Circuit Court for Baltimore City
Case Nos.: 194266024-26

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1329

September Term, 2020

KEVIN LEE SHERROD

v.

STATE OF MARYLAND

Shaw Geter,
Zic,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),
JJ.

PER CURIAM

Filed: August 2, 2021

*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.

On May 26, 1995, Kevin Lee Sherrod, appellant, pleaded guilty in the Circuit Court for Baltimore City to first-degree murder, two counts of attempted first-degree murder, and use of a handgun in the commission of a crime of violence. On July 6, 1995, the court sentenced him to life imprisonment for first-degree murder, a concurrent term of life imprisonment for one of the counts of attempted first-degree murder, a concurrent term of 30 years' imprisonment for the other count of attempted first-degree murder, and a concurrent term of 20 years' imprisonment for the handgun offense.[1]

The factual background of appellant's offenses is immaterial to the resolution of the issues in this appeal. Suffice it to say that appellant went to the home of his estranged girlfriend, who was the mother of his 21-month old daughter, produced a pistol, shot, but did not kill, both his ex-girlfriend and his daughter, and shot and killed his ex-girlfriend's brother.

In 2019, appellant, acting *pro se*, filed a paper titled "motion to reopen post conviction proceedings or in the alternative second petition for post conviction relief pursuant to the 2nd post conviction provision of Article 27 § 645A and the ex post facto prohibitions."[2] In it, he contended that, for two reasons, he was entitled to file a second petition for post-conviction relief even though the General Assembly, in 1995, reduced, from two to one, the number of post-conviction petitions a person could file. For reasons

[1] Appellant failed to present to this Court any transcripts of any prior proceedings. As a result, we rely heavily on the circuit court's recitation of the procedural and factual background of this case contained in its March 5, 2004 memorandum opinion and order denying appellant's first petition for post-conviction relief.

[2] This appears to be appellant's third collateral attack on his convictions.

more fully explained below, according to appellant, the General Assembly made that legislative change, and then repealed it just days later. Also, he claims that change in the law that effectuated the reduction in the number of petitions a person could file violated certain case law and provisions of the Maryland Declaration of Rights and the United States Constitution. He also contended that he was denied his right to effective assistance of counsel for failing to file a motion for modification or reduction of sentence.

On June 12, 2020, the circuit court summarily denied appellant's petition/motion. Appellant sought leave to appeal that decision, which, on January 29, 2021, we granted and transferred the case to our regular docket. In this appeal, appellant claims that the circuit court erred and/or abused its discretion in denying his petition/motion. We disagree and affirm.

BACKGROUND

In 1995, the General Assembly passed, and the governor signed into law, two bills that affected the same statutory provision (then Article 27 § 645(a)(2)) concerning the filing of post-conviction petitions in Maryland. One of the laws (Ch. 110) reduced, from two to one, the number of post-conviction petitions a person could file, and, in place of the second petition, created a new provision permitting the court to reopen previously concluded post-conviction proceedings "in the interests of justice."[3] The other bill (Ch. 258) created a ten-year time limit to file a post-conviction petition which began running upon imposition of sentence.

[3] The two-petition limit was enacted in 1986. Prior to that, there was no limitation on the number of petitions a person could file.

Chapter 110

Chapter 110 of the 1995 Laws of Maryland was signed by the governor on April 11, 1995 and became effective on October 1, 1995. The law was intended to apply to all criminal cases regardless of when they occurred. That meant that a post-conviction petitioner had until October 1, 1995 to file a second petition. *Grayson v. State*, 354 Md. 1, 5 (1999). In pertinent part, Chapter 110 read as follows:

Article 27 – Crimes and Punishments

645A

(a)(2)(I) A person may file only one petition, arising out of each trial, for relief under this subtitle.

(II) The court may in its discretion reopen a postconviction proceeding that was previously concluded if the court determines that such action is in the interests of justice.

Chapter 258

Chapter 258 of the 1995 Laws of Maryland was signed by the governor on May 9, 1995 and became effective on October 1, 1995. This law was not intended to have any retroactive application, and therefore the 10-year deadline had no application to post-conviction proceedings in which the sentence had been imposed before the effective date of the act. In pertinent part, Chapter 258 read as follows:

Article 27 – Crimes and Punishments

645A

(a)(2)(I) A person may not file more than 2 petitions, arising out of each trial, for relief under this subtitle.

(II) UNLESS EXTRAORDINARY CAUSE IS SHOWN IN A CASE IN WHICH A SENTENCE OF DEATH HAS NOT BEEN IMPOSED, A

PETITION UNDER THIS SUBTITLE MAY NOT BE FILED LATER THAN 10 YEARS FROM THE IMPOSITION OF SENTENCE.[4]

DISCUSSION

I.

Appellant first contends that, because the governor signed Chapter 258 after he signed Chapter 110, that Chapter 258, which contains the two-petition limit in subsection (a)(2)(I), repealed the one-petition limit in Chapter 110 "[d]ays later." Therefore, according to him, he is entitled to file a second petition. He asserts that the two-petition limit was not removed until Article 27 § 645A was moved into the Criminal Procedure Article in 2001.

We first note that "[i]t is a settled principle of Maryland law that the General Assembly is presumed to be aware of legislation it has enacted." *Montgomery Cty. v. Robinson*, 435 Md. 62, 78 (2013) (citation omitted). Moreover, "[t]he circumstances surrounding [an] amendment [to the law] must be considered … in order to determine the legislature's intent." *In re Crim. Investigation No. 1-162*, 307 Md. 674, 689 (1986). In addition, "[l]egislative enactments treating the same subject matter should generally be construed harmoniously, especially if enacted at the same time." *Id*. at 690.

We find it unlikely in the extreme that the General Assembly intended to pass a law, and then repeal it just days later. In context, the two laws can be, and were, easily harmonized into Article 27 § 645A. Appellant ignores the fact that subsection (a)(2)(I), which was not affected by Chapter 258, is merely repeated in that session law because, at

[4] Certain stricken-through language was omitted for readability.

that time, it represented the existing law. Appellant's argument also fails to acknowledge that capitalization in a session law indicates matter added to existing law. Finally, if appellant were correct, it would lead to the absurd result that the two-petition limit would have no effect on persons sentenced prior to October 1, 1995 because, as noted earlier, Chapter 258 had no effect on persons sentenced prior to that date.

II.

Alternatively, appellant contends that, for two reasons, Chapter 110, which reduced the number of petitions a person could file, should not be applied retroactively. He claims that, pursuant to *Mason v. State*, 309 Md. 215 (1987), the elimination of the second petition is not allowed because it interferes with "substantive rights previously enjoyed." He also asserts that the elimination of the second petition violated the prohibitions on *ex post facto* laws found in the Maryland Declaration of Rights and United States Constitution.

In *Mason*, in the absence of any indication from the General Assembly about whether the 1986 change in the law which created the two-petition limit was to be applied prospectively or retrospectively, the Court of Appeals determined that the two-petition limit should not be given retrospective application, and therefore, persons sentenced before the effective date of that law (July 1, 1986) could file an unlimited number of petitions. That is not the situation with Chapter 110. Chapter 110 included uncodified language explicitly making the two-petition limit fully retroactive to persons sentenced before the effective date of that law (October 1, 1995), and also contained language permitting the court to process second petitions filed before the effective date of the law "in due course." That uncodified language is as follows:

> SECTION 2. AND BE IT FURTHER ENACTED, That, subject to Section 3 below, the provisions of this Act shall apply to all criminal cases, regardless of whether the case arises out of an offense that is committed before or after the effective date of this Act or whether the trial or sentencing of the defendant occurs before or after the effective date of this Act.
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> SECTION 3. AND BE IT FURTHER ENACTED, That the provisions of this Act that amend Article 27, § 645A of the Code do not apply to a case in which a second postconviction petition was filed prior to the effective date of this Act. In such a case, the court shall process the case in due course as required under Article 27, § 645A prior to the effective date of this Act.

As such, appellant's reliance on *Mason* is misplaced because that case dealt with the situation where the General Assembly was silent as to retrospectivity and, in this case, the General Assembly was not.

Appellant next contends that the elimination of the second petition violated the prohibitions on *ex post facto* laws found in the Maryland Declaration of Rights and United States Constitution.

The question of whether the application of a statute violates the *ex post facto* clauses of the federal and state constitutions is a legal issue. *See, e.g., In re Nick H.*, 224 Md. App. 668, 681 (2015). Consequently, we conduct review of the decision of the circuit court *de novo*.

Article I, Section 10, of the United States Constitution provides that "[n]o State ... shall pass any ... ex post facto Law[.]" Article 17 of the Maryland Declaration of Rights likewise declares: "That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required." The Court of Appeals has historically interpreted

Article 17 as having the same meaning as its federal counterpart. *See, e.g., Sec'y, Dep't of Pub. Safety & Corr. Servs. v. Demby*, 390 Md. 580, 608 (2006).

In *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), the Supreme Court set forth the following explanation of which laws fall within the constitutional prohibition against *ex post facto* laws:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. at 390.

Maryland's *ex post facto* clause, as well as its federal counterpart, precludes the retroactive application of statutes or regulations that increase or otherwise affect the penal consequences for conduct predating the statute or regulation. *Demby v. Sec'y, Dep't of Pub. Safety & Corr. Servs.*, 163 Md. App. 47, 61 (2005).

Appellant does not attempt to explain how a law removing his ability to file another petition for post-conviction relief fits any traditional category of an *ex post facto* law. Instead, appellant relies heavily on language from *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535 (2013) for the proposition that the *ex post facto* provision in Article 17 of the Maryland Declaration of Rights is broader than its federal counterpart. *Doe* held that Article 17 should not be limited to the protections provided by the federal Constitution and instead "Article 17 prohibits, under the ex post facto prohibition, any law passed after

the commission of an offense which ... in relation to that offense, or its consequences, alters the situation of a party to his [or her] disadvantage." *Id*. at 559 (emphasis omitted, citation and quotation omitted). Appellant claims that limiting him to one petition, instead of two, works to his disadvantage, and therefore the limitation is prohibited by Article 17.

Appellant's reliance on *Doe* is misplaced because *Doe* was a three-member plurality opinion and no four judges agreed with any shift away from the federal *ex post facto* analysis to the broader "disadvantage" analysis. *Quispe del Pino v. Maryland Dep't of Pub. Safety & Corr. Servs.*, 222 Md. App. 44, 56 (2015). "[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [four judges], the holding of the court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Wilkerson v. State*, 420 Md. 573, 594 (2011) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)) (internal quotation marks and citation omitted). This Court has already determined that Judge McDonald's interpretation of Article 17 in his concurrence, as having the same meaning as the federal e*x post facto* Clause, was the narrowest ground taken by the judges who concurred in the judgment. *In re Nick H.*, 224 Md. App. 668, 685 (2015).

The specific purpose of the 1995 amendment to Art. 27 § 645A was not to impose additional punishments on offenders, but to limit the number of permissible post-conviction petitions in a way that would lessen the burden on the courts. *Gray v. State*, 388 Md. 366, 378 (2005). The 1995 amendment did not increase appellant's punishment beyond what the law permitted when he committed his offenses. His sentence remains the same both before and after the 1995 amendment. The General Assembly did not change

the punishment for appellant's offense when it removed one opportunity to collaterally attack a conviction and sentence.

It is therefore our view that the 1995 amendment to Art. 27 § 645A reducing the number of petitions for post-conviction relief that a person can file from two to one does not violate the prohibitions against *ex post facto* laws under either the United States Constitution or the Maryland Declaration of Rights.

III.

Appellant's final contention is that the circuit court abused its discretion when it declined to reopen his closed post-conviction proceedings. Appellant claims that he was entitled to have his post-conviction proceedings reopened so that he could litigate, or more precisely re-litigate, a claim of ineffective assistance of counsel for failing to file a motion for modification or reduction of sentence pursuant to *State v. Flansburg*, 345 Md. 694 (1997) and its progeny.[5]

In 2002, appellant raised his *Flansburg* claim in his first petition for post-conviction relief. The circuit court denied relief on the basis that appellant had filed a *pro se* motion for modification or reduction of sentence, which was denied on its merit, and, therefore, he suffered no prejudice from any alleged error of counsel. In appellant's 2009 motion to reopen a closed post-conviction, he re-raised his *Flansburg* claim. The circuit court declined to re-open appellant's closed post-conviction proceedings finding that it was not

[5] On appeal, appellant also raises the claim that "if the State opposes [his] sentence being modified, then [he] seeks to vacate the plea due to a breech of agreement." Appellant did not raise this claim below. We decline to address it for the first time on appeal.

in the interests of justice to do so. Appellant then, once again, re-raised the same claim in the petition/motion that is the subject of this appeal. The circuit court, noting that it had considered appellant's petition/motion, the State's response to it, and "all prior proceedings and filings relevant thereto," summarily denied appellant's petition/motion, as not in the interests of justice.

We review the circuit court's ruling on a request to reopen a closed post-conviction proceeding for abuse of discretion. *Gray v. State*, 388 Md. 366, 382 (2005)

> [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration 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.

Id. at 383 (citation and quotation omitted).

On this record, we are not persuaded that the circuit court's decision to not reopen appellant's closed post-conviction amounted to an abuse of discretion.

Consequently, we shall affirm the judgment of the circuit court.

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