Circuit Court for Harford County
Case No. 12-K-12-001309

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 239

September Term, 2018

STATE OF MARYLAND

v.

CHRISTINA RENEE PARKS

Kehoe,
Berger,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: November 4, 2019

In this appeal from the Circuit Court for Harford County, the State of Maryland asserts that the trial court granted a sentence modification contrary to Maryland Rule 4-345.[1]

On December 6, 2012, after having been convicted by a jury on various charges, appellee, Christina Renee Parks, was sentenced to 25 years' incarceration with all but five years suspended for first-degree assault, a consecutive three years for fleeing and eluding, and a suspended three years for malicious destruction, all of which were to be followed by five years of supervised probation.

Following four unsuccessful motions seeking a sentence modification, Parks filed a fifth motion to modify and was afforded a hearing. The court, on April 2, 2018, granted her motion to modify sentence. This appeal followed.

PROCEEDINGS

Parks' convictions of first-degree assault and several incarcerable motor vehicle offenses followed a jury trial on November 15, 2012. She was sentenced on December 6, 2012, as we have noted, *supra*. On direct appeal, this Court affirmed in all respects.[2]

The parties agree that, during the pendency of her appeal, Parks filed, on December 10, 2012, a motion to modify sentence, which was held *sub curia*.[3] On April 18, 2014,

[1] Parks raises no question as to the State's authority to appeal. *See*, Md. Code (1974, 2013 Repl. Vol., 2019 Supp.) Courts & Judicial Proceedings, § 12-302(c)(3)(ii).

[2] *Parks v. State*, No. 2368, September Term 2012 (filed December 9, 2013).

[3] In its brief, the State asserts that the record does not contain Parks' initial motion seeking modification, however, the circuit court appears to have separated the record file into two volumes – one for matters relating to her direct appeal in 2012 and one for matters relating

Parks filed a second motion to modify, which the court denied on April 29, 2014, without a hearing. A third motion was filed, in letter form addressed to the presiding judge, on January 29, 2015, which the court denied on February 9, 2015, again without a hearing. Again, in letter form addressed to the court, Parks sought modification on January 13, 2016. To this filing, the court issued a separate order denying the motion.

Parks' final *pro se* motion was filed on October 30, 2017, and was heard by the court on April 2, 2018.[4] The State objected to the modification, arguing that because the five-year time limit pursuant to Rule 4-345(e)(1) had passed the court was without jurisdiction to order modification. The court did not address the State's time-barred argument and modified Parks' sentence by ordering her three-year sentence for fleeing and eluding a police officer, originally consecutive to the sentence for first-degree assault, to be concurrent with the greater sentence.

DISCUSSION

In its appeal, the State challenges the court's authority to modify Parks' sentence, arguing (1) that the motion to modify was not filed within 90 days of the imposition of sentence, and (2) that the court's order to modify was granted more than five years after imposition of the sentences.

to all subsequent filings following her filing of the notice of direct appeal. The initial motion for modification was filed on the same day as her notice of appeal on December 10, 2012. Thus, her initial motion is located in the separate record volume with her notice of direct appeal.

[4] An earlier hearing, scheduled for February 26, 2018, was continued on Parks' motion, over the State's objection.

Maryland Rule 4-345(e) provides, in relevant part, that

> [u]pon a motion filed within 90 days after imposition of a sentence … in a circuit court, whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.

Rule 4-345(e)(1)(B).[5]

The 90-day filing requirement

The State first avers that "the rule requires that a motion to modify be filed within 90 days of a court's imposition of sentence[,]" and that "[t]he 90-day requirement is mandatory, and the court's denial of a motion to modify that has been filed within that time shuts the door to any further efforts by the defendant to seek modification." For support

[5] The rule further provides, in sub-sections (e)(2) and (e)(3), for victim notification of pending motions for modification and the court's required pre-hearing inquiry of the same. The record reflects that after the court heard arguments on the motion, it acknowledged that the victim was not present but had been present for the originally set hearing date on February 26, 2018. The court then stated on the matter, "So I don't know if there was a reminder that was separately sent to her but the Court did not send out new notices once we set the date back in court on September [sic] 26th for today's date in this case."

We also note that the State's Attorney present at the hearing, was standing in for the assigned prosecutor, and Parks' defense counsel was not initially present for the hearing. Defense counsel, having been seen in the courthouse for an unrelated matter, was called to the courtroom by the clerk. He explained on the record that he had not received notice of the hearing. There was, coincidently, a motion to modify pending with another judge relating to a sentence imposed on Parks' violation of probation that was to run consecutively to the sentences imposed on her original offenses. That motion sought to have both motions to modify heard jointly by the court on the same date, but that did not happen because the other motion had not been ruled on. Rather than reschedule so that both motions could be heard together, defense counsel requested to move forward on the motion being dealt with in this appeal.

of this proposition, the State refers to this Court's opinion in *Tolson v. State*, 201 Md. App. 512 (2011), wherein we determined that

> because no logical distinction can be drawn between reconsideration of a previously denied motion to modify and consideration of a second motion to modify under Rule 4-345, we hold that, once a court has lost jurisdiction after denying a motion to modify, because ninety days have elapsed from imposition of sentence, it may not reconsider a previously denied motion to modify sentence and impose a new sentence.

201 Md. App. at 518.

In response, without citing any authority in support of her argument, Parks contends that her initial motion, which had been filed within four days of the imposition of sentence and was held *sub curia*, caused "the door [to remain] open … [because] the trial court *never denied* [her] timely motion for modification …." (Emphasis in original). While conceding that the court had denied three subsequent motions for modification, "none of those motions referred back to the first motion …. [and] the trial court's denials of the *untimely* second, third, and fourth motions did not implicate its authority to grant the *timely* first motion." (Emphasis in original). We are satisfied that Parks' first motion was timely. We are equally satisfied that the subsequent motions were not timely and that, the court having denied the second motion, "more than ninety days have elapsed since the imposition of sentence, 'the defendant is finished[]….'" *Tolson*, 201 Md. App. at 517 (quoting *Greco v. State*, 347 Md. 423, 436 (1997)).

The five-year limitation

Without regard to our conclusion that Parks' second, third, fourth and fifth motions were untimely filed, we hold that the circuit erred in granting the modification beyond the five-year limitation established by Rule 4-345.

In support of the court's authority to modify her sentence beyond the five-year limitation period, Parks relies on this Court's recent opinion in *Schlick v. State*, 238 Md. App. 681 (2018), asserting that "*Schlick* establishes that the five-year revisory window in Rule 4-345(e) is not jurisdictional." Because of that, Parks explains, "[a]fter the five-year period has expired, a trial court has 'discretion' to 'consider the totality of the circumstances and determine whether to hear the motion on its merits.'" (Quoting *Schlick*, 238 Md. App. at 693).

Having been granted post-conviction relief on the basis of ineffective assistance of his trial counsel, who failed to file a timely motion for modification, Schlick was afforded an opportunity to file a belated motion. 238 Md. App. at 685. In the trial court's consideration of the belated motion to modify, it found that it lacked jurisdiction to consider the belated motion because the five-year limitation from the date of sentencing had passed. *Id*. at 686-87. On appeal, this Court noted that "a strong factor is that appellant timely filed a belated motion for modification, but the lower court did not set an initial hearing date on the motion until after the expiration of five years from the imposition of the original sentence." *Id*. at 693. Rather than punish the defendant for the trial court's failure to timely schedule a hearing on the motion, we found that the trial court was vested with the discretion to consider the motion after the five-year limitation, stating that "the court has

jurisdiction over the motion, but it is within the discretion of the trial court to consider the totality of the circumstances and determine whether to hear the motion on its merits." *Id*.[6]

Procedurally, *Schlick* is significantly inapposite from the matter before us. Schlick initially received a sentence of 16 years in prison, with all but 18 months suspended, to be followed by five years of probation. 238 Md. App. at 684. As the result of a subsequent conviction, his probation was revoked, resulting in the execution of the suspended portion of the original sentence. *Id*. Because his counsel failed to file a timely motion for modification, he was granted, by way of post-conviction relief, leave to file a belated motion for modification. *Id*. at 685. He did so, but the motion was not heard within a five-year period commencing with the date of his initial sentencing. *Id*. at 685-86. The trial court ruled that, five years having passed, it was without jurisdiction to modify Schlick's sentence. *Id*. at 686-87.

Having granted the State's petition for certiorari, the Court of Appeals (Greene, J.) affirmed. *State v. Schlick*, 465 Md. 566 (2019). In affirming, the Court directed its attention to a determination of the time at which the five-year clock began to run. The Court observed:

> The postconviction court ruled on March 20, 2013 that Mr. Schlick received ineffective assistance of counsel because his attorney failed to file

[6] We filed our reversal in *Schlick v. State*, *supra*, on September 20, 2018. The State filed a petition for certiorari on November 9, 2018. *State v. Schlick*, Pet. No. 389, Sept. Term, 2018. While the petition was pending before the Court of Appeals, the instant case was argued before this Court on December 6, 2018. On January 7, 2019, the Court of Appeals granted the State's petition for certiorari and, as a result, proceedings in the instant case were stayed by order of January 17, 2019, pending the Court of Appeals's disposition of *State v. Schlick*. On August 23, 2019, the Court of Appeals decided *State v. Schlick*, 465 Md. 566 (2019), affirming this Court's judgment.

> a timely motion for modification. Accordingly, the postconviction court granted Mr. Schlick permission to file a belated motion for modification within 90 days of the postconviction court's order….
>
> By affording Mr. Schlick 90 days from the date of its order to file a motion for modification, the postconviction court effectively restored Mr. Schlick's rights and the circuit court's revisory power under Rule 4-345(e). That is, had Mr. Schlick received effective assistance of counsel, he would have had 90 days from the date of his probation revocation and final judgment of the court to file a motion for modification….

465 Md. at 584.

Thus, the Court of Appeals clarified that the five-year period provided by Rule 4-345(e) begins from the date of final judgment. *Id*. In *Schlick*, that date was deferred, first by the revocation of his probation and execution of the suspended portion of his sentence and again by the post-conviction relief which provided him the right to file a belated motion for modification. *Id*.

In the instant case there are no such deferring considerations. Parks' sentence, imposed on December 6, 2012, was the final judgment from which all post-conviction proceedings were counted. We find nothing in *Schlick* that would compel a finding that, absent intervening events, the five-year requirement of Rule 4-345(e) could be tolled. A final judgment is rendered in a criminal case when a "sentence is imposed on a verdict of guilty." *Chmurny v. State*, 392 Md. 159, 167 (2006). *See also Johnson v. State*, 142 Md. App. 172, 201-02 (2002) (explaining that "'[i]n a criminal case, a final judgment consists of a verdict and either the pronouncement of sentence or the suspension of its imposition or execution.'" (quoting *Lewis v. State*, 289 Md. 1, 4 (1980))). Therefore, the five-year window opened on the date of Parks' sentencing, December 6, 2012, and closed on

December 7, 2017. In *Schlick*, the Court of Appeals emphasized that "our holding in this case is limited to those situations where a defendant is deprived of the opportunity to timely file or otherwise obtain consideration by the court of a motion for modification under Maryland Rule 4-345(e) as a result of ineffective assistance of counsel." 465 Md. at 586-87. Parks does not submit such a scenario.

We conclude that the court's consideration of Parks' third, fourth, and fifth untimely motions were without merit. Because "the court had no jurisdiction to modify appellant's original sentence, that modified sentence was a nullity." *Tolson*, 201 Md. App. at 518. We further conclude that the expiration of five years from the imposition of Parks' sentence on December 6, 2012, left the court without jurisdiction to entertain and grant a sentence modification on April 2, 2018.

ORDER OF THE CIRCUIT COURT FOR HARFORD COUNTY GRANTING SENTENCE MODIFICATION VACATED; CASE REMANDED TO THAT COURT FOR CORRECTION OF THE RECORD AND COMMITMENT RECORDS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

The correction notice for this opinion can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/0239s18cn.pdf