UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2400

September Term, 2015

VERNON LEE EVANS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Woodward,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: December 27, 2016

In 1983, Vernon Lee Evans, appellant, for a fee of $9,000 paid by or on behalf of his friend, Anthony Grandison, murdered Scott Piechowicz and Susan Kennedy at the Warren House Motel in Pikesville, in Baltimore County, to prevent them from testifying against Grandison in a then-pending criminal trial in the United States District Court for the District of Maryland.[1] *Evans v. State*, 304 Md. 487, 494-95 (1985), *reconsideration denied*, 305 Md. 306, *cert. denied*, 478 U.S. 1010 (1986). The following year, after removal of the case at Evans's request, he was convicted, by a jury sitting in the Circuit Court for Worcester County, of two counts of first-degree, premeditated murder, as well as conspiracy to commit murder and use of a handgun in the commission of a felony or crime of violence. The jury thereafter sentenced him to death for both murders. *Id.*

Evans subsequently filed a post-conviction petition, in the Circuit Court for Worcester County, which, in 1991, granted his petition in part, vacating his death sentences. On Evans's suggestion for removal, the case was transferred to the Circuit Court for Baltimore County, where a jury again sentenced him to death for both murders. *Evans v. State*, 333 Md. 660, 667 (1994). Evans thereafter has lodged repeated challenges, in both state and federal court, to those sentences, finally gaining a then-temporary reprieve when, in 2006, the Court of Appeals enjoined the State from

[1] From the standpoint of Evans and Grandison, the murder of Susan Kennedy was actually a mistake—the intended victim was Ms. Kennedy's sister (and Scott Piechowicz's wife), Cheryl Piechowicz. Scott Piechowicz and Cheryl Piechowicz worked at the Warren House Motel, but, unbeknownst to Evans, Mrs. Piechowicz was unable to work on the night of the murders, and Ms. Kennedy worked in her stead. Evans, who did not personally know the Piechowiczes, killed Susan Kennedy in the apparent belief that he was actually killing her sister. *Evans v. State*, 304 Md. 487, 494-95 (1985), *reconsideration denied*, 305 Md. 306, *cert. denied*, 478 U.S. 1010 (1986).

carrying out the death penalty against him because the protocols governing the method of administering that penalty, lethal injection, had been adopted, held the Court, in a manner that violated the Maryland Administrative Procedure Act. *Evans v. State*, 396 Md. 256, 344-46 (2006).[2]

That injunction was to remain in effect until new protocols were promulgated in accordance with the Maryland Administrative Procedure Act, *id.* at 350, but new protocols were never promulgated. Instead, after the General Assembly, in 2013, prospectively repealed the death penalty, 2013 Md. Laws, ch. 156, § 3, then-Governor Martin O'Malley, exercising his pardon power, commuted Evans's death sentences to sentences of life imprisonment without the possibility of parole.

At the time Evans committed the murders in question, there was no statutory provision for a sentence of life imprisonment without the possibility of parole. Instead, at that time, under Maryland law, the only possible sentences, following a conviction for murder in the first degree, were death or life imprisonment. Md. Code (1957, 1982 Repl. Vol.), Art. 27, § 412(b). Not until 1987 was the death penalty statute amended so as to provide for a sentence of life imprisonment without the possibility of parole as a third option, following a conviction for murder in the first degree. 1987 Md. Laws, ch. 237, codified at Md. Code (1957, 1987 Repl. Vol.), Art. 27, § 412(b).

[2] In an Appendix to its 2006 opinion, the Court of Appeals set forth the lengthy procedural history of Evans's challenges to his death sentences. *Evans v. State*, 396 Md. 256, 350-70 (2006). Because that procedural history is not pertinent to the instant appeal, we have provided only a summary and direct the interested reader to the Court of Appeals' Appendix for greater detail.

After his death sentences were commuted to sentences of life imprisonment without the possibility of parole, Evans filed, in the Circuit Court for Baltimore County, a motion to correct an illegal sentence, contending that the Governor's action, in commuting his sentences, resulted in the imposition of illegal ex post facto sentences of life without the possibility of parole. After the circuit court denied that petition without a hearing, Evans noted this timely appeal.

DISCUSSION

In his pro se motion below, as well as his pro se brief in this Court, Evans presents a number of related arguments, which, in essence, boil down to a single contention: that the Governor, in exercising his clemency power and commuting Evans's death sentences to sentences of life imprisonment without the possibility of parole, violated the Maryland constitutional prohibition against ex post facto laws, because, at the time of the crimes at issue, there was no provision, under Maryland law, for a sentence of life imprisonment without the possibility of parole.[3] For the reasons that follow, we reject that contention.

[3] The issues, as stated in Evans's appellate brief, are:

> I. Did the circuit court abuse its discretion when it denied Evans's motion to correct illegal sentence without a hearing upon Evans claim that the former Governor exercising commutation powers under the 2013 Amendment version of Correctional Service § 7-601(a)(1) to commute his death sentences to sentences of life imprisonment without the possibility of parole violate his rights against ex post facto laws because such sentence was not an authorized sentence when he was convicted and sentenced in 1984 or resentenced in 1992 constitutes illegal sentences based on multiple reasons?

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> (a) in May, 1984 when Evans was convicted of first degree murder former Article 27, 412(b) did not authorize a sentence of life imprisonment without the possibility of parole;
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> (b) the legislative 2013 amended version of former § 7-601(a)(1) from its original 1999 version to now authorize the Governor effective October 1, 2013 to commute a sentence of death into a sentence of life imprisonment without the possibility of parole conflict with former Article 27, 412 and its [Criminal Law Article] 2-302 amended version legal requirements that must be met before a sentence of life imprisonment without the possibility of parole mat be imposed;
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> (c) the editor notes establishes that the legislature did not intent to authorize the former Governor with commutation power to retroactively commute sentences of death into sentences of life without the possibility of parole when a defendant has already been sentenced to death prior to the effective date of Oct. 1, 2013 or [where] the State had not filed or served defendant with written notice thirty days before trial;
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> (d) because Article 17 prohibition against ex post facto laws was one of the other Articles that prohibited the former Governor from exercising retroactive executive commutation powers renders the exercise of commutation powers under Article II Section Twenty to commute Evans's sentences of death into sentences of life imprisonment without the possibility of parole under the 2013 legislature amended version of Correctional Service § 7-601(a)(1) null and void and illegal sentences; [and]

(continued…)

I.

The Governor of Maryland has had the power to grant reprieves and pardons under every version of the Maryland Constitution, dating back to 1776. *See* "A Declaration of Rights, and the Constitution and Form of Government, Agreed to by the Delegates of Maryland, in free and full Convention assembled," Art. 33, at 16 (Annapolis, 1776: Printed by Frederick Green) (providing that the governor "may alone exercise all other [of] the executive powers of government," including the power to "grant reprieves or pardons for any crime, except in such cases where the law shall otherwise direct").[4] Under the present 1867 Maryland Constitution, the Governor possesses the power to "grant reprieves and pardons," as provided under Article II, § 20:

> He shall have power to grant reprieves and pardons, except in cases of impeachment, and in cases, in which he is prohibited by other Articles of this Constitution; and to remit fines and forfeitures for offences against the State; but shall not remit the principal or interest of any debt due the State, except, in cases of fines and forfeitures; and before granting a nolle prosequi, or pardon, he shall give notice, in one or more

(…continued)

> (e) even if the legislature intended the October 2013 amended version of § 7-601(a)(1) to apply retroactive to defendants convicted of first degree murder prior to July 1, 1987 or prior to October 1, 2013 however when analyzing under the basis four principles established by the Court of Appeals retroactive application would still be prohibited.

[4] Available at the website of the Archives of Maryland, http://aomol.msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/html/convention1776.html, last visited Nov. 30, 2016.

> newspapers, of the application made for it, and of the day on, or after which, his decision will be given; and in every case, in which he exercises this power, he shall report to either Branch of the Legislature, whenever required, the petitions, recommendations and reasons, which influenced his decision.

The author of a leading treatise on Maryland constitutional law stated that "there is practically no restriction upon" a Governor's "pardoning any offense against the state, except in the case of impeachment." Alfred S. Niles, *Maryland Constitutional Law* 122 (1915). More recently, Judge Dan Friedman, a member of this Court and the author of a second leading text on the subject, wrote that "the pardon power is broad" and that, save in cases of impeachment and, perhaps, bribery of public officials, *see* Md. Const., Art. III, § 50,[5] there is "no other provision that limits the Governor's pardon power[.]" Dan Friedman, *The Maryland State Constitution* 119 (2011). Moreover, the Court of Appeals has recognized that the gubernatorial pardon power encompasses the power to commute a sentence, *Jones v. State*, 247 Md. 530, 534 (1967),[6] that is, to "substitute[] a lesser penalty for the grantee's offense for the penalty imposed by the court in which the

[5] Article III, § 50 provides in part that "any person," convicted of bribery of a public official "shall, as part of the punishment thereof, be forever disfranchised and disqualified from holding any office of trust, or profit, in this State." According to Judge Friedman's treatise, such punishment "may not be subject to pardon," though "[t]here are no appellate opinions to suggest whether" that interpretation is correct. Dan Friedman, *The Maryland State Constitution* 119 (2011).

[6] When *Jones v. State*, 247 Md. 530 (1967), was decided, capital punishment was still a legal sentence upon a conviction for rape. Although that is obviously no longer true, as a matter of federal constitutional law, *see Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding that a death sentence for a conviction "for the rape of a child where the crime did not result, and was not intended to result, in death of the victim," was barred by the Eighth Amendment), the Court of Appeals' statements, in *Jones*, concerning the scope of the gubernatorial pardon power are still binding.

grantee was convicted." Md. Code (1999, 2008 Repl. Vol.), Correctional Services Article ("CS"), § 7-101(d).

Arguably, the gubernatorial pardon power may be exercised independently of legislative control, so long as the Governor, in exercising that power, does not violate federal constitutional provisions such as the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment. That is to say, given the express provision in the Maryland Constitution, providing for the gubernatorial pardon power, as well as the express provision in the Maryland Declaration of Rights, providing for separation of powers, *see* Md. Decl. of Rights, Art. 8,[7] a reasonable argument could be made that such power is essentially plenary, although, undoubtedly, in commuting a prisoner's sentence, the Governor may not impose a reduced sentence that, itself, constitutes "cruel and unusual punishment." *See*, *e.g.*, *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion of Warren, C.J.) (stating that "use of denationalization as a punishment is barred by the Eighth Amendment"); *Weems v. United States*, 217 U.S. 349, 364, (1910) (holding that fifteen-year sentence "at hard and painful labor," along with "accessory penalties" of "civil interdiction," "perpetual absolute disqualification," and "subjection to surveillance during life," upon conviction for falsifying a public record, constituted cruel and unusual

[7] Article 8 of the Maryland Declaration of Rights provides:

> That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

punishment). But we need not decide that question in the instant case, because, as we shall explain, in any event, Evans has failed to show that he was subjected to an ex post facto violation.

II.

The Maryland constitutional prohibition against ex post facto laws is found in Article 17 of the Maryland Declaration of Rights, which provides:

> 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.

This provision is generally construed *in pari materia* with its federal counterpart, Article I, Section 10, of the United States Constitution.[8] *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 548 (2013) (plurality opinion of Greene, J.); *id.* at 577 n.1 (McDonald, J., concurring); *id.* at 578-79 (Barbera, J., dissenting). Moreover, as the State asserts in its brief before us, it arguably applies only to the retroactive application of a *statute*, not to the purportedly retroactive application of an executive action, as took place here. Once more, however, we need not decide that issue, because, even if we were

[8] Article I, Section 10, clause 1 of the United States Constitution provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility[.]

to assume that executive actions are included within the strictures of Article 17, Evans's claim must fail, as we next explain.

In light of recent decisional law, the test to be applied, in determining whether there has been a violation of Article 17, is somewhat unclear, as the Court of Appeals has been sharply divided over that question. But, under either of the tests applied in the most recent decisions by our State's highest Court, there was no ex post facto violation in the instant case.

The *Doe* plurality opinion applied the following test, derived from *Kring v. Missouri*, 107 U.S. 221, 235 (1883), and *Weaver v. Graham*, 450 U.S. 24, 29 (1981), and adopted by the Court of Appeals, in *Anderson v. Dep't of Health & Mental Hygiene*, 310 Md. 217, 224, 226-27 (1987), to determine whether there was an ex post facto violation: "Two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must *disadvantage* the offender affected by it." *Doe*, 430 Md. at 556 (plurality opinion of Greene, J.) (citations omitted). Under that test, it is obvious that Evans cannot demonstrate that Governor O'Malley's commutation of his death sentences to sentences of life imprisonment without the possibility of parole resulted in an ex post facto violation, because he obviously did not suffer a *disadvantage* as a consequence of that commutation of sentence.

The *Doe* dissent would have applied a different test, derived from *Collins v. Youngblood*, 497 U.S. 37, 49-50 (1990) (overruling *Kring*), and *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798), to wit: The Ex Post Facto Clause prohibits "[e]very law that

changes the punishment, and inflicts a *greater punishment*, than the law annexed to the crime, when committed." *Doe*, 430 Md. at 582 (Barbera, J., dissenting) (quoting *Calder*, 3 U.S. (3 Dall.) at 390).[9] Clearly, under that test, Evans's claim must still fail, as it is clear that Governor O'Malley's commutation of his sentences most certainly did not result in a "*greater punishment*, than the law annexed to the crime, when committed." Indeed, the result of Governor O'Malley's action was to *reduce* Evans's sentences.

III.

Notwithstanding the apparently independent constitutional basis for the gubernatorial pardon power, Md. Const., Art II, § 20, that power is also set forth in statutes. The pertinent statutes, for our purposes, are Maryland Code (1957, 1982 Repl. Vol.), Article 41, § 118, and its modern day counterpart, CS § 7-601. Article 41, § 118, the statute in effect at the time Evans committed the murders at issue, provided:

[9] Actually, according to *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), there are four categories of laws, which violate the Ex Post Facto Clause:

> 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. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. 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.

Only the third category, enumerated in *Calder*, has any relevance to this case.

> The Governor upon giving notice required by the Constitution may commute or change any sentence of death into penal confinement for such period as he shall think expedient. And, on giving such a notice, he may pardon any person, convicted of crime, on such conditions as he may prescribe, or he may upon like notice remit any part of the time for which any person may be sentenced to imprisonment on such like conditions without such remission operating as a full pardon to any such person.

Plainly, under the statute then in effect, the Governor was authorized to "commute or change any sentence of death into penal confinement for such period **as he shall think expedient**." (Emphasis added.) Such a period would obviously include life without the possibility of parole. That point is further confirmed by the provision that the Governor could "remit any part of the time for which any person may be sentenced to imprisonment on such like conditions," that is, "**such conditions as he may prescribe**," "without such remission operating as a full pardon to any such person." (Emphasis added.) Clearly, among "such conditions" as the Governor "may prescribe" would include the condition that a prisoner, like Evans, being granted commutation of his death sentences, would not be eligible for parole.

The modern day counterpart to Article 41, § 118, is CS § 7-601, which, effective October 1, 2013, provides in pertinent part:

> (a) On giving the notice required by the Maryland Constitution, the Governor may:
>
> > (1) change a sentence of death into a sentence of life without the possibility of parole;
> > (2) pardon an individual convicted of a crime subject to any conditions the Governor requires; or

> (3) remit any part of a sentence of imprisonment subject to any conditions the Governor requires, without the remission operating as a full pardon.

By our reading of the statutes, the Governor, both under the current statute and its 1982 version, was authorized to commute a sentence of death to a sentence of life without the possibility of parole, although the current version states this proposition more plainly. It follows, then, that the statutory changes have not resulted in a violation of Article 17, because they have not effected a retroactive change in the law.

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