheless, even for fundamental rights, a presumption of a knowing and intelligent waiver arises when a petitioner could have made, but does not make, an allegation in a proceeding where the allegation could have been raised. *Id.*; *see also McElroy v. State*, 329 Md. 136, 151–52 (1993); Md. Code Ann., Crim. Proc. § 7-106(b) (West 2011).

In this case, there is no dispute that the issue raised by appellant was fully documented in the record, and that he did not file a timely application for leave to appeal his guilty plea: he was sentenced on September 2, 2016, and he did not note his appeal until April 26, 2017. Nevertheless, appellant argues that his appeal is proper because the circuit court's sentence is illegal. He conceded this issue, however, in his motion for appropriate relief when he stated "the undisputed facts provided sufficient evidence to convict Defendant of sexual abuse of a minor." This is consistent with the circuit court's finding:

> Clearly the evidence shows beyond a reasonable doubt that you were a household member because that means a person, who at the time of the alleged abuse, lived with or were regularly present in the home of the victim, and the Court is satisfied beyond a reasonable doubt that the sexual contact was done on the victim, meaning the intentional touching of the victim's and your genital or anal area or other intimate parts, again intimate parts includes the buttocks or the chest, for the purpose of sexual arousal or gratification.

Further, the court's sentence, as noted by the State, was within the statutory maximum penalty of twenty-five years for sexual abuse of a minor, and it was in accord with the terms of appellant's plea agreement. It was therefore a legal sentence.

Appellant's argument that the court erred in announcing he was convicted of a crime of violence is also without merit. First, under Crim. Proc. § 6-217(b), the court's statement was "for information only and is not a part of the sentence." Second, Crim. Law § 14-101 defines the crimes of violence that are subject to mandatory sentences; it does not provide that a court makes the determination of whether a crime constitutes a crime of violence at sentencing, especially where, as here, enhanced penalties are not being sought by the State. Finally, parole eligibility is not determined by the court. *See Yoswick v. State*, 347 Md. 228, 241 (1997) ("Parole eligibility falls within the province of the Parole Commission and the executive branch, and not within the jurisdiction of the courts."). As a result, appellant has failed to rebut the presumption of waiver arising from his guilty plea. *McElroy*, 329 Md. at 151–52. The circuit court thus did not impose an illegal sentence, and we shall dismiss the appeal on the ground that the sentence was not illegal, appellant failed to timely file an application for leave to appeal and his parole eligibility has not been determined.[2]

STATE'S MOTION TO DISMISS GRANTED. COSTS TO BE PAID BY APPELLANT.

[2] While we express no view as to the merits of the case, we note that the State's proffer indicated that appellant "asked" the victim to touch his exposed penis; it never indicated whether the victim complied with the request.