Circuit Court for Prince George's County
Case No. CT160567X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 613

September Term, 2017

KEYRON JENKINS

v.

STATE OF MARYLAND

Berger,
Arthur,
Krauser, Peter B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: August 1, 2018

Convicted, by a jury, in the Circuit Court for Prince George's County, of robbery with a dangerous weapon as well as the lesser included offenses of robbery, second degree assault, and theft of property with a value of less than $1,000, Keyron Jenkins, appellant, received the maximum sentence that could have been imposed for robbery with a dangerous weapon conviction: 20 years of imprisonment. A consideration upon which the circuit court relied in imposing that sentence triggers the first of two issues appellant raises in this appeal. They are:

1. Did the sentencing judge impermissibly consider a pending charge while imposing the maximum allowable sentence of twenty years of incarceration?

2. Did the court abuse its discretion in ruling on Appellant's motion for sanctions for the State's discovery violation?

For the reasons that follow, we affirm.

FACTS

On March 2, 2016, Javon Walker was walking on Karen Boulevard in Capitol Heights, when an individual, in a burgundy Lincoln Town Car, "jumped out and pulled" Walker into that vehicle. Then, as one of the vehicle's three occupants held what appeared to be a handgun to Walker's back, he was told to empty his pockets. After Walker removed a cell phone from his pocket and handed it to one of his assailants, he was instructed to get out of the car. When he did, the car drove off.

Eight days later, on March 10, 2016, Officer Brandon Farley of the Prince George's County Police Department observed a burgundy Lincoln Town Car being driven "erratically." After activating the lights and sirens of his patrol vehicle, the officer drove

up behind the Town Car, signaling it to pull it over. But, instead of pulling over, the driver of that vehicle continued to drive for approximately one mile before ultimately stopping. During that time, Officer Farley observed "a lot of furtive movements from the driver and passenger."

After the officer left his patrol car and walked up to the now stopped Town Car, he smelled an odor of marijuana emanating from that vehicle and saw a marijuana grinder in the ashtray and an open bottle of tequila on the rear floor board. Consequently, he ordered appellant and the three other occupants of the Town Car to get out of the vehicle. A subsequent search of that car, by the officer, uncovered, among other things, what appeared to be a "black and silver handgun"[1] and several cell phones, including the phone that had been taken from Walker.

Walker thereafter identified appellant, from a photo array, as one of the persons who was "involved in the robbery." Appellant was thereafter tried and convicted of robbery with a dangerous weapon and related offenses.

Motion to Revoke Bond

After appellant's trial had concluded, the circuit court, over the State's objection, allowed appellant to remain free on bond pending his sentencing hearing. However, on January 19, 2017, before that hearing was to be held, the State filed a motion to revoke appellant's bond. In that motion, the State informed the court that appellant had been

[1] The handgun found in the car was later determined to be a pellet gun.

arrested and charged, while free on bond, with another armed robbery, and summarized the facts underlying that charge. Specifically, the State's motion advised:

> On January 17, 2017 [appellant] was arrested as a result of an incident in which he and two other men robbed two victims at gun point. [Appellant] and the other suspects fled from the police but were eventually apprehended. [Appellant] has been charged with the following offenses: Armed Robbery, First Degree Assault, Use of a Handgun in a Crime of Violence, and Theft in District Court case 0E00602567.

The court granted the State's motion and ordered that appellant be held without bond pending sentencing.

Sentencing Hearing

At appellant's sentencing hearing, the State recommended that the court impose a sentence at the top of the sentencing guidelines. Then, after recounting the evidence adduced at trial, the State informed the court that appellant had a prior conviction for armed robbery, had received probation before judgment for a prior theft offense,[2] and, most relevant to this appeal, reminded the court that appellant had been charged, following his trial for armed robbery, with another armed robbery offense in January 2017 and that, as a result, his bond had been revoked by the court.

In response to the State's recommendations, defense counsel proposed a sentence at the bottom of the guidelines, which prompted the following exchange between the court and counsel:

[2] According to the pre-sentence investigation report that was submitted to the court, the date of appellant's earlier armed robbery conviction was June 2006 and the probation before judgment was entered in December 2010.

> THE COURT: . . . I let him stay on bond. I put people at risk by exercising my discretion and he went out and did the exact same thing again. Tell me how he merits a sentence not at the top of the guideline.
>
> [DEFENSE COUNSEL]: We understand Your Honor[']s concerns. I just would ask Your Honor to consider at this point, those are still allegations. He hasn't been adjudicated guilty of anything, Your Honor. And I guess without getting too much into the facts of [sic] the merits of that, there's no allegation that he actually was acting outside. The main part of the allegation is that he may have been in a car and driving a car. But the individuals who actually were acting and doing things, he wasn't initially a part of that. I mean, I know that's not the case before Your Honor but I would just kind of - - since it's being taken into consideration by Your Honor in terms of what - - at least from what we know as we don't represent [him] in that case what his (indiscernible) might be.

Later, in stressing that appellant's crimes were largely the result of appellant's untreated drug problem, defense counsel stated that the allegations supporting his subsequent pending charges were "similar to [the] allegations" in the instant case.

Then, before the defense's allocution had concluded, appellant apologized to Walker and to his own family for making "a bad decision[,]" and seemingly attributed his bad behavior to a drug addiction:

> [APPELLANT]: I would just like to apologize to everyone involved in this situation. Of course, the victim. My family. I made a bad decision. This past year or two in my life, I've just been going through a lot and I made a bad decision and I'm sorry for everything. That's it.
>
> THE COURT: You actually got involved in an armed robbery while you were on bail awaiting sentence. Tell me how I rationalize that.
>
> [APPELLANT]: Like I say [sic], I was just going through - - battling a drug addiction at this time. A drug I never used before and never knew the side effects or where it could take me to.

In imposing the maximum sentence of 20 years, the court stated:

> . . . it is just so disappointing for you to have been released on bail, trusted to be on your best behavior and you went out and did the very thing that got you here to begin with and not for the first time.
>
> I'm going to impose the maximum penalty of 20 years. I'll give you credit for the 110 days that you served. You work the other one out and let me know and I might reconsider. But just for now, I think you earned whatever the maximum penalty is.

It is noteworthy, from the foregoing quote, that the court, in concluding its sentencing of appellant, indicated that it might "reconsider" appellant's sentence after he had "work[ed] the other [case] out," a reference to appellant's pending armed robbery charges. But, after subsequently pleading guilty to those charges, appellant never took the court up on that offer.

DISCUSSION

I.

Appellant claims that, at his sentencing hearing, the court impermissibly relied upon "bald accusations" regarding subsequent crimes with which he had been charged but had not yet been tried for, as "the judge's only information about the new charge was the State's assertion that [appellant] had been arrested and was pending trial." We conclude that this claim was not preserved for appellate review but, in any event, is unpersuasive, as the court did not rely upon "bald accusations" with respect to that charge, as appellant suggests.

A.

The State maintains that appellant's claim is not properly before this Court because defense counsel did not object to the court's consideration, at sentencing, of his post-conviction arrest for a subsequent armed robbery but "noted only that the post-verdict

conduct was 'still' an allegation." We agree, with the State, that this claim was not preserved for our review.

Maryland Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." To be more precise, under that rule, "a defendant must object to preserve for appellate review an issue as to a trial court's impermissible considerations during a sentencing proceeding.'" *Taylor v. State*, 236 Md. App. 397, 451 (2018) (quoting *Sharp v. State*, 446 Md. 669, 683 (2016)).

There is no dispute that appellant did not formally object to what he now claims was the court's consideration of "bald accusations" with respect to his pending charges, but he now claims, relying on *Sharp*, *supra*, that his counsel's statement – "I just would ask Your Honor to consider at this point, those are still allegations. He hasn't been adjudicated guilty, Your Honor" – was sufficient to preserve this issue for appellate review. We disagree.

Sharp posed, among other things, the question of whether the defendant, who had been convicted by a jury of assault and a weapons offense, had preserved the issue of whether the circuit court had erred by considering, at sentencing, his decision not to plead guilty. *Sharp*, 446 Md. at 672. At sentencing, defense counsel requested that the court impose a sentence that was part of a pre-trial plea offer by the State, noting "[n]othing is anything [sic] different because we went to trial." *Id.* at 679. The court responded, "So you don't believe that putting [the] State's witnesses, the victim through, reliving that and testifying in [c]ourt is no different than if he would have admitted what he did and pled

guilty in front of me?" *Id.* Defense counsel, in turn, replied, "I don't believe in punishing someone for wanting to go to trial." *Id.*

It was those words, held the Court of Appeals, that preserved "the issue of whether the circuit court impermissibly considered during sentencing [Sharp's] decision not to plead guilty" for appellate review. *Id.* at 683-84. The Court reasoned that the foregoing statement by Sharp's counsel "made known his objection to the circuit court" of what appeared to be its intention to penalize Sharp for declining all plea offers and going to trial. *Id.* at 684.

But, here, unlike in *Sharp*, the statement made by defense counsel did not address the issue he now raises on appeal. The statement made by Jenkins's counsel was only a reminder to the sentencing court that appellant had only been charged and not convicted of the pending criminal offenses as yet. In other words, defense counsel was speaking not to the "baldness" of the allegations or charges against appellant but simply to the fact that appellant had only been accused of the pending charges and not yet convicted of them. Indeed, at no time, during sentencing, did defense suggest that the basis of the allegations at issue lacked any factual support as he does now by describing them, on appeal, as "bald accusations." Hence, the issue of whether the sentencing court erred in considering pending charges involving a subsequent crime allegedly committed by appellant was not, under Maryland Rule 8-131(a), preserved for appellate review.

B.

But, even if appellant's claim was preserved for appellate review, it clearly lacks any merit. To begin with, we note that "'the objectives of sentencing [are] punishment,

deterrence and rehabilitation,'" *Cruz-Quintanilla v. State*, 455 Md. 35, 40 (2017) (quoting *Smith v. State*, 308 Md. 162, 166 (1986)), and that, in achieving those objectives, the sentencing court has "very broad latitude," *Johnson v. State*, 274 Md. 536, 540 (1975); the exercise of which we review for "abuse of discretion," *Cruz-Quintanilla*, 455 Md. at 41.

Indeed, "'a judge is not limited to reviewing past conduct whose occurrence has been judicially established[.]'" *Hamwright v. State*, 142 Md. App. 17, 42 (2001) (quoting *Logan v. State*, 289 Md. 460, 481 (1981)). In addition to prior criminal convictions or criminal contacts with the justice system, a sentencing court may consider "'reliable evidence of conduct which may be opprobrious although not criminal, *as well as details and circumstances of criminal conduct for which the person has not been tried*.'" *Taylor*, 236 Md. App. at 454 (quoting *Logan*, 289 Md. at 481) (emphasis added). That is to say, the court "may consider uncharged or untried offenses, or even circumstances surrounding an acquittal." *Anthony v. State*, 117 Md. App 119, 131 (1997). As appellant has noted, however, "bald accusations of criminal conduct for which a person either has not been tried or has been tried and acquitted[,]" standing alone, may not be considered. *Brown v. State*, 85 Md. App. 523, 539 (1991) (quoting *Henry v. State*, 273 Md. 131, 147 (1974)).

But no such accusations were considered by the sentencing court here. First of all, the judge, who presided at appellant's sentencing hearing, was the same judge that had ruled on the State's motion to revoke appellant's bond. In that motion, as both sides were well aware, the State informed the court that appellant had been arrested in January 2017, while awaiting sentencing, "as a result of an incident in which he and two other men robbed two victims at gunpoint." Thus, the sentencing court was informed, before sentencing, of

the basic facts underlying appellant's pending charges. Then, at sentencing, the State brought up that arrest and reminded the court that it was the basis upon which the court had revoked appellant's bond. And, lest the court had any doubt as to how those facts were relevant to the instant case, defense counsel advised the court, before it imposed sentence, that the allegations in appellant's pending armed robbery case were "similar to the allegations" in the instant case, and, in attempting to distinguish the cases, stated that, in the pending case, appellant was alleged to have been driving the car, and that other individuals were "actually [ ] acting and doing things." Hence, it is clear that the court did not have before it just "bald accusations of criminal conduct," as appellant claims, when it sentenced appellant.[3]

Finally, we note that, at the conclusion of the sentencing hearing, the court, in effect, offered to take additional evidence with respect to the pending charges, once they were no longer pending. That is, to be more precise, the court advised appellant that, once the pending charges were "worked out," it, upon appellant's request, "might reconsider" its sentence. But, as appellant subsequently entered guilty pleas, in that pending case, to two counts of armed robbery, he understandably chose not to avail himself of that offer.

[3] Appellant appears to suggest that, to be reliable, "sworn testimony of an individual with firsthand knowledge of an event" is required. There is nothing in the cases cited by appellant that supports such a contention.

II.

Appellant contends that the trial court abused its discretion in denying his motion to exclude the testimony of Javon Walker, the victim of his crimes. We disagree.

On the first day of trial, appellant filed a motion in limine to exclude the testimony of Walker, as a sanction for a purported discovery violation by the State. Although the State had indicated, in its discovery responses, that Walker had "no known criminal history," the defense had learned, through its own investigation, that Walker had a prior theft conviction, and that he was, at the time of trial, incarcerated on a pending matter. Appellant asserted that, because the State failed to disclose this information, in violation of discovery rules, Walker should be disqualified from testifying.

Prior to jury selection, the court held a hearing on that motion, at which defense counsel asserted that the defense had "real difficulty" because it did not know the "extent of [Walker's] criminal history," which was relevant to his credibility as the only eyewitness to the charged crimes. The State responded that it was not aware of the prior conviction at the time it responded to appellant's discovery requests, and that details of the pending matter did not need to be provided because Walker had not yet been convicted, and that, in any event, disqualifying Walker from testifying was not a proper remedy because "everybody knows he has a conviction."

The court agreed with defense counsel that the State was obligated to disclose information regarding Walker's criminal history, including the pending charge, but denied the motion to exclude Walker's testimony, stating:

> I don't think the remedy is appropriate to bar the witness from testifying. I think that would be inappropriate. I'm not sure what a proper remedy is, but since there has been a character[ization] [4] of everything from the conviction to the fact that there were pending charges, accordingly, I'm going to deny the motion in limine.

Specifically, appellant now claims that the trial court abused its discretion by failing to make a determination as to prejudice and failing to determine and then impose an appropriate remedy. We conclude otherwise.

Maryland Rule 4-263(d)(6)(C) provides that the state's attorney shall, without request, provide to the defense any information that tends to impeach a State's witness, including prior criminal convictions and pending charges. The rule further provides that the state's attorney "is not required to investigate the criminal record of the witness unless the State's Attorney knows or has reason to believe that the witness has a criminal record." Sanctions for violations of the rule are set forth in subsection (n) of the rule, which provides:

> (n) **Sanctions.** If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

[4] Presumably mistranscribing "characterization" as character, the transcript actually reads:

> I'm not sure what the proper remedy is, but since there has been a character of everything from the conviction to the fact that there were pending charges, accordingly, I'm going to deny the motion in limine.

A trial court's ruling on sanctions for discovery violations is reviewed for abuse of discretion. *Bellard v. State*, 229 Md. App. 312, 340 (2016), *aff'd*, 452 Md. 467 (2017)). "To constitute an abuse of discretion, the decision 'has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Cousins v. State*, 231 Md. App. 417, 438 (quoting *Evans v. State*, 396 Md. 256, 277 (2006)), *cert. denied*, 453 Md. 13 (2017).

Generally, in ruling on sanctions, the trial court "'should impose the least severe sanction that is consistent with the purpose of discovery rules.'" *Raynor v. State*, 201 Md. App. 209, 228 (2011) (quoting *Thomas v. State*, 397 Md. 557, 571 (2007)). This view is consistent with the tenet that "discovery sanctions are designed to prevent a defendant from being surprised, not to yield a defendant the windfall of exclusion every time the State fails to comply with discovery rules." *Morton v. State*, 200 Md. App. 529, 543 (2011) (citations and internal quotation marks omitted). Indeed, "[e]xclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed." *Thomas*, 397 Md. at 572. Moreover, in considering whether, and to what extent, sanctions are appropriate, "'a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances.'" *Raynor*, 201 Md. App. at 228 (quoting *Thomas*, 397 Md. at 570-71).

Contrary to appellant's claim that the court "failed to make a determination as to prejudice," it is apparent that the court, after hearing argument from both sides on this issue, considered the extent of any prejudice to the defense and found that the State's failure

to disclose that information did not so prejudice appellant that it warranted dismissal of the instant case. It presumably so held because the defense was aware, prior to trial, of the conviction and the pending charge. *See, e.g.*, *Warrick v. State*, 302 Md. 162, 173 (1985) (stating that, evaluating the prejudice from a discovery violation by the State may involve a determination of "whether the matter omitted from a formal discovery production by the State had nevertheless been timely communicated to or known to the defense in some other way").

Finally, once the court had denied the only sanction requested by appellant, it was not incumbent upon the court to fashion another remedy that appellant had not requested. Indeed, "although Maryland Rule 4-263 gives trial courts the discretion to fashion remedies for discovery violations, the Rule does not require the court to take any particular action or any action at all." *Bellard*, 229 Md. App. at 340 (citation omitted). *See also Raynor*, 201 Md. App. at 228 (observing that, if a defendant foregoes requesting a "limited remedy that would serve the purpose of the discovery rules and instead seeks the greater windfall of an excessive sanction, the 'double or nothing' gamble almost always yields 'nothing.'") (citation and some internal quotation marks omitted).

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.