UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2614

September Term, 2015

RONALD TYRONE HAMMOND

v.

STATE OF MARYLAND

Meredith,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: April 14, 2017

The Circuit Court for Baltimore City found that Ronald Tyrone Hammond, appellant, violated his probation. The court revoked his probation and sentenced him to fifteen years of imprisonment. Appellant raises two questions on appeal which we have slightly modified:

I. Did the circuit court err when it revoked appellant's probation because:

A) The State was precluded by res judicata from pursuing probation violations that it had abandoned at an earlier probation hearing, and

B) Appellant was deprived of due process under the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights when the State pursued probation violations in 2015 that involved allegations that occurred in 2011 and 2012?

II. Did the circuit court abuse its discretion when it adhered to its prior promise to revoke appellant's probation if he violated any condition of it?

We affirm.

FACTS

On January 29, 2010, appellant pleaded guilty to distribution of cocaine before Judge Lynn Stewart in the Circuit Court for Baltimore City. The court sentenced him to twenty years of imprisonment, suspended all but one day, and placed him on five years of supervised probation. Judge Stewart stated several times during the sentencing hearing that should appellant violate his probation, she would revoke his probation and impose the full suspended sentence. Approximately two years later, on April 7, 2012, appellant violated his probation by possessing a controlled dangerous substance. On May 15, 2012,

appellant pleaded guilty in the District Court for Baltimore City to possession of marijuana (5.9 grams) and was fined.

A warrant request and report was subsequently issued charging appellant with violating several conditions of his probation–not only failing to obey all laws based on the marijuana conviction—a "Rule[1] 4 violation"—but also failing to report to his probation agent, failing to provide verification of employment, and failing to advise and obtain permission for an address change. The warrant was served and appellant was arrested on December 5, 2012.

On May 21, 2013, appellant appeared with counsel before Judge Stewart at a violation of probation hearing. The parties and the court focused on the Rule 4 violation for failure to obey all laws based on the marijuana conviction. Appellant chose to proceed "by way of an admission." After the State recited the facts relevant to that Rule 4 violation and admitted into evidence a copy of the marijuana conviction, the court found that appellant had violated Rule 4 of his probation based on the marijuana conviction. The trial court found that appellant violated the terms of his probation by a preponderance of the evidence, stating "[appellant] violated Rule Number 4; that is, [appellant] failed to obey all laws by being subsequently convicted of an offense while [appellant was] on an order of supervised probation to this court." In mitigation, appellant's counsel argued that, besides the marijuana conviction, appellant had obeyed all other conditions of his probation. The trial court disagreed, noting that appellant's probation agent also alleged other violations

[1] In this context all "Rule" violations refer to standard conditions of probation.

of probation, including: Rule 1 by failing to report, Rule 8 by possessing an illegal substance and also by not informing his agent of his arrest, and Rule 2 by failing to prove employment. Rather than focus on these violations, the court stated, "let's just pretend none of that exists and I'll just assume it's just a Rule 4 [violation]." Appellant's trial counsel agreed, stating, "that's what I got [sic] here, too, that that's just a Rule 4." Based on appellant's admission that he violated Rule 4, the court then turned to the matter of disposition. Referring to its earlier promise to revoke and impose all of the suspended part of appellant's sentence should he violate probation, the court did as promised and revoked appellant's probation and sentenced him to "19 years, 11 months and 29 days to the Department of Corrections."

On June 3, 2015, appellant's marijuana conviction was vacated on the ground that he had been denied his right to counsel.[2] Several weeks later, the State *nol prossed* the marijuana charge. Appellant then filed a motion seeking relief from the probation revocation on July 20, 2015. On September 2, 2015, Judge Stewart-Mays[3] granted the motion, vacated the revocation of appellant's probation, and struck the sentence imposed. Two days later, a second warrant request and report was issued charging appellant with the violations the State had not pursued in the first warrant request and report.

[2] Appellant filed his coram nobis petition on October 30, 2014, challenging his May 15, 2012, plea in the District Court for possession of marijuana.

[3] Judge Stewart changed her last name to Stewart-Mays.

On December 9, 2015, appellant appeared with counsel at a second probation violation hearing before Judge Stewart-Mays. At that hearing, Judge Stewart-Mays denied appellant's motion to dismiss the alleged violations and heard testimony from the probation agent regarding the violations. The court found that appellant: violated Rule 1 by failing to report to his probation agent, violated Rule 2 by failing to verify his employment, and violated Rule 3 by failing to provide his address to his probation agent. Relying on only those probation violations, and not the Rule 4 violation, the court revoked appellant's probation. In determining an appropriate sentence, the court referred to its earlier statement that it would impose the suspended portion of appellant's sentence should he violate his probation. The court stated: "[H]e will serve a term of incarceration. At this time, I will allow each party to make a recommendation. I will tell you that it will be close to the 19 years, 11 months, and 29 days, unless the Court hears argument to the contrary that is compelling." Defense counsel advised the court that it would be an abuse of discretion to impose a predetermined sentence. Appellant exercised his right to allocute, and the court sentenced appellant to fifteen years of imprisonment.

DISCUSSION

I.

Appellant argues that the circuit court erred for two reasons when it revoked his probation, for the second time, in 2015. Appellant first argues that the State was precluded by res judicata from pursuing the probation violations in 2015. Appellant next argues that he was prejudiced and deprived of due process under the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights when the

State pursued probation violations in 2015 that were abandoned in 2013 but involved allegations that occurred in 2011 and 2012. The State responds that appellant failed to preserve his res judicata claim, and it disputes appellant's due process argument.

A. Preservation

In its brief, the State argues that appellant failed to allege res judicata in the proceedings before the trial court, as well as in his application for leave to appeal. We agree. In his Motion to Dismiss the Alleged Violation of Probation, appellant did not allege that res judicata precluded the State from pursuing the other violations. The motion simply argues that the State could have alleged the violations at the previous hearing and, due to the time delay, the State therefore violated appellant's due process rights. Appellant also failed to argue res judicata at the hearing on his motion on December 9, 2015. Specifically, appellant's trial counsel argued at the hearing,

> There are two reasons why Your Honor should grant the motion to dismiss the alleged violation of probation. First, it would violate [appellant's] due process rights to hold a violation of probation hearing now. And second, the equities of this case make it clear that [appellant] has been adequately punished and has been rehabilitated.

Maryland Rule 8-131(a) states 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." We have previously stated that "[U]nless a defendant makes timely objections in the lower court or makes his feelings known to that court, he will be considered to have waived them and he cannot now raise such objections on appeal." *Breakfield v. State*, 195 Md. App. 377, 390 (2010) (internal citations and quotations omitted). "This Court has repeatedly stated that we will not decide an issue unless it plainly

appears to have been decided below." *Id*. (quoting *Sutton v. State*, 139 Md. App. 412, 424 (2001)). Accordingly, we hold that by failing to argue res judicata before the trial court, appellant failed to preserve that argument.[4]

B. Res judicata

Even assuming appellant had preserved his res judicata argument, we perceive no error. It is well-established that res judicata applies in criminal cases as well as civil cases. *Cook v. State*, 281 Md. 665, 668 (citations omitted), *cert. denied*, 439 U.S. 839 (1978). Res judicata has three elements:

> (1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation; and (3) there was a final judgment on the merits in the prior litigation.

Cochran v. Griffith Energy Servs., Inc., 426 Md. 134, 140 (2012) (citation and quotation marks omitted). The parties focus their attention on the second element.

We are aware of no Maryland cases, and the parties cite none, with a fact pattern identical to the unusual facts before us. Appellant, however, cites two cases which he argues are instructive and support the application of res judicata here: *Knox v. Pa. Bd. Of*

[4] Further, appellant failed to invoke the doctrine of res judicata in his application for leave to appeal. We have previously stated that when a party does not raise an issue in the application for leave to appeal, the party has failed to preserve the issue. *See Walker v. State*, 161 Md. App. 253, 278 (2005) (holding that appellant failed to preserve his structural error argument where appellant failed to raise the issue at his post-conviction hearing, in his application for leave to appeal, and in his motion to reconsider denial of application for leave to appeal), *aff'd*, 391 Md. 233 (2006).

Prob. & Parole, 588 A.2d 79 (Pa. Commw. Ct. 1991) and *Shumate v. State*, 718 N.E.2d 1133 (Ind. Ct. App. 1999). We find neither case persuasive.

In *Knox*, petitioner Gregory Knox was convicted of both robbery and possessing implements of a crime in 1983. *Knox*, 588 A.2d at 80. He was paroled in 1988. *Id*. A year later, a parole agent charged Knox with three violations of "general parole condition 4" based on the fact that he had been convicted of three counts of retail theft in 1989. *Id*. At Knox's parole revocation hearing, a hearing examiner for the parole board found that a district magistrate—not a court of record—had convicted Knox, and that the evidence did not establish, by a preponderance, that Knox had been convicted of three counts of retail theft. *Id*. at 80-81. Five days later, the parole agent recharged Knox with the same three violations of "general parole condition 4" except that these charges were based on technical violations rather than the convictions. *Id*. at 81. This time, the hearing examiner found that Knox had failed to comply with "general parole condition 4" by a preponderance of the evidence and the parole board ordered him to serve nine months of "backtime." *Id*. Knox appealed his sentence, arguing that because the hearing examiner dismissed the charges against him for theft at the first hearing, the parole board was precluded from finding him guilty based on the same conduct at the second hearing. *Id*. The Commonwealth Court agreed with Knox, and explained that,

> *[T]he ultimate issue which the [parole] Board was trying to determine was whether [Knox] had been convicted of retail theft*. This was evidenced when the [parole] Board held a revocation hearing based on technical violations to determine whether [Knox] had been convicted of retail theft in order to determine if he had complied with general condition 4 of his parole, even though that identical issue had previously been determined at the revocation hearing based on charges that he was convicted.

Id. at 82 (emphasis added). Res judicata precluded the parole board from charging Knox with violating different parole rules based on the same conduct—the retail thefts.

Knox is distinguishable from this case. In *Knox*, the parole board premised its parole revocation on the retail thefts. Although the parole board characterized the parole violations as "technical violations" rather than actual convictions, the Commonwealth Court recognized that the conduct bringing about the violations stemmed from the same conduct at issue in the first revocation hearing, the retail thefts. The parole board, in essence, had tried to "chang[e] its decision and [find Knox] guilty of technically violating his parole *based on the same conduct*." *Id*. at 81 (emphasis added). Whereas in *Knox* the second violation hearing was based on the same conduct—the retail thefts—here, appellant's second violation hearing was based on alleged violations separate from the marijuana conviction. The trial court found appellant in violation of the following: not reporting to his agent, not proving his employment, and not informing his agent where he was living. Because the trial court relied on different conduct in finding that appellant violated his probation, res judicata under *Knox* does not apply here.

Appellant next relies on *Shumate*. In *Shumate*, Clinton W. Shumate was convicted in an Indiana court of dealing controlled substances in 1992 and sentenced to ten years, with the first four to be served in prison, and the last six to be served while on probation. 718 N.E.3d at 1134. In 1997, a person named Clinton W. Shumate was convicted of a misdemeanor in Ohio. *Id*. The State, believing the two Clinton W. Shumates to be the same person, successfully revoked Shumate's probation. *Id*. Shumate appealed. *Id*. The

Indiana Court of Appeals reversed Shumate's probation revocation, holding that the State had failed to prove by a preponderance of the evidence that the same Shumate had been convicted in Ohio. *Id*. Following that reversal, the trial court held a second probation revocation hearing in which the State proved that the same Shumate on probation in Indiana had been convicted of a misdemeanor in Ohio. *Id*. The trial court then revoked Shumate's probation.

Shumate appealed the revocation of probation, arguing, among other things, that res judicata precluded the relitigation of a claim after final judgment. *Id*. at 1135. Specifically, Shumate argued that the decision reversing the revocation constituted a final judgment on the merits. *Id*. The Indiana Court of Appeals agreed and held that "the reversal of the trial court's judgment revoking Shumate's probation was a judgment on the merits, and that it satisfie[d] the 'judgment on the merits' element of res judicata."[5] *Id*. at 1136. That court concluded, "Thus, any further proceedings relating to the revocation of Shumate's probation, *based on the same violation of probation at issue in the first revocation proceeding*, were barred by res judicata." *Id*. (emphasis added).

Whereas in *Shumate* the State of Indiana sought to revoke probation based on a conviction from Ohio at both revocation hearings, here, the trial court explicitly stated that appellant's second probation revocation was based on violations completely distinct from those at the first hearing. Like *Knox*, *Shumate* is inapposite.

[5] We note that such a conclusion implicates the third element of res judicata, not the second.

The State argues that our decision in *Sweetwine v. State*, 42 Md. App. 1 (1979), *aff'd*, 288 Md. 199, *cert. denied*, 449 U.S. 1017 (1980), better fits this appeal. In *Sweetwine*, Timothy Sweetwine was indicted for armed robbery, robbery, and other related charges. *Id*. at 2. He pleaded guilty to simple robbery and was sentenced to six years of imprisonment. *Id*. Sweetwine challenged his guilty plea on voluntariness grounds. Finding the record inadequate to determine whether the plea was voluntary, we reversed on appeal. The State recharged the entire indictment, not just the simple robbery charge, and offered Sweetwine the original plea agreement. Sweetwine declined. *Id.* at 2. The State then retried Sweetwine on all of the charges, and he was ultimately convicted of armed robbery and sentenced to twenty years of imprisonment. *Id*. at 2-3. On appeal, Sweetwine challenged his trial for armed robbery on double jeopardy grounds. We rejected his challenge, stating:

> Going straight to the jugular of the present issue . . . we may ignore the subtle metaphysics of whether jeopardy ever attached as to the armed robbery count and whether such jeopardy (if it existed) ever terminated in the Appellant's favor (implicitly or otherwise). *In the context of a negotiated plea of guilty, the whole package of reciprocal arrangements and obligations is conditional. The condition is the continuing good health of the guilty plea. If it is voided, both the defendant and the state return to "square one." They both begin again with a clean slate. The invalidation of the "contract" invalidates all obligations incurred under that contract by either contracting party.*

Sweetwine, 42 Md. App. at 3-4 (emphasis added) (footnotes omitted).

Like the guilty plea agreement in *Sweetwine*, appellant here proceeded at the first revocation of probation hearing by admitting that he had violated Rule 4 when he was convicted of a new crime. When the marijuana conviction was later vacated and then

dismissed, the parties returned to "square one." The State did not affirmatively abandon the other alleged violations of probation at the first probation hearing. Rather, the State did not pursue them in light of appellant's decision to proceed by way of admission. We find *Sweetwine* persuasive and, accordingly, we hold that the doctrine of res judicata is inapplicable.

C. Due process

Although a defendant in a revocation of parole hearing is not entitled to the "full panoply of rights due a defendant" in a criminal prosecution, he is entitled to some rights, including: written notice of claimed violations; the opportunity to be heard and present witnesses and evidence; the examination of adverse witnesses; the presence of a neutral and detached fact finder; and a written statement of the fact finder's conclusion and evidence relied upon. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). In Maryland, this principle also applies to probation revocation. *Bailey v. State*, 327 Md. 689, 698 (1992). Additionally, to meet the standard of a fair hearing, "the touchstone of due process[,]" "the State must bring about the revocation hearing with due diligence or reasonable promptness so as to avoid prejudice to the defendant." *State v. Berry*, 287 Md. 491, 499-500 (1980). As to what constitutes "reasonableness," the Court of Appeals has explained:

> We do not perceive the need to set forth the factors a court will consider in determining whether the State has been diligent in instituting and conducting hearings under the statute here involved. However, we think it fair to say that, at a minimum, the State should make reasonable efforts to initiate the proceedings and to locate and serve the defendant with process so as to bring him to trial promptly. On the other hand, we think the trial court should consider the availability of the defendant to receive such process and the extent to which he has made his presence known in the community in which he lives. While what action is timely, diligent or reasonable will differ on a

> case by case basis, we do believe that inactivity and inattention by the State for an inordinate period of time, where the defendant has been available and has not concealed his whereabouts, may be sufficient to persuade a court that fundamental fairness should prevent the State from proceeding with the revocation hearing.

Berry, 287 Md. at 500.

Appellant argues that in seeking to revoke his probation in 2015 based on actions that occurred in 2011 and 2012, the State violated his right to due process and "undermine[d] the fairness of the revocation hearing by impairing [his] ability to meaningfully confront his accusers and present a defense." We hold that the State acted in a timely fashion. Appellant was found guilty of possession of marijuana on May 15, 2012. Appellant did not challenge that conviction until October 30, 2014, when he filed his coram nobis petition. On June 3, 2015, appellant's marijuana conviction was vacated on the ground that he had been denied his right to counsel. Within three months of the court's vacation of the first revocation of probation decision and sentence, the State recharged appellant with the other probation violations. Three months later, the second violation of probation hearing occurred. Under the circumstances presented, we cannot say that the State did not act with due diligence and reasonable promptness in bringing about the second violation of probation hearing. Accordingly, we hold that appellant's due process rights were not violated.

II.

Finally, appellant argues that the circuit court abused its discretion when it revoked his probation and sentenced him to fifteen years because it adhered to a prior "deal." We disagree.

A probation revocation case generally involves two stages: 1) a factual determination regarding whether the probationer has violated a condition of probation, and 2) a discretionary determination regarding whether the violation warrants revocation and what sentence should be imposed. *Hammonds v. State*, 436 Md. 22, 31 (2013) (citation omitted). Appellant claims that the lower court erred at the second stage.

The Court of Appeals has stated:

> Confinement of a probation violator is based upon commission of the criminal offense which the State was required to prove beyond a reasonable doubt. Probation rather than incarceration at the time of conviction is a matter of grace which may be withdrawn when the violator is shown, to the "satisfaction" of the court, as explained above, not to have honored the conditions made known at the time probation was granted.

Wink v. State, 317 Md. 330, 341 (1989). It is well-settled in Maryland that a sentencing court "is vested with virtually boundless discretion" and is "accorded this broad latitude to best accomplish the objectives of sentencing – punishment, deterrence and rehabilitation." *State v. Dopkowski*, 325 Md. 671, 679 (1992) (citations and quotation marks omitted).

The second stage of a probation revocation case is reviewed for an abuse of discretion. *Wink*, 317 Md. at 337-38. The Court of Appeals has explained abuse of discretion as follows:

> Abuse of discretion . . . has been said to occur where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles. It has also been said to exist when the ruling under consideration appears to have been made on untenable grounds, when the ruling is clearly against the logic and effect of facts and inferences before the court, when the ruling is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an untenable judicial act that defies reason and works an injustice.

Alexis v. State, 437 Md. 457, 478 (2014) (quoting *North v. North,* 102 Md. App. 1, 13–14 (1994)) (quotation marks omitted).

Appellant's probation agent testified at appellant's second violation of probation hearing that he supervised appellant's probation from June 2010 until December 2012, when appellant was arrested. The agent testified that: 1) appellant failed to report to him on July 26, 2011, all of August 2011, and stopped reporting entirely after September 6, 2011; 2) that appellant failed to provide verification of employment after February 2011; and 3) that appellant failed to obtain permission before changing his home address around May, September, and November of 2011. The trial court found appellant violated Rules 1, 2 and 3 of his probation.[6]

A court cannot exercise its discretion if it only relies upon its preconceived determination. See *Kent v. State*, 287 Md. 389, 395 (1980) (holding that "if the prior agreement is so firm that whatever is later said by the defendant or counsel in mitigation cannot be taken into consideration, or cannot change the trial judge's conclusion no matter how meritorious the argument, then the right of allocution becomes meaningless."). After hearing mitigation argument and allocution, the court sentenced appellant to fifteen years. Despite its earlier promise to do so, the trial court did not sentence appellant to 19 years, 11 months and 29 days, the remainder of appellant's suspended sentence. We infer that

[6] The court found that appellant did not violate his probation based on a fourth allegation – failure to obey all laws based on a letter dated December 14, 2012, that appellant wrote to his probation agent begging for a drug treatment program because of his addiction issues.

appellant's mitigation and allocution persuaded the court to impose a shorter sentence. We cannot hold that the court abused its discretion in revoking appellant's probation and imposing a sentence of fifteen years under the circumstances presented.

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