Circuit Court for Prince George's County
Case No. CJ171506

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2503

September Term, 2017

DONALD EUGENE BAILEY

v.

STATE OF MARYLAND

Berger,
Friedman,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.
Dissenting opinion by Friedman, J.

Filed: January 2, 2019

Appellant, Donald Eugene Bailey, was found guilty by a jury sitting in the Circuit Court for Prince George's County of driving while impaired by alcohol (DWI), reckless driving, negligent driving, and failure to control speed to avoid a collision. For the DWI conviction, as a subsequent offender, the court sentenced appellant to one year of imprisonment, with all but eight weekends suspended, plus two years of probation. The court also imposed a fine of $300 for reckless driving, and suspended fines for negligent driving and failure to control speed. Appellant presents the following question for our review:

> Should appellant's enhanced sentence for DWI be vacated because the State did not timely serve the subsequent offender notice mandated by Md. Rule 4-245(b)?

For the reasons discussed below, we answer that question in the negative. We therefore affirm appellant's convictions.

BACKGROUND

Given the nature of the issue presented, we need not recite in detail the facts of the case. Suffice it to say that, on March 4, 2017, the vehicle appellant was driving collided with the rear of another vehicle. Thereafter, the police arrived at the scene, arrested appellant, and charged him with various offenses, including driving while impaired by alcohol pursuant to Transportation Article ("TR"), § 21-902(b)(1).[1] Appellant prayed a jury trial, and the case was transferred from the District Court to the circuit court.

[1] At the time of the offenses, in March 2017, Maryland Code (1977, 2012 Repl. Vol., 2016 Supp.), Transportation Article ("TR"), § 21-902(b)(1) provided:

(continued)

On December 1, 2017, the State served a notice of intention to seek enhanced penalties for a DWI conviction. Appellant's two-day jury trial began on December 11, 2017. It resulted in the convictions and sentences, as noted above.

DISCUSSION

Recognizing that he did not object in circuit court to the late notice, appellant contends that, because the State failed to timely comply with the notice requirement applicable to subsequent offender penalties, the court lacked the authority to impose such

(continued)

> (b)(1) A person may not drive or attempt to drive any vehicle while impaired by alcohol.

At that same time, the penalty provisions for violations of TR § 21-902 were codified at TR § 27-101, subsections (c), (f) and (q). Effective October 1, 2017, TR §§ 21-902 and 27-101 were amended, with the effect that the penalty provisions for violations of § 21-902 were transferred from § 27-101 to § 21-902. 2017 Md. Laws, ch. 55. TR 21-902(b) now provides, in pertinent part:

> (b)(1)(i) A person may not drive or attempt to drive any vehicle while impaired by alcohol.
>
> (ii) A person convicted of a violation of this paragraph is subject to:
>
> > 1. For a first offense, imprisonment not exceeding 2 months or a fine not exceeding $500 or both;
> >
> > 2. For a second offense, imprisonment not exceeding 1 year or a fine not exceeding $500 or both; and
> >
> > 3. For a third or subsequent offense, imprisonment not exceeding 3 years or a fine not exceeding $3,000 or both.

None of the 2017 changes to § 21-902 substantively changed the law, and they therefore have no impact on the outcome of this case. For ease of use, therefore, all statutory citations throughout this opinion are to the version of the TR after the October 1, 2017 changes.

penalties, and the sentence for the DWI conviction is illegal. In the alternative, he contends that he was denied the effective assistance of counsel or we should exercise discretion to address the unpreserved issue.

The available penalty for a first DWI offense is "imprisonment not exceeding 2 months or a fine not exceeding $500 or both." TR §21-902(b)(ii)(1). The available penalty for a second DWI offense is "imprisonment not exceeding 1 year or a fine not exceeding $500 or both." TR §21-902(b)(ii)(2). The statute does not contain a notice provision relating to the subsequent offense. Maryland Rule 4-245 does require notice, however. Rule 4-245 (b), applicable to permitted but not mandated additional penalties, provides:

> When the law permits but does not mandate additional penalties because of a specified previous conviction, the court shall not sentence the defendant as a subsequent offender unless the State's Attorney serves notice of the alleged prior conviction on the defendant or counsel before the acceptance of a plea of guilty or nolo contendere or at least 15 days before trial in circuit court or five days before trial in District Court, whichever is earlier.

Rule 4-245 (b) is applicable here. For purposes of comparison, we quote Rule 4-245(c), applicable to mandated additional penalties. It provides:

> When the law prescribes a mandatory sentence because of a specified previous conviction, the State's Attorney shall serve a notice of the alleged prior conviction on the defendant or counsel at least 15 days before sentencing in circuit court or five days before sentencing in District Court. If the State's Attorney fails to give timely notice, the court shall postpone sentencing at least 15 days unless the defendant waives the notice requirement.

In *Armstrong v. State*, 69 Md. App. 23, 35 (1986), we explained the purpose behind these provisions and the difference between (b) and (c).

> If the law prescribes a *mandatory* penalty based on prior convictions, the only relevant issue is whether the defendant meets the criteria for subsequent offender status; if he does, there is no discretion in terms of sentencing. . . . That issue is of concern only at sentencing. It can have no bearing on trial or pre-trial strategy, and, thus, reasonable notice before sentencing is all that is required for the defendant to challenge the State's assertion that he is a subsequent offender subject to a mandatory sentence.

(Emphasis in original).

Appellant did not have a trial in the District Court because he prayed a jury trial in the circuit court. According to Rule 4-245 (b), the State was required to serve its notice regarding subsequent offender penalties on appellant at least 15 days before trial. Because appellant's trial began on December 11, 2017, and the notice was not served until December 1, the State concedes that the notice was not timely.

The plain language in Rule 4-245 (b) provides that, when notice is not properly served on the defendant or counsel, "the court *shall not* sentence the defendant as a subsequent offender[.]" *Id*. (Emphasis added). As the Court of Appeals has stated:

> The language of MR 4-245(b) is clear and unambiguous and consistent with the purpose of the statute which is to provide notice to the defendant. The language requires that the notice be filed as early as possible based on the alternatives provided. Hence, we will interpret the language of the statute to effectuate this legislative goal.

Carter v. State, 319 Md. 618, 621 (1990) (*citing Kaczorowski v. City of Baltimore*, 309 Md. 505, 516 (1987)). The question then becomes whether failure to comply with the

Rule is procedural in nature and subject to preservation requirements or whether it renders the sentence illegal.

As the Court of Appeals explained in *Bryant v. State*, 436 Md. 653, 663 (2014),

> The distinction between those sentences that are "illegal" in the commonly understood sense, subject to ordinary review and procedural limitations, and those that are "inherently" illegal, subject to correction "at any time" under Rule 4-345(a), has been described as the difference between a substantive error in the sentence itself, and a procedural error in the sentencing proceedings. *See Tshiwala v. State*, 424 Md. 612, 619, 37 A.3d 308, 312 (2012) ("[W]here the sentence imposed is not inherently illegal, and where the matter complained of is a procedural error, the complaint does not concern an illegal sentence for purposes of Rule 4-345(a)."); *State v. Wilkins*, 393 Md. 269, 284, 900 A.2d 765, 774 (2006) ("[A]ny illegality must inhere in the sentence, not in the judge's actions. In defining an illegal sentence the focus is not on whether the judge's 'actions' are *per se* illegal but whether the sentence itself is illegal.").

In *Armstrong*, this Court determined that the circuit court unlawfully imposed an enhanced subsequent offender penalty on Armstrong after the State had failed to provide any notice under Md. Rule 4-245 (b). *Id*. at 33-36. On appeal, relying on *Walczak v. State*, 302 Md. 422 (1985), we vacated Armstrong's enhanced sentence notwithstanding that he failed to raise his appellate argument at sentencing. *Armstrong*, 69 Md. App. at 35. In *Walczak*, a leading case addressing illegal sentences, the Court of Appeals stated

> that when the trial court has allegedly imposed a sentence not permitted by law, the issue should ordinarily be reviewed on direct appeal even if no objection was made in the trial court. Such review and correction of an illegal sentence is especially appropriate in light of the fact that Rule 4-345(a) . . . provides that "[t]he court may correct an illegal sentence at any time." Thus, a defendant who fails to object to the imposition of an

> illegal sentence does not waive forever his right to challenge that sentence.

302 Md. at 427. Thus, we treated the failure to give any notice as giving rise to an illegal sentence.

In *Carter*, decided after *Armstrong*, the District Court found Carter guilty of driving under the influence of alcohol, and Carter thereafter took an appeal *de novo* to the circuit court. *Id*. at 619-20. The State did not serve a notice of intention to seek enhanced penalties on Carter prior to the trial in the District Court, but did timely serve such a notice on him prior to the trial in the circuit court. *Id*. at 620. After Carter was found guilty, the circuit court sentenced him as a subsequent offender to one year in prison. *Id*. Under those circumstances, the Court of Appeals vacated Carter's sentence because "the State did not file its notice of enhanced punishment by the earlier of the applicable deadlines specified in the rule," and therefore "the circuit court was prohibited from sentencing [Carter] as a subsequent offender." *Id*. at 623. The Court found that, "[c]onsequently, the maximum sentence that [Carter] could have received in circuit court was 60 days and/or $500.00, the maximum possible sentence without enhanced punishment for a conviction for driving under the influence." *Id*. It is implicit that Carter did not object in District Court to the lack of notice because the issue of enhanced penalty was not raised. It is unclear whether, in circuit court, Carter objected to the failure to give notice to him prior to his trial in District Court.

In *Swinson v. State*, 71 Md. App. 661 (1987), decided before *Carter*, charges were filed in District Court. Swinson removed the case to circuit court prior to trial in District

Court. The State then served timely notice of its intent to seek enhanced penalties. This Court held that notice was proper. In *Carte*r, the Court of Appeals cited *Swinson* with approval but distinguished it by pointing out that, in *Carter*, there was a trial in District Court. In addition to the language used in *Carter*, appellant points to language in *Swinson*, and similar language in other cases, tending to indicate that proper notice is a condition precedent to imposing an enhanced penalty. In *Swinson, e.g.*, this Court stated that had trial occurred in District Court, the District Court would have been "precluded by Md. Rule 4-245(b) from imposing the enhanced sentence. . . ." *Id*. At 663. Similarly, in *Fielding v. State*, 238 Md. App. 262, 275 (2018), a case not on point factually, this Court repeated the language in *Carter, i.e.*, "'because the State did not file its notice of enhanced punishment by the earlier of the applicable deadlines specified in the rule, the circuit court was prohibited from sentencing [Carter] as a subsequent offender.'" (quoting *Carter*, 319 Md. at 619).

In *Carter* and *Armstrong*, the State failed to provide any notice. Based on those cases, failure to do so gives rise to an illegal sentence. We note that, even if the illegality were not premised on the requirement in Rule 4-245, as it was, failure to give any notice would raise due process concerns. The most significant issue, from a defendant's perspective, even if the defendant has actual knowledge of a prior conviction(s) is *whether*, prior to trial, the State intends to seek an enhanced penalty.

Despite the above cases, and although not free from doubt, we conclude that the violation of Rule 4-245 (b) by failure to give timely notice is a procedural error and subject to harmless error analysis. Preliminarily, we observe that the notice requirement

is by Maryland Rule and is not in the statute. Ordinarily, the Rules are procedural in nature and do not create substantive rights although they may impact substantive rights.

We conclude that *King v. State*, 300 Md. 218 (1984) governs this case. In that case, the State served King with timely notice of its intent to seek enhanced penalties, but the notice was substantively defective in that it did not contain the prior conviction. *Id* at 221. The Court, observing that there was substantial compliance with the Rule, applied the harmless error doctrine, and affirmed, observing that King had timely actual notice of the conviction relied upon and had not demonstrated prejudice. *Id* at 232.

Lee v. State, 332 Md. 654 !993) is not on point but is consistent with our conclusion. In *Lee*, the Court, interpreting the Rule, held that the notice required by the Rule had to be served, by hand delivery or mail, the required number of days prior to trial. Applying Rule 1-321, the Court concluded that service could be made by mail. *Id.* at 667. Recognizing that the conclusion could create due process concerns in a given case, the Court concluded that there was no due process violation because the notice was in fact received a reasonable time before sentencing. *Id.* At 668.

It is clear that failure to give any notice before trial is substantive and gives rise to an illegal sentence. A procedural defective notice is subject to a harmless error analysis. The difference is consistent with due process concerns. When notice is given, we see no reason to treat a defect in notice as to timeliness different from a defect in content. As noted, the requirement for both the substantive content and the timeliness are contained in the Rule, not in the statute. The timeliness of notice is subject to preservation requirements, and a violation does not give rise to an illegal sentence. We hasten to add

that, as the Court stated in *King*, a procedural defect may implicate due process based on the facts of a particular case. That is not the situation here.

We will accept appellant's invitation to exercise our discretion and reach the issue of failure to give timely notice as if it had been preserved. In this case, appellant had actual notice, does not argue that he sustained prejudice as a result of the late notice, and does not raise due process concerns. Thus, consistent with the Court of Appeals' decision in *King*, we conclude that the error was harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638 (1976).

Ordinarily, we do not reach ineffective assistance of counsel claims on direct appeal. *See Mosley v. State*, 378 Md. 548, 558 (2003). Even if we were inclined to do so here, it would be moot.

Accordingly, we affirm appellant's convictions and sentences.

JUDGEMENTS AND SENTENCES OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. APPELLANT TO PAY THE COSTS.

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Dissenting Opinion by Friedman, J.

Filed: January 2, 2019

My colleagues in the majority think that Bailey's claim is controlled by *King*, slip op. at 8, and, therefore is subject to a harmless error analysis. Slip Op. at 7. In my view, this case should be controlled by *Carter* instead and, as a result, violation of the notice requirement should preclude sentence enhancement, without regard to whether the error was harmless.

First, *Carter* was written later than *King* and while *Carter* claimed to be following *King*, it did not employ the harmless error analysis that was the centerpiece of *King*. *Carter v. State*, 319 Md. 618, 621 (1990) ("[a]lthough *King* dealt with the specificity requirements of the notice, we believe the analysis articulated there is equally applicable to time requirements."). Because I read *Carter* to have modified the holding in *King*—if without explicitly telling us it was doing so—I think it is our obligation to follow *Carter*, not *King*. I also note that this Court has universally followed *Carter* in subsequent cases. *Fielding v. State*, 238 Md. App. 262 (2018) (discussed *supra*, slip op. at 7); *Swinson v. State*, 71 Md. App. 661 (1987) (discussed *supra*, slip op. at 7); *Armstrong v. State*, 69 Md. App. 23 (1986) (discussed *supra*, slip op. at 4).

Second, to the extent that *Carter* and *King* are inconsistent, Bailey's case—which concerns the timeliness of a notice of intent to seek an enhanced penalty—is closer to the facts in *Carter* (which concerned the *timeliness* of a notice of intent to seek an enhanced penalty) than it is to the facts in *King* (which concerned the *sufficiency* of a notice of intent to seek an enhanced penalty). Thus, because it is the more closely analogous precedent, I think we ought to be following *Carter*, not *King*.

And, *finally*, if my previous two points weren't true and we had two equal precedents of exactly the same weight pointing in exactly opposite directions, (and in this imaginary world, I was free to choose), I would still choose to follow *Carter*. In my view, it is the better-reasoned case. I note two thoughts in support of this preference. I think the text of the rule carries within it the sole penalty for noncompliance: if notice isn't given, the judge "shall not" impose an enhanced sentence. Md. Rule 4-245(b). Additionally, while I believe that harmless error analysis makes perfect sense when we are reviewing errors committed by *trial judges*, who have no incentive to commit or repeat errors, the calculus may well be different when we are, as here, reviewing errors by *prosecutors*. Although I understand that intermediate courts don't get to select freely the precedents we prefer, if we could, I would choose to follow *Carter*, not *King*.

For these reasons, I think that Bailey's case ought to be controlled by *Carter* not *King*. I do not think we ought to conduct a harmless error analysis but, instead, upon finding that the State provided late notification of its intention to seek an enhanced sentence, the circuit court should have been precluded from imposing an enhancement. I would reverse and remand for a new sentencing without the enhancement.