Circuit Court for Wicomico County
Case No. C-22-CR-17-000028

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3084

September Term, 2018

MICHAEL BROWN

v.

STATE OF MARYLAND

Fader, C.J.,
Zic,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 8, 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.

Michael Brown, appellant, challenges the denial, by the Circuit Court for Wicomico County, of his motion for modification of sentence pursuant to the Justice Reinvestment Act (hereinafter "JRA"). For the reasons that follow, we shall affirm the judgment of the circuit court.

On January 19, 2017, Mr. Brown was charged in the circuit court with possession of heroin with intent to distribute and related offenses. The State subsequently gave Mr. Brown notice that it would "seek enhanced punishment as authorized by law, against [Mr. Brown], on the basis that [he] is a subsequent offender as defined by law." The State cited Mr. Brown's 2004 convictions in the circuit court for possession of a narcotic with intent to distribute and possession of marijuana, and 2006 conviction in the circuit court for possession of a narcotic with intent to distribute.

On May 2, 2017, Mr. Brown pleaded guilty to possession of heroin with intent to distribute. In support of the plea, the prosecutor stated that in November 2016, Salisbury Police Detective Adam Waller used a "covert social media account" to arrange the purchase of $2,500 worth of heroin from Mr. Brown, with whom Detective Waller "was familiar . . . from previous investigations." As Mr. Brown and his companions, two men named White and Conway, were proceeding to the site of the transaction, police conducted a traffic stop of their vehicle. Mr. Brown fled the vehicle, but was apprehended and found to be in possession of 29 grams of heroin. The court subsequently convicted Mr. Brown of the offense and sentenced him to a term of imprisonment of ten years, to be served

without the possibility of parole pursuant to Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 5-608(b) of the Criminal Law Article ("CL").[1]

Mr. Brown subsequently filed a "motion for modification and/or reduction of . . . sentence" pursuant to the JRA.[2] At a hearing on the motion, defense counsel proffered:

[1]At the time of Mr. Brown's sentencing, CL § 5-608(b) stated:

> *Second time offender.* – (1) Except as provided in § 5-609.1 of this subtitle, a person who is convicted under subsection (a), of this section . . . shall be sentenced to imprisonment for not less than 10 years . . . if the person previously has been convicted once:
>
> (i) under subsection (a) of this section or § 5-609 of this subtitle[.]
>
> * * *
>
> (2) The court may not suspend the mandatory minimum sentence to less than 10 years.
>
> (3) Except as provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole during the mandatory minimum sentence.

[2]CL § 5-609.1, as amended by the JRA, states:

> (a) *Application for modification of sentence.* – [A] person who is serving a term of confinement that includes a mandatory minimum sentence imposed on or before September 30, 2017, for a violation of §§ 5-602 through 5-606 of this subtitle may apply to the court to modify or reduce the mandatory minimum sentence as provided in Maryland Rule 4-345, regardless of whether the defendant filed a timely motion for reconsideration or a motion for reconsideration was denied by the court.
>
> (b) *Conditions for modification.* – The court may modify the sentence and depart from the mandatory minimum sentence unless the State shows that, giving due regard to the nature of the crime, the history and character of the defendant, and the defendant's chances of successful rehabilitation:

(continued)

> On May 30, 2017, there was an incident that involved the police officer, the lead detective on this case, that resulted in an internal investigation at the police department that ultimately resulted in his termination or resignation as a police officer.
>
> There was a sustained finding of untruthfulness.
>
> * * *
>
> It did not have anything to do with [Mr. Brown] per se, however, there were two codefendants also involved in this matter who was [sic] able to receive the benefit of a nol pros. Because of the officer's untruthfulness finding, there was a motion in limine in one of the codefendant's trials, where [it was] argued that [the officer] should be precluded from testifying because of that, and ultimately, the [c]ourt granted that. He was not permitted to testify in that case, and ultimately, a nol pros was entered in that case.
>
> The other codefendant, I did try to look his information up on case search, but I could not find anything, so I'm assuming that maybe there was some type of expungement.
>
> So with that being said, I think that the imposition of the mandatory minimum sentence in this case does result in an injustice to Mr. Brown.

Opposing the motion, the prosecutor informed the court that Mr. Brown's criminal record included a 2016 conviction in Maryland for "theft less than $1,000," 2012 convictions in Maryland for second degree assault and driving while impaired, the 2006 conviction in Maryland for "manufacture distribute narcotics CDS," the 2004 convictions in Maryland for "manufacture distribute narcotic" and possession of marijuana, a 2003 conviction in Maryland for false statement to an officer, 2002 convictions in Delaware for

> (1) retention of the mandatory minimum sentence would not result in substantial injustice to the defendant; and
>
> (2) the mandatory minimum sentence is necessary for the protection of the public.

"shoplifting under $1,000" and "conspiracy third degree," 2001 convictions in Maryland for second degree assault, underage drinking, and driving without a license, and 2000 convictions in Maryland for disorderly conduct and fleeing and eluding. The prosecutor also remarked that Mr. Brown was prepared "to sell not a small amount of heroin but at least 26 grams of heroin, almost close to an ounce of heroin for $2,000."

Following the hearing, the court denied the motion, stating:

> Well, I don't see any reason to modify the sentence, frankly, based on his record, based on the benefit of bargain that he got before, and whatever happened to the other officer is really irrelevant to this case.
>
> So I think the sentence was fair under the circumstances. I see no reason not [sic] to deviate from it. I find that the factors for retaining the mandatory minimum sentence are present.

Mr. Brown now contends that "it was error or an abuse of discretion" by the court to deny the motion, because for numerous reasons,[3] "the State failed to meet its statutory

[3]Specifically, Mr. Brown contends that:

- "The State's case depended entirely upon Detective Waller's credibility, which the [c]ourt agreed was so poor that he could not testify for the State, at all, in the cases against the codefendants (or presumably, in any other case)."
- "But for the bad luck that [Mr. Brown] went to trial, the State's case against him would surely have collapsed, as well."
- "[I]n the 19 years since Mr. Brown's first conviction . . . , the State could not point to a single conviction: for wearing, carrying, transporting, possessing[,] or using any firearm or ammunition; for possessing or using any type of weapon, whatsoever; for reckless endangerment of anyone; for resisting arrest; or for any kind of attempted or completed felony crime of violence."
- "One old, and one extremely old, misdemeanor conviction for common assault cannot be sufficient to show that a harsh, mandatory minimum sentence without the possibility of parole is necessary for the protection of the public from Mr. Brown."

(continued)

burden of persuasion" to "show that retention of the mandatory minimum sentence would not result in substantial injustice to" Mr. Brown, and "that the mandatory minimum sentence is necessary for the protection of the public." We disagree. The State proffered, and Mr. Brown did not dispute, that at the time of his arrest, he was in possession of at least 26 grams of heroin, which he intended to sell for at least $2,000. The State also proffered, and Mr. Brown did not dispute, that his criminal record includes at least fifteen convictions in two states over the course of approximately seventeen years, and that at least three of those convictions include possession of a narcotic with intent to distribute. We conclude that this evidence was sufficient to show that, giving due regard to the nature of Mr. Brown's crime, his history and character, and his chances of successful rehabilitation, retention of his mandatory minimum sentence would not result in substantial injustice to him, and the mandatory minimum sentence is necessary for the protection of the public. Hence, the court did not err or abuse its discretion in denying the motion for modification of sentence pursuant to the JRA.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

- "Mr. Brown has been a model prisoner, since he was charged on November 23, 2016; he has a good adjustment history in prison; he is assigned to education there; and he has given them no problems in his housing unit."

(Quotations, italics, and boldface omitted.)