Circuit Court for Baltimore City
Case No. 814272001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1133

September Term, 2019

DEMETRIUS BRADSHAW

v.

STATE OF MARYLAND

Reed,
Gould,
Eyler, Deborah S.
Senior Judge, Specially Assigned

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 10, 2020

In the Circuit Court for Baltimore City, Demetrius Bradshaw, the appellant, was found in violation of his probation for failure to complete an outpatient substance abuse treatment program. The court revoked his probation and ordered him to serve out the remaining 2 years and 6 months of his previously suspended sentence. He appeals, posing two questions, which we have reordered and rephrased:

> I. Did the circuit court err by admitting hearsay evidence at the violation of probation hearing?
>
> II. Did the circuit court err by imposing a sentence that exceeded the presumptive statutory maximum without making the requisite findings to do so?

For the following reasons, we answer the first question in the negative and the second question in the affirmative. Accordingly, we shall affirm the part of the judgment finding that Bradshaw was in violation of his probation, but we shall vacate the sentence and remand for further proceedings.

FACTS AND PROCEEDINGS

On October 20, 2014, Bradshaw pleaded guilty to two counts of second-degree assault and one count of malicious destruction of property based on the following underlying facts.

On July 2, 2014, Bradshaw forced his way into an apartment occupied by Sonya Chambers, the mother of his child.[1] He pulled her out of apartment and slapped her. When Everett Wicks,[2] a friend of Chambers's mother, intervened to help her, Bradshaw shoved him against a wall with enough force to damage the wall. Chambers ran to the bathroom to hide. Bradshaw kicked in the door to the bathroom and put his hands around her neck. Wicks again intervened, and Bradshaw again threw him against a wall, creating a large hole. Bradshaw then fled on foot.

For these offenses, the circuit court imposed a split sentence: a term of 6 years with all but 6 months suspended in favor of 3 years' supervised probation. The probation order included all the standard conditions of probation and two special conditions: 1) to stay away from Chambers and Wicks and 2) to complete the HARBEL program.[3]

On November 19, 2015, a violation of probation warrant was issued for Bradshaw. The attached statement of charges alleged that he had violated five conditions of his

[1] This was the third time that day that Bradshaw had tried to enter Chambers's apartment. The first two times the police were called, and Bradshaw was ordered to leave.

[2] Wicks's name is spelled "Witt" in the transcript, but "Wicks" elsewhere in the record.

[3] HARBEL is a community organization in Northeast Baltimore City. As relevant to the instant case, it operates the HARBEL Prevention and Recovery Center, an outpatient substance abuse prevention and treatment center, including specialized services for men who have been involved in domestic violence. *See* http://www.harbel.org/preventionandrecovery.html (last visited May 27, 2020).

probation, including the standard condition that he obey all laws, and the special conditions that he have no contact with Chambers and that he complete the HARBEL program. It further specified that on October 30, 2015, Bradshaw had been arrested and charged with disorderly conduct, failure to obey a police officer, and resisting arrest, and that Chambers was the complainant who contacted the police.[4]

On February 17, 2016, the circuit court held a revocation of probation hearing. By then, Bradshaw had been convicted in the District Court for Baltimore City of disorderly conduct and failure to obey and was sentenced to 95 days in jail. He agreed to admit to a violation of the standard "obey all laws" condition based upon his recent conviction and to forgo a full hearing. The court found that Bradshaw had violated his probation on that basis and heard argument on sentencing. In arguing for a reduced sentence, defense counsel acknowledged that Bradshaw had not yet completed the HARBEL program but explained that he had attended some sessions geared toward domestic violence prevention and some drug and alcohol treatment sessions. The court decided to reimpose the previously suspended sentence of 5 years, 6 months, suspending all but 3 years, and imposed a new term of 3 years' probation. In addition to the standard conditions of

[4] On that date, Chambers had called 911 and reported that Bradshaw had assaulted her and that she was bleeding from the head. Police responded to her apartment. Bradshaw was present, in a "highly intoxicated" state. He was arguing with police and bystanders, refusing to follow orders, and yelling. Chambers refused medical treatment and to make a statement.

probation, the court ordered as special conditions that Bradshaw stay away from Chambers and "enroll & complete [the HARBEL program.]"

Roughly two years later, on February 23, 2018, Muriel Curtis, a senior agent with the Division of Parole and Probation in the Violence Prevention Unit, applied to the circuit court for a violation of probation warrant for Bradshaw. Agent Curtis alleged that Chambers had reported that Bradshaw was harassing her, that Chambers had called the police after an argument with him, and that he was living in Chambers's apartment building, across the hall from her. Based upon this information, Agent Curtis asserted that Bradshaw had violated a standard condition of his probation by providing a false address and had violated the special condition that he stay away from Chambers. Agent Curtis added that "[i]t should be noted[] that [Bradshaw] is attending [HARBEL] as directed." The court issued a warrant on April 2, 2018.

The violation of probation hearing went forward on September 25, 2018. At the outset, the prosecutor asked to approach the bench and advised the court that Chambers was not present in the courtroom and it did not appear that she had been notified of the hearing date. The prosecutor had attempted to contact her by telephone but had not been able to reach her directly. The prosecutor noted that the State also had "HARBEL . . . [as] an allegation."

Through counsel, Bradshaw opposed a postponement.[5] The court asked the prosecutor whether Agent Curtis was present. The prosecutor confirmed that she was present but said that Agent Curtis could not testify to any of the "substantive allegations." The court asked the prosecutor whether Bradshaw had completed the HARBEL program. The prosecutor responded that he had not.

Defense counsel stated that "under the new [Justice Reinvestment Act ("JRA")]" failure to complete the HARBEL program would amount to a technical violation "punishable by not more than 15 days for the first one[.]" He added that Bradshaw would be "happy to admit to the HARBEL technical violation" since he had been incarcerated on the violation of probation warrant for 116 days already (since June 1, 2018).[6]

The court responded: "Yes. So what the Court will do, because he hasn't completed HARBEL and doesn't seem to have any interest in doing it, will find that the technical violation penalty is not sufficient in this instance. So he needs to know that." The prosecutor agreed that that was "permissible [for the court to do] under the statute." Defense counsel responded that, in that case, Bradshaw wanted "a full hearing." Counsel returned to the trial tables.

[5] The hearing had been postponed twice before – on July 6, 2018 and again on August 30, 2018.

[6] The transcript mistakenly denotes that the prosecutor was making this argument, but it is clear from context that it was defense counsel.

The prosecutor asked the court to take judicial notice of the court file, which it did, and then called Agent Curtis. She testified that Bradshaw enrolled in "the HARBEL treatment program" on February 28, 2018 and was "unsuccessfully discharged" on April 7, 2018.[7, 8] While in the program, he tested positive for Suboxone on four occasions and self-reported taking Percocet and Oxycodone. Agent Curtis identified a discharge summary from HARBEL, which was marked as State's Exhibit 1. Exhibit 1 was admitted into evidence over defense objection.[9]

On cross-examination, Agent Curtis testified that Bradshaw still was enrolled in the HARBEL outpatient drug treatment program when she filed her violation report. The program typically lasts 6 months.

[7] Agent Curtis also testified that Bradshaw violated a standard condition of his probation that required him to obtain permission before changing his home address. According to Agent Curtis, one of her colleagues conducted a home visit on January 30, 2018 at the address Bradshaw had provided. Bradshaw's grandfather was there and stated that he was no longer living at that address. On cross-examination, Agent Curtis acknowledged that when she conducted a home visit in March 2018, however, Bradshaw was present at the address he gave her. During Bradshaw's testimony, the State conceded that it had failed to meet its burden with respect to the violation of the change of address standard condition.

[8] Throughout its brief, the State refers to the HARBEL program as an anger management program. Although anger management may have been a component of the program, it is clear from Agent Curtis's testimony and from Bradshaw's testimony that the program was a substance abuse treatment program.

[9] That exhibit is not in the record.

On redirect examination, Agent Curtis testified that the "Discharge Summary" stated that Bradshaw was discharged from the HARBEL program because he "left before completing program."

Bradshaw testified that he enrolled in HARBEL and remained in the program for "two or three months" and was "doing good." He stopped attending the program after he learned that a violation of probation warrant had been issued "for something that [he] didn't even do" because he expected that if he reported to HARBEL he would be arrested. Before then, he stated, he had been compliant with the program.

The court found that Bradshaw willfully had violated his probation by failing to complete the HARBEL program.

At sentencing, Agent Curtis recommended that Bradshaw be sentenced to "a period of incarceration" because he was a Violence Prevention Unit client. The prosecutor argued that because this was Bradshaw's second violation of probation and given the seriousness of the underlying crimes, the court should "strike the probation and impose a substantial portion of the balance of the sentence[.]"

Defense counsel responded that pursuant to the provisions of the JRA codified at Md. Code (2001, 2008 Repl. Vol., 2017 Supp.), section 6-223(d)(2)(ii) & (e)(1) of the Criminal Procedure Article ("Crim. Pro."), there is a rebuttable presumption that the

sentence should not exceed 30 days for a second technical violation of probation.[10] Given that Bradshaw had been incarcerated since June 1, 2018, defense counsel argued that time served was the appropriate sentence. He emphasized that Bradshaw was working and had been compliant with the HARBEL program until the warrant issued for his arrest.

The court imposed sentence as follows:

> Mr. Bradshaw, you were supposed to enroll and complete the HARBEL program as a condition of your probation in October of 2014. You were given a second opportunity to do that and you were asked to enroll and complete the HARBEL program in February of 2018, and you failed to do so.... [T]he whole purpose of the Violence Prevention Unit is for the Parole and Probation to work with younger offenders to make sure that they get on the right track, and part of that is making sure that you enroll and complete programs, which you've failed to do.
>
> The purpose of the program that you were enrolled in is to treat your addiction issue as well as the issues underlying any kind of personality traits that you may have or behaviors that you may have or conflict resolution skills that you failed to have in domestic relationships. You didn't complete it the first time, you didn't complete it the second time. And the underlying offense for which you are on probation involves a domes – is domestic in nature, which is why you were assigned to the HARBEL program.
>
> Not completing the program is not acceptable and you were given the benefit of the doubt the first time. You will not be given the benefit of the doubt this time. So under those circumstances, the Court will give – impose the balance of your sentence – which is [two years and six months with credit for time served].

On October 15, 2018, Bradshaw filed an application for leave to appeal with this Court. We stayed the application pending the outcome of *Conaway v. State*, 464 Md. 505

[10] As we shall discuss, *infra*, the parties mistakenly believed that the 2016 violation of probation had been a technical violation.

(2019),[11] which was decided on July 11, 2019. Thereafter, we ordered the State to respond and granted the application by order entered August 30, 2019.

We shall supply additional facts as necessary to our discussion of the issues.

DISCUSSION

I.

Bradshaw contends the circuit court erred by admitting into evidence State's Exhibit 1, the discharge summary from HARBEL. He asserts that the exhibit was inadmissible hearsay and that its erroneous admission prejudiced him, requiring reversal of the violation of probation finding. We disagree.

"It is firmly established that a revocation of probation hearing is a civil proceeding, in which the probationer is not cloaked with the full panoply of constitutional rights and procedural safeguards enjoyed by a defendant in a criminal cause." *Gibson v. State*, 328 Md. 687, 690 (1992). Further, "the rules of evidence, including rules against the admission of hearsay, are relaxed at probation revocation hearings." *Bailey v. State*, 327 Md. 689, 698 (1992) (footnote omitted). Hearsay may be admitted at a probation revocation hearing subject to a two-part test:

> The hearsay evidence is "tested against the formal rules of evidence to determine whether it fits any of the 'firmly rooted' exceptions to the hearsay rule." If so, it will be admitted. If not, the court may admit it upon

[11] In *Conaway*, which was two consolidated appeals, the Court of Appeals held that an appeal taken from a decision revoking probation must proceed by application for leave to appeal, not by direct appeal. 464 Md. 505, 516-17 (2019).

> finding that "it is 'reasonably reliable' and . . . that there is good cause for its admission."

Blanks v. State, 228 Md. App. 335, 353-54 (2016) (quoting *Bailey*, 327 Md. at 698-99) (internal citations omitted). A finding that the evidence is reliable also supports a finding of good cause for its admission. *Blanks*, 228 Md. App. at 354 (citing *Bailey*, 327 Md. at 699).

In the case at bar, after defense counsel objected to the admission of the discharge summary, the prosecutor argued that the court only needed to be convinced that the exhibit was what it purported to be. The court asked to review the discharge summary and then admitted it over objection. In so ruling, the court implicitly found that the discharge summary was reliable.

We perceive no error. In *Bailey*, the Court of Appeals held that a circuit court did not err by admitting a letter from a substance abuse treatment center stating that the probationer failed to complete the program because the information in the letter was corroborated by other evidence, was evidence of an objective fact, and the source was reliable. 327 Md. at 703-05. Likewise, here there was other evidence in the record corroborating that Bradshaw failed to complete the HARBEL program; the summary was admitted to prove the objective fact that Bradshaw was discharged without completing the program; and the source of the information, an established outpatient drug treatment center, was reliable.

Even if the court had erred by admitting the exhibit, which it did not, we would hold that no prejudice resulted. Before the discharge summary was admitted, Agent

Curtis testified without objection that Bradshaw had been "unsuccessfully discharged" from the HARBEL program. In addition, Bradshaw admitted during his testimony that he did not complete the HARBEL program. Thus, any error in admitting the exhibit was cumulative of other properly admitted evidence establishing the same fact: that Bradshaw had failed to complete the HARBEL program.

II.

"Probation is a creature of statute[.]" *Bailey v. State*, 355 Md. 287, 293 (1999). Bradshaw contends the circuit court exceeded its statutory authority when it revoked his probation and imposed his previously suspended sentence without making a finding that the presumption in favor of a 15-day sentence had been rebutted. We agree.

In 2016, the General Assembly enacted the JRA which, as relevant here, amended the statutes governing probation to "establish[] presumptive incarceration limits for technical violations of probation." *Brendoff v. State*, 242 Md. App. 90, 97 (2019) (citing 2016 Md. Laws, ch. 515). "Setting limits on the sanction for a technical violation was part of a larger effort to reduce the State's prison population and invest the resulting savings in treatment and recidivism-reducing alternatives to incarceration for low-level offenders." *State v. Alexander*, 467 Md. 600, 609 (2020) (citing Revised Fiscal and Policy Note for Senate Bill 1005 (June 2, 2016)).

As pertinent, a "technical violation" is defined, by reference to the definition set forth in Md. Code (1999, 2017 Repl. Vol.), section § 6-101(m) of the Correctional Services Article, to mean:

> a violation of a condition of probation, . . . that does not involve: (1) an arrest or a summons issued by a commissioner on a statement of charges filed by a law enforcement officer; (2) a violation of a criminal prohibition other than a minor traffic offense; (3) a violation of a no-contact or stay-away order; or (4) absconding.

In the instant case, there is no dispute that Bradshaw's failure to complete the HARBEL program was a technical violation.

Pursuant to Crim. Pro. section 6-223(d)(2), upon a finding that a defendant has committed a technical violation, a circuit court may

> (i) Subject to subsection (e) of this section, for a technical violation, impose a period of incarceration of
>
> 1. not more than 15 days for a first technical violation;
>
> 2. not more than 30 days for a second technical violation; and
>
> 3. not more than 45 days for a third technical violation; and
>
> (ii) for a fourth or subsequent technical violation or a violation that is not a technical violation, impose any sentence that might have originally been imposed for the crime of which the probationer or defendant was convicted or pleaded nolo contendere.

This subsection creates "a rebuttable presumption that the limits on the period of incarceration that may be imposed for a technical violation . . . are applicable." Crim. Pro. § 6-223(e)(1).

Crim. Pro. section 6-223(e)(2) empowers a circuit court to impose a greater sentence for a first, second, or third technical violation, however, if it makes certain findings:

> (2) The presumption may be rebutted *if the court finds and states on the record*, after consideration of the following factors, that adhering to the

> limits on the period of incarceration established under subsection (d)(2) of this section would create a risk to public safety, a victim, or a witness:
>
> (i) the nature of the probation violation;
>
> (ii) the facts and circumstances of the crime for which the probationer or defendant was convicted; and
>
> (iii) the probationer's or defendant's history.
>
> (3) On finding that adhering to the limits would create a risk to public safety, a victim, or a witness under paragraph (2) of this subsection, the court may:
>
> (i) direct imposition of a longer period of incarceration than provided under subsection (d)(2) of this section, but no more than the time remaining on the original sentence; or
>
> (ii) commit the probationer or defendant to the Maryland Department of Health for treatment under § 8-507 of the Health--General Article.
>
> (4) A finding under paragraph (2) of this subsection or an action under paragraph (3) of this subsection is subject to appeal under Title 12, Subtitle 3 or Subtitle 4 of the Courts Article.

(Emphasis added.)

As a threshold matter, we agree with Bradshaw that this was his first technical violation, not his second. The circuit court mistakenly stated on the record at the September 25, 2018 hearing that Bradshaw's 2016 violation of probation was premised upon his failure to complete the HARBEL program. As explained above, however, Bradshaw admitted to and was found to have violated the "obey all laws" standard condition of probation, not the special condition pertaining to the HARBEL program. Because his first violation of probation was not a technical violation, there was a

rebuttable presumption that the appropriate sentence for his first technical violation was 15 days.

Bradshaw maintains that the circuit court failed to comply with the JRA because it did not make any of the requisite findings pursuant to Crim. Pro. section 6-223(e), and imposed the remainder of his previously suspended sentence, far exceeding the 15-day sentence it was authorized to impose. He maintains that the appropriate remedy is reversal and immediate release.

The State responds that the court "found that the presumptive . . . cap . . . was rebutted" because imposition of that sentence would "create a risk to public safety and the victim in this case." It relies upon the court's remarks at the bench that it would find that presumptive penalty was insufficient, and by its findings made on the record at the end of the hearing about the nature of Bradshaw's technical violation and his underlying offenses. It argues that even if we were to conclude that the court failed to make the necessary findings, the appropriate remedy is a remand for further findings, not reversal of the sentence.

We reject the State's contention that the court's comments made at the bench before the hearing commenced, that it would "find that the technical violation penalty is not sufficient in this instance[,]" satisfied Crim. Pro. section 6-223(e)(2). The court made this remark before hearing any evidence or finding that Bradshaw had violated his probation. Furthermore, the court did not expressly consider any of the statutory factors

before making that comment, nor did it state on the record that the 15-day penalty was insufficient for one of the statutorily authorized reasons.

The court also did not satisfy Crim. Pro. section 6-223(e)'s mandate when it sentenced Bradshaw. The statute requires the court to "find[] and *state[] on the record*," that imposing the presumptive incarceration limit "would create a risk to public safety, a victim, or a witness." Crim. Pro. § 6-223(e)(2) (emphasis added). In construing a statute, we assume that the legislature "meant what it said and said what it meant." *Bellard v. State*, 452 Md. 467, 481 (2017) (citations omitted). Where, as here, the language is clear and unambiguous, we give effect to the plain language of the statute. *Id*. The court did not make a finding that imposition of a 15-day sentence for Bradshaw's technical violation would create a threat to public safety or to Chambers or Wicks. We decline the State's invitation to parse the court's remarks to discern if it made an implicit finding to that effect.

Although we hold that the court's findings were insufficient to satisfy the statute, we acknowledge that the court implicitly found that a 15-day sentence would create a risk to public safety or Chambers. The court found that the nature of Bradshaw's probation violation was that he had failed to comply with the special condition that he enroll in and complete the HARBEL program; that his underlying crime was a domestic violence crime; that this was the second time he had been ordered to complete the HARBEL program; and that this was the second time he had failed to comply. The court emphasized that Bradshaw was ordered to complete the HARBEL program to address

substance abuse issues that were intertwined with domestic violence and a lack of conflict resolution skills, and recognized that his probation was being supervised by the Violence Prevention Unit, the purpose of which was to ensure that "younger offenders . . . get on the right track[.]"

Under the circumstances, we conclude that a remand for further proceedings on sentencing is the appropriate remedy. *See* Md. Rule 8-604(d) (if an appellate court concludes "that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings," it may "remand the case to a lower court"). On remand, the circuit court may make additional findings consistent with Crim. Pro. section 6-223 based upon the evidence adduced at the September 25, 2018 hearing and shall sentence Bradshaw for his violation of probation consistent with those findings, with credit for time served during the pendency of this appeal.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY FINDING A VIOLATION OF PROBATION AFFIRMED. SENTENCE VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.