Circuit Court for Baltimore County
Case No. 03-K-05-003212

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1597

September Term, 2015

PAUL DAVID PRINCE

v.

STATE OF MARYLAND

Woodward, C.J.,
Reed,
*Krauser,

JJ.

Opinion by Woodward, C.J.

Filed: June 1, 2018

*Krauser, J., now retired, participated in the hearing of this case while an active member of this Court and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

On November 23, 2005, Paul David Prince, appellant, pleaded guilty to one count of second degree sexual offense against his seven-year-old stepdaughter, J.W. The Circuit Court for Baltimore County subsequently sentenced appellant to twenty years of imprisonment, with all but fifteen years suspended, and five years of supervised probation upon release. As a special condition of probation, appellant's probation order stated that he "[h]ave no contact with child under 16." While he was still incarcerated, the court revoked appellant's probation after he admitted to contacting his minor children from prison. The court resentenced appellant to twenty years of incarceration, with all but seventeen and one-half years suspended, and five years of supervised probation.

On appeal, appellant presents one question for our review, which we have rephrased: Did the trial court have the authority to revoke appellant's probation for non-criminal conduct that occurred during his incarceration and prior to the commencement of his probation? [11]

We hold that the circuit court properly revoked appellant's probation and, accordingly, affirm the judgment of the circuit court.

[1] Appellant's question, as presented in his brief, is as follows:

> Did the circuit court properly revoke Appellant's probation for non-criminal conduct by Appellant – writing letters and sending Christmas and birthday cards to his biological children – during his incarceration and prior to the commencement of his term of probation?

BACKGROUND

On August 3, 2005, police received a child abuse referral regarding the abuse of two children, J.W. (age seven) and M.P. (age two). Appellant was identified as the stepfather of J.W. and the biological father of M.P. When interviewed, J.W. informed the police that appellant had sexually abused both her and M.P. and that appellant threatened to kill her if she told anyone about the abuse. On August 4, 2005, appellant was interviewed by police and confessed to sexually abusing his stepdaughter, J.W. Appellant denied that he ever abused his biological daughter, M.P. On August 29, 2005, appellant was indicted in the circuit court on twenty-four counts involving both J.W. and M.P.: one count of child abuse, five counts of second degree rape, four counts of second degree sexual offense, five counts of third degree sexual offense, five counts of incest, and four counts of sexual abuse of a minor.

On November 23, 2005, appellant pleaded guilty to count eight, second degree sexual offense upon J.W., his stepdaughter.[2] On January 27, 2006, the trial court sentenced appellant to twenty years of incarceration, with all but fifteen years of that sentence suspended. The court went on to state that, "[f]or the five years of his 20 year sentence that I have suspended, he'll be on probation for five years upon his release from prison." The court added:

> Conditions of probation are he must be involved in sexual offender treatment, **he is to have no contact with the children in this case, he is to have no contact with a child under 16 years of age, none**. He will register as a child sex offender under Criminal Procedure 11-

[2] Appellant did not plead guilty to any offenses related to his biological daughter, M.P.

> 701, so when he's out of prison he has to report on a regular basis his whereabouts to the police department.

(Emphasis added). Appellant signed the Probation/Supervision Order that day. The order provides that "[p]robation begins on release." One of the special conditions of the Order states that appellant must "[h]ave no contact with child under 16."

On June 6, 2015, while appellant was still incarcerated, the State filed a petition to revoke appellant's probation. The basis for the revocation was appellant's contact with two children under the age of sixteen, his daughter, M.P., and his son, P.P. During his time in prison, appellant sent several letters to both children.

A hearing was held on the petition to revoke probation on July 9, 2015. At the hearing, appellant admitted that he had sent the letters to his children. Despite such admission, defense counsel argued that revocation was improper because appellant's probation had not begun, and that appellant's actions were not criminal in nature, which distinguished the instant case from those cases where the revocation of probation had been upheld. Defense counsel stressed that appellant was writing letters to his biological daughter, M.P., and not his stepdaughter J.W., who he had been convicted of abusing. Defense counsel contended that appellant was only "trying to establish a connection with his child before he [got] released[,]" that there was nothing inappropriate in the content of the letters, and that appellant had no reason to believe that the letters were problematic. In reference to the probation order stating that appellant is to "[h]ave no contact with child under 16[,]" defense counsel stated: "I don't know that that is, quite frankly, clear to [appellant] that that includes his own biological children."

After hearing arguments from both sides, the trial court held that it had the authority to revoke appellant's probation and found that there was overwhelming evidence that appellant had violated the court's probation order, because the order clearly stated that appellant was not to have contact with any child under the age of sixteen. The court then resentenced appellant to twenty years' imprisonment, with all but seventeen and one half years suspended, and five years of supervised probation. The terms of appellant's probation remained the same. This timely appeal followed.

STANDARD OF REVIEW

The parties agree that the first issue for this Court to decide is the legal issue of whether the trial court had the authority to revoke probation for non-criminal acts committed after sentencing but before the commencement of probation. Beyond that, the court's decision to revoke probation is reviewed for abuse of discretion. *State v. Dopkowski*, 325 Md. 671, 678 (1992). "Ordinarily, '[a]buse of discretion will be found only if the trial court has erroneously construed the conditions of probation, has made factual findings that are clearly erroneous, or has acted arbitrarily or capriciously in revoking probation.'" *Id.* (quoting *Herold v. State*, 52 Md. App. 295, 303 (1982)).

DISCUSSION

I. Revocation of Probation for Non-Criminal Acts

"On entering a judgment of conviction, the court may suspend the imposition or execution of sentence and place the defendant on probation on the conditions that the court considers proper." Md. Code (2001, 2008 Repl. Vol.), § 6-221 of the Criminal Procedure Article ("CP"). Under CP § 6-225(b)(1)(iv), "[t]he court may revoke or modify a condition

of probation or may reduce the period of probation." "Probation is a matter of grace which is in effect a bargain made by the people with the malefactor that he may be free as long as he conducts himself in a manner consonant with established communal standards and the safety of society." *Smith v. State*, 306 Md. 1, 6 (1986).

In the instant case, we are faced with the issue of the scope of the trial court's authority to revoke a defendant's probation prior to the commencement of said probation. The leading case on this issue is *Matthews v. State*, 304 Md. 281 (1985). Both appellant and the State contend that the holding of *Matthews* supports their respective positions. In that case, Matthews was sentenced to five years imprisonment, with all but nine months suspended and three years of probation. *Id.* at 283. In explaining the terms of Matthews' probation order, the sentencing judge ordered that probation was "effective the day of sentencing." *Id.* While on work release, Matthews was arrested and convicted of maintaining a common nuisance and various drug charges. *Id.* at 283-84. At the time, Matthews was still serving a prison sentence and had not yet started his probation. *Id.* Because of his criminal conduct, the trial court found Matthews in violation of his probation and revoked his entire suspended sentence. *Id.* at 284.

On appeal, the Court of Appeals addressed the issue of whether a defendant's "right to probation may be revoked for criminal acts committed after sentencing but before commencement of probation." *Id.* at 288. Although the Court agreed with Matthews that the period of probation could not commence while he was serving a prison sentence, the Court nonetheless concluded that a defendant's "right to probation maybe revoked for criminal acts committed after sentencing but before commencement of probation." *Id.* at

288, 292. In analyzing the statute now codified at CP § 6-225(b)(1)(iv),[3] the Court explained that the "broad grant of authority to revoke probation does not contain any limitation as to when the power may be exercised[.]" *Id.* at 288-89. The Court therefore concluded that there is "no statutory bar to the revocation of probation before it has begun." *Id.* at 289 (emphasis added). Consistent with this conclusion, the Court noted that federal courts and the majority of state courts had held that a defendant's probationary status may be revoked before probation actually begins. *Id.* at 289. Moreover, the Court reasoned that "[s]ound policy requires that courts should be able to revoke probation for a defendant's offense committed before the sentence commences; an immediate return to criminal activity is more reprehensible than one which occurs at a later date." *Id.* (alterations in original) (internal quotation marks and citation omitted).

The Court then examined the rationale behind revoking probation prior to its commencement:

> **"The question here is whether a defendant probationer can, with impunity, engage in a criminal course of conduct (or for that matter any course of conduct which is essentially contrary to good behavior) during the interval between the date of an order of probation and some subsequent date when the probationary term is to commence. We think not.** To hold otherwise would make a mockery of the very philosophy underlying the concept of probation, namely, that given a second chance to live within the rules of society and the law of the land, one will prove that he will thereafter do so and become a useful member of society."

[3] At the time, the applicable statute was Art. 27, § 641A(b), which has since been recodified into CP § 6-225 without substantive change.

Id. at 290 (quoting *Martin v. State*, 243 So.2d 189, 190-91 (Fla. Dist. Ct. App. 1971)) (emphasis added). Accordingly, the Court concluded:

> **[A] trial court has the authority to revoke probation for criminal acts committed after the imposition of sentence but before service of probation based on a condition implicit in the grant of probation that the defendant obey all laws.** Our statutory scheme does not preclude the revocation of probation before it commences and the purposes for granting probation would be effectuated by recognizing this authority. The Maryland courts have long held that probation is a matter of grace, not of right. In *Kaylor* [*v. State*, 285 Md. 66, 75 (1979)], we observed that:
>
> > **[P]robation is a matter of grace, not entitlement, which permits a wrongdoer to keep his freedom "as long as he conducts himself in a manner consonant with established communal standards and the safety of society."** Probation should not be allowed to develop into a grant of immunity from punishment**.**
>
> **The commission of a new crime during the interval between the imposition of sentence and the effective date of probation may furnish proof that a defendant cannot conduct himself in conformity with societal standards and he may rightfully forfeit his freedom as a result.**

Id. at 292-93 (footnote omitted) (citations omitted) (emphasis added).

In sum, *Matthews* established that Maryland trial courts have the authority to revoke probation while a defendant is serving a prison sentence and before probation begins. *Id.* at 292. The *Matthews* Court, however, limited its holding to situations where a defendant commits a crime before probation begins. Indeed, *Matthews* expressly did not address the issue presented by the instant case: "We do not reach the question of whether probation may be revoked before it begins for bad behavior or misconduct that does not amount to a violation of the criminal law." *Id.* at 292 n.3.

In the instant case, appellant committed acts that did not constitute a violation of the criminal law. The acts at issue were appellant's sending of letters from prison to his children, P.P. and M.P., who were under the age of sixteen. Such acts violated a special condition of his probation order, which forbade any contact with children under the age of sixteen. Therefore, the issue before this Court is whether the trial court's authority to revoke probation before it commences extends to non-criminal acts that violate a special condition of the probation granted as a part of the sentence being served.

Two years after the Court of Appeals issued its opinion in *Matthews*, this Court applied the teachings of *Matthews* in *Wilson v. State*, 70 Md. App. 527 (1987). Appellant claims that *Wilson* supports his argument that the trial court's authority to revoke probation does not extend beyond criminal acts. Such argument is without merit.

Much like *Matthews*, the defendant in *Wilson* was sentenced to a period of imprisonment followed by probation. 70 Md. App. at 529. The trial court then revoked Wilson's probation for two violations committed during work release: an unauthorized trip to his car and use of marijuana. *Id.* at 530-31. On appeal, we remanded the case on other grounds, but to aid the trial court on remand, we briefly addressed the issue of whether the trial court had the authority to revoke probation before it started. *Id.* at 529. We noted that "*Matthews* decided that probation can be revoked before it begins for *criminal acts* committed during a preprobation period." *Id.* at 537 (emphasis in original). We then advised: "Use of marijuana falls within the ruling in *Matthews*. If on remand the trial court is 'reasonably certain' that appellant voluntarily ingested marijuana, then MD.ANN.CODE art. 27, § 287 is implicated and this may be a proper basis for revocation." *Id.*

Appellant argues that our decision in *Wilson* means that the non-criminal act—Wilson's unauthorized visit to the car—is not sufficient to revoke probation. We disagree. No such holding was made in *Wilson*, because we never reached the issue of whether non-criminal acts were enough to revoke probation before it began. Moreover, as argued by the State, *Wilson* is factually distinguishable from the instant case. The unauthorized visit to Wilson's car was not a violation of a special condition of his probation; it was a violation of the work-release guidelines. *See Wilson*, 70 Md. App. at 530. Appellant in the instant case violated an expressly stated special condition of his probation.

Although there is no Maryland decision directly on the issue before us, the rationale for the policy allowing early revocation for criminal acts supports giving trial courts the authority to revoke probation for non-criminal acts as well. In stating the rationale for such policy in *Matthews*, the Court of Appeals quoted from the opinion of the District Court of Appeal of Florida in *Martin*:

> "The question here is whether a defendant probationer can, with impunity, engage in a criminal course of conduct **(or for that matter any course of conduct which is essentially contrary to good behavior)** during the interval between the date of an order of probation and some subsequent date when the probationary term is to commence. We think not."

Matthews, 304 Md. at 290 (emphasis added) (quoting *Martin v. State*, 243 So.2d 189, 190-91 (Fla. Dist. Ct. App. 1971)).

Another Florida case, *Williamson v. State*, 388 So.2d 1345 (Fla. Dist. Ct. App. 1980), provides us with further guidance. In *Williamson*, the defendant pleaded guilty to burglary and received a one-year jail sentence, "followed by three years of probation." *Id.*

at 1346. The trial court granted the defendant a two-week deferral of the commencement of his sentence, but the defendant did not show up to serve his jail sentence. *Id.* The court responded by revoking his probation for failure to surrender. *Id.* On appeal, the defendant argued that the revocation was erroneous, because he did not violate any stated condition of probation. *Id.* The Florida appellate court concluded that, even though probation had not started, the issue was "whether probation may validly be revoked for plainly improper conduct which occurs before the term actually begins." *Id.* at 1347. The court determined that *Martin* was controlling. *Id.* The *Williamson* court held that probation could be revoked for this kind of conduct, because

> [t]o hold otherwise would make a mockery of the very philosophy underlying the concept of probation, namely, that given a second chance to live within the rules of society and the law of the land, one will prove that he will thereafter do so and become a useful member of society. Although the statute empowers the court to revoke probation when a probationer has violated a condition of his probation in a material respect, **the power to revoke probation is an inherent power of the trial court, which may be exercised at anytime upon the court determining that the probationer has violated the law. Under the exercise of such inherent power, the court can revoke an order of probation, the term of which has not yet commenced, should the court determine that the defendant probationer has been guilty of misconduct occurring subsequent to the entry of the order of probation.**

Id. (quoting *Martin*, 243 So.2d at 190-91) (emphasis added) (citations omitted). The Court continued:

> While Martin's pre-probation actions, unlike Williamson's, involved the commission of specific crimes, this does not change the result. **It is obvious that Williamson's failure to adhere to an undertaking which was granted, like the probation itself, only as a matter of grace of the court, was a reprehensible course of conduct which is essentially contrary to good behavior, and**

> **misconduct, which well-supports an exercise of the trial court's inherent power to revoke the order of probation.** Again to draw upon the language of the Martin opinion, it would be a mockery to permit Williamson to claim his continued entitlement to future probation after he deliberately and knowingly violated the trust reposed in him upon the granting of his own request for a reciprocal benefit. We will not approve such a result.

Id. at 1347-48 (emphasis added) (footnotes omitted) (internal quotation marks and citation omitted).

We do not need to go as far as *Williamson* to resolve the issue of the scope of the trial court's authority to revoke probation before its commencement in the instant case. Here, appellant was charged with twenty-four counts of sexual abuse of his minor daughter, M.P., and stepdaughter, J.W., and eventually pleaded guilty to sexually abusing J.W. When the trial court sentenced appellant to a period of imprisonment, to be followed by probation, the court imposed a special condition of "[h]ave no contact with child under 16." The clear purpose of such condition was to prevent a reoccurrence of the same criminal behavior that resulted in appellant's conviction. In so doing, the special condition also protected any child under sixteen from becoming a future victim of abuse by appellant. Appellant directly, and repeatedly, violated the aforementioned special condition of probation by sending letters to his son and to his daughter, M.P.

Appellant's actions indicate that he is unlikely to comply with the terms of probation when he is released from prison, thus increasing the risk of his reoffending and decreasing the protection provided by the probation order for any potential future victim. As pointed out by the State, "the crime to which [appellant] pleaded guilty involved an abuse of a cultivated trust of his own family member[,]" and "[h]is violations of the no contact order

in the manner alleged is consistent with this same sinister motive." In addition, at the hearing below, defense counsel advised the trial court that in the letters sent to his daughter, M.P., from prison, appellant

> is a man who talks about the fact that he's incarcerated and that he's trying to establish a connection with his child before he gets released. It would be typical that you would see of anybody incarcerated writing to their child to have a connection before they suddenly appear, you know, out on the street and getting released.

When appellant is released from prison, however, he will be barred by the probation order from having contact with his daughter, because she will still be under the age of sixteen. Establishing a connection with his daughter is precisely what the trial court did not want appellant to do before she reached the age of sixteen. In accord with the reasoning of the *Matthews* Court, appellant's violation of the "no contact" provision of his probation order "during the interval between the imposition of sentence and the effective date of probation [ ] furnish[es] proof that a defendant cannot conduct himself in conformity with societal standards and he may rightfully forfeit his freedom as a result." *Matthews,* 304 Md. at 293.

Additionally, we agree with the State that "[t]o hold otherwise, would lead to the absurd result of authorizing [appellant] to have contact with children under 16 for the lengthy time he was in prison, yet barring such contact once he was released to probation." Probation is a privilege, not a right, and it is subject to revocation if a defendant proves he is incapable of satisfying its conditions. *See Smith v. State*, 306 Md. 1, 6 (1986).

For the foregoing reasons, we hold that, when a defendant, who is serving a sentence of imprisonment, violates a special condition of probation that was granted as a part of the sentence being served, the trial court has the authority to revoke the defendant's probation

prior to its commencement. Accordingly, under the circumstances of the instant case, the revocation of appellant's probation prior to its commencement was proper.

II. Vagueness

Appellant next argues that the condition barring contact with children under the age of sixteen is unconstitutionally vague. The State claims that appellant's argument is not preserved for appellate review, because he never made such argument below.

Our review of the record reveals that during the hearing on the petition to revoke appellant's probation, appellant's counsel never made any argument that the "no contact" condition was unconstitutionally vague. Instead, counsel's argument focused mainly on distinguishing the instant case from *Matthews*. The only reference to any ambiguity in the no contact condition were counsel's statements: "I don't know that that it is, quite frankly, clear to [appellant] that that includes his own biological children. . . . The letters that he sent to his children he would have no reason to believe or understand were problematic in any way . . . ."

Issues not raised before the trial court are not preserved for appellate review. *See* Md. Rule 8-131(a). Because appellant never raised the issue of whether the no contact provision was unconstitutionally vague, appellant has not preserved such issue for our review.

Regardless, even if the issue is properly before this Court, appellant's argument still fails on its merits. As previously stated, the probation order in this case provided that, as a condition of probation, appellant was to "[h]ave no contact with child under 16."

Appellant signed the probation order, which indicates that he understood such conditions and agreed to it.

"'It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.'" *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1044 (10th Cir. 2017) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Conditions of probation "must be clear, definite and capable of being properly comprehended and understood not only by the individual upon whom they are imposed but by those responsible for their enforcement." *Douglas v. State*, 130 Md. App. 666, 674 (2000). A condition of probation is permissible so long as the defendant is given "reasonable, specific direction within the ambit of the initially expressed general condition, and such guidance is in fact given." *Smith*, 306 Md. at 1, 7 (internal quotation marks and citation omitted).

Appellant contends that the no contact provision is too vague, because it does not make clear that "[appellant] should have known that he was prohibited from engaging in any form of communication with his biological children." We disagree. The language of the no contact condition in the probation order is short and unambiguous. It states that there is to be "no contact with child under 16." There are no exceptions contained in the language of that directive. Appellant was ordered to have no contact, and contact clearly includes contacting any child under sixteen years old via letter, as he did. As we have stated before, "'no contact' means 'no contact,' in person, by telephone, *or by mail*." *Douglas*, 130 Md. App. at 674 (emphasis added). Furthermore, when explaining the conditions of probation at the sentencing hearing, the trial court said that appellant was "to

have no contact with *the children in this case*, he is to have no contact with a child under 16 years of age, *none*." (Emphasis added). Because appellant had been charged with the sexual abuse of his biological daughter, M.P., she was one of "the children in this case." And when the court used the word "none[,]" it was crystal clear that appellant was to have no contact with *any* child under the age of sixteen.

Appellant also contends that in order to avoid a construction that is unconstitutionally vague, this Court should interpret the no contact provision to allow "[w]holly innocent correspondence with his biological children." Given the circumstances of this particular case, that argument fails. Although appellant maintained his innocence as to abusing M.P., he confessed to sexually abusing his stepdaughter and pleaded guilty. Given the nature of child abuse, any contact no matter how "innocent," can be used to foster future victimization. As appellant himself acknowledges, the condition that he "have no contact with a child under 16 serves a single purpose: to protect potential victims." In the trial court's view, the victims in this case were appellant's daughter and stepdaughter; thus, it naturally follows that the "no contact" provision would include any form of communication, whether characterized as "innocent" by appellant or "sinister" by the State.

Maryland courts have previously recognized the validity of similar "no contact" provisions. *See State v. Griswold*, 374 Md. 184, 188 (2003) (recognizing lawfulness of probation condition that barred unsupervised contact with any child under 18 years of age); *Douglas*, 130 Md. App. at 673-75 (concluding that condition of probation that defendant have "no contact" with assault victim, who was his former girlfriend, was not too vague; "'no contact' mean[t] no contact, [whether] in person, by telephone, or by mail[,]" and

defendant signed probation order acknowledging that he understood the conditions of his probation).

In short, the language of the "no contact" condition was not "vague, indefinite or uncertain." *See Smith*, 306 Md. at 7. Accordingly, the enforcement of such condition did not violate appellant's constitutional right to due process.

III. Notice

Lastly, appellant argues that he "was not given fair notice that he was not permitted to write to his children during his term of incarceration[,]" and thus the revocation of probation violated his right to due process. Again, the State claims that appellant's argument is not preserved for appellate review, because he never made it below.

Our review of the record reveals that during the hearing on the petition to revoke appellant's probation, appellant's counsel never made any argument that appellant's right to due process was violated by a lack of notice. Indeed, appellant's counsel suggested to the trial court that appellant understood that he could not have contact with children under sixteen while in prison, but did not understand that prohibition to include his own children under sixteen:

> **[Appellant] will cease any correspondence with the children.** I think it just needs to be made clear to him because it's been a decade. . . . **for it now to be crystal clear to him that no contact with anyone under the age of 16 includes his own children.** That he not have any further correspondence and the Court affords him the opportunity to show that that has been heard and understood by him and that it does not continue.

(Emphasis added). Therefore, not only is the issue of fair notice not preserved for our review under Maryland Rule 8-131(a), it is affirmatively waived. *See Brockington v.*

Grimstead, 176 Md. App. 327, 355 (2007) (stating that "[g]enerally, a waiver is the intentional relinquishment of a known right, or conduct that warrants such inference."), *aff'd*, 417 Md. 332 (2010); *cf. Booth v. State*, 327 Md. 142, 180 (stating that defense counsel's response was more than "the simple lack of an objection[;]" he "affirmatively advised the court that there was no objection."), *cert. denied*, 506 U.S. 988 (1992).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; APPELLANT TO PAY COSTS.