

Circuit Court for Baltimore City
Case No. 115345004

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0197

September Term, 2018

ANTONIO CLAYTON

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: April 16, 2019

*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.

In 2016, Antonio Clayton pleaded guilty to first-degree assault and was sentenced by the Circuit Court for Baltimore City to ten years' imprisonment, with all but time served suspended, and placed on supervisory probation for a three-year term.

While on probation, Mr. Clayton was arrested and charged with possession with intent to distribute heroin, conspiracy to possess heroin with the intent to distribute, and possession of heroin. The charges arose after the police recovered 276 “gel caps of heroin” from the center console of a vehicle parked, with Mr. Clayton sitting in the driver's seat, in an area known by the police to be an “open drug marketing area.” Although the criminal charges were ultimately *nol prossed*, the State sought to revoke Mr. Clayton's probation based on the same arrest. At a contested violation of probation hearing on January 16, 2018, a Baltimore City police officer testified that he had observed the CDS recovered from Mr. Clayton's vehicle in plain view. The circuit court found the officer's testimony credible and concluded that Mr. Clayton had violated the conditions of probation that required him to obey all laws and to abstain from illegal possession of a narcotic drug or controlled substance. The court terminated his probation and ordered him to serve four years of his previously suspended sentence (with 179 days credit for time served).

Mr. Clayton filed an application for leave to appeal, in which he argues that the court violated the Justice Reinvestment Act when it ordered him to serve more than fifteen days for the probation violation. We ordered the State to respond, and after considering both filings, we grant the application for leave to appeal and affirm.

The Justice Reinvestment Act, effective October 1, 2017, created a progressive discipline scheme that limits the sentences for “technical” violations of probation:

(d) If, at the hearing, a circuit court or the District Court finds that the probationer or defendant has violated a condition of probation, the court may:

- (1) revoke the probation granted or the suspension of sentence; and
- (2) (i) subject to subsection (e) of this section, for a technical violation, impose a period of incarceration of:
 1. not more than 15 days for a first technical violation;
 2. not more than 30 days for a second technical violation; and
 3. not more than 45 days for a third technical violation; and(ii) for a fourth or subsequent technical violation or a violation that is not a technical violation, impose any sentence that might have originally been imposed for the crime of which the probationer or defendant was convicted or pleaded nolo contendere.

Md. Code (2001, 2018 Repl. Vol.), § 6-223(d) of the Criminal Procedure Article (“CP”).

The statute distinguishes “technical violations” from full-blown violations, which can still, as before, result in a sentence up to the sentence that might originally have been imposed.

“Technical violations” are defined fairly generally, though—not by reference to particular acts, but rather as violations of probation conditions that “d[o] not involve”:

- (1) an arrest or a summons issued by a commissioner on a statement of charges filed by a law enforcement officer;
- (2) a violation of a criminal prohibition other than a minor traffic offense;
- (3) a violation of a no-contact or stay-away order; or
- (4) absconding.

Md. Code, (1999, 2017 Repl. Vol.), § 6-101(m) of the Correctional Services Article (“CS”). If a violation qualifies as technical, the Act creates “a rebuttable presumption that the limits on the period of incarceration that may be imposed for a technical violation . . . are applicable.” CP § 6-223(e)(1). “The presumption may be rebutted if the court finds and

states on the record, after consideration [of certain factors], that adhering to the limits on the period of incarceration . . . would create a risk to public safety, a victim or a witness[.]” CP § 6-223(e)(2). The court must consider “(i) the nature of the probation violation; (ii) the facts and circumstances of the crime for which the probationer or defendant was convicted; and (iii) the probationer’s or defendant’s history.” *Id.*

Mr. Clayton argues that the court failed to consider these factors and “failed to make the requisite findings on the record to support that [he] was a risk to public safety, a victim, or a witness[.]” The State responds that he’s asking the wrong question, that his violation was not a “technical violation,” but rather “a criminal law violation” that didn’t require a finding that Clayton was a risk to the public safety, a victim, or a witness.

We agree with the State. Mr. Clayton’s violation did not arise from a mere failure to report or other minor infraction, but from his arrest for possessing heroin with intent to distribute it:

Viewing the evidence as I heard and the credibility of Detective Wright, I find he was credible. I find that he saw in plain view in a car in an area accessible to the defendant a large quantity of heroin, which was in plain view. And also the fact that he was driving or at least in the driver’s seat, and [the Detective] had seen him at least on one other occasion, and the defendant admitted on his testimony that he’s driven or at least been in the car on one other occasion.

For that reason, then I will find him in violation of both condition number 4, failing to obey all laws, and condition number 8, illegally possessing an illegal – or illegally possessing a narcotic drug.

His conduct qualified as “a violation of a criminal prohibition other than a minor traffic offense.” CS § 6-101(m)(2); *see* Md. Code (2002, 2012 Repl. Vol.) § 5-601 of the

Criminal Law Article (“CR”) (prohibiting the possession of a controlled dangerous substance); CR § 5-602 (prohibiting the possession of a controlled dangerous substance with the intent to distribute); CR § 5-402 (including heroin as a Schedule I controlled dangerous substance). As such, the court had the discretion to “impose any sentence that might have originally been imposed for the crime of which the probationer or defendant was convicted.” CP § 6-223(d)(2)(ii). The court need only consider the factors listed in CP § 6-223(e)(2) and make findings about a probationer’s risk to public safety, a victim, or a witness when the probation violation is “technical” *and* if the court orders the probationer to serve a period of incarceration that exceeds the limits for a first, second, or third technical violation.

**APPLICATION FOR LEAVE TO APPEAL
GRANTED. JUDGMENT OF THE
CIRCUIT COURT FOR BALTIMORE
CITY AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**