

Circuit Court for Baltimore City
Case No. 116123015

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 531

September Term, 2017

MAURICE DUBOSE

v.

STATE OF MARYLAND

Meredith,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: May 18, 2018

*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.

Maurice Dubose was convicted by a Baltimore City jury of second degree murder and carrying a dangerous weapon openly with intent to injure.¹ On appeal, Dubose raises three claims of error: *first*, he argues that the circuit court erred by failing to give him enough time to discuss whether he would testify in his own defense at trial; *second*, he argues that his attorney’s failure to request a jury instruction regarding the lack of motive for the crime was ineffective assistance of counsel; and *third*, he argues that his sentence for carrying a dangerous weapon was unlawfully imposed. We hold that the sentence was unlawful, and otherwise affirm.

I. DELIBERATIONS WITH COUNSEL

Dubose first argues that the trial judge did not give him enough time to discuss with his counsel whether he should testify in his own defense.

A critical issue at Dubose’s trial was, if he decided to testify in his own defense, whether he would be subject to impeachment with evidence of his 2009 conviction for possession of narcotics with intent to distribute. The trial judge deferred the decision until nearly the end of the State’s case, just before Dubose would testify. At that time, the trial court ruled that Dubose could be impeached with evidence of his prior conviction.

Following the ruling, Dubose sought to discuss his options with his counsel. After several minutes,² the court required Dubose to make a decision without any further discussion. Dubose argues that the court erred by not giving him enough time to discuss

¹ The facts of Dubose’s crimes are not germane to the issues on appeal and we, therefore, forgo their recitation.

² The parties don’t agree on how many, but we do not need to resolve the issue here.

whether he would testify with his attorney, because the court’s ruling on the admission of the impeachment evidence changed the circumstances under which Dubose would testify. The State argues, on the other hand, that Dubose and his counsel had nine months prior to trial to determine whether he would testify. In this case, it was not an abuse of discretion for the trial court to find that the defendant had sufficient time to consult with his attorney. The trial court is afforded deference in how it conducts trials and manages the courtroom, and we review such decisions for abuse of discretion. *Choate v. State*, 214 Md. App. 118, 151 (2013). From our review of the transcript, we don’t think that the decision here was so rushed as to constitute an abuse of discretion.³

We also observe that the question of whether a defendant will testify on his or her own behalf is—because of our constitutional protections against self-incrimination—a question in every criminal case. From the moment counsel appears in a case, the decision looms.⁴ Counsel considers many factors: strength of the State’s case; defendant’s articulateness and persuasiveness; defendant’s ability to withstand cross-examination; availability of other sources of evidence. Each step in the process brings more information and narrows the range of choices. At the arrest and charging stages, counsel might not have a clear view of the State’s case and can’t predict whether the defendant will testify in his

³ Any other outcome would require us to engage in line-drawing for the trial court: ten minutes is enough deliberation time, but nine minutes and fifty-nine seconds is not. Because we defer to the trial court’s discretion, we need not engage in this line drawing.

⁴ We have framed this in terms of defense counsel as that was the situation here, but in circumstances in which a defendant chooses to represent him or herself, the same choices are presented.

own defense. Md. Rule 4-202(a) (a charging document must contain “a concise and definite statement of the essential facts of the offense” but does not discuss the State’s case or trial strategy). As the defendant learns more about the case against him, this becomes clearer. When the State discloses its witness list, Md. Rule 4-263(d)(3), and when the State makes its *Brady* disclosures, Md. Rule 4-263(d)(5) (the State must disclose “[a]ll material or information ... that tends to exculpate the defendant or negate or mitigate the defendant’s guilt”), the defense may have a better sense of the strategic necessity of the defendant’s testimony. Pretrial motions (and rulings on those motions) may narrow the considerations further. And, as here, rulings in the middle of trial may narrow things, or even change the calculus entirely. But while the decision is complex, it is binary. The trial court was either going to permit the impeachment evidence or not. Dubose and his attorney had only to prepare for these two possibilities. Dubose and his attorney could have, in the time prior to trial, fully discussed the issues and determined whether Dubose would testify given either outcome. Dubose was not limited to thinking about this in the time in the courtroom.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Dubose next argues that the trial court erred in denying his motion for a new trial based on ineffective assistance of counsel. He argues that his counsel’s failure to request an instruction regarding his lack of motive—and counsel’s admission that this failure was not attributable to trial strategy—proves that he received constitutionally inadequate representation. *See Strickland v. Wash.*, 466 U.S. 668, 690 (1984) (creating a test for assessing whether defendant was denied Sixth Amendment rights by the ineffective assistance of counsel).

In our view, allegations of ineffective assistance of counsel are best left for post-conviction proceedings, rather than considered on direct appeal. “Post-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel’s ineffectiveness.” *Mosley v. State*, 378 Md. 548, 560 (2003). Dubose’s counsel’s admission of error alone is insufficient, particularly as it was not made under oath or subject to cross-examination. Moreover, in the present posture, we don’t know what other evidence might be relevant to a determination. We are persuaded by *Mosley*’s words of caution that this issue is more appropriately addressed in post-conviction procedures.

III. THE SENTENCE

Dubose’s final argument concerns a discrepancy between the commitment record for his two convictions and the sentence imposed at trial. Dubose asks us to reinstate the sentence imposed by the court and vacate the entered sentence. The State agrees.

The transcript of Dubose’s sentencing hearing reflects that the court imposed the following sentence:

As to ... murder in the second degree, the sentence of the Court is 25 years ... without parole, which is a mandatory sentence.

As to ... carrying a dangerous weapon openly with intent to injure, the sentence of the Court is three years to run consecutive to count three.

A total sentence of 28 years, suspend all but 25 years without parole.

By contrast, Dubose’s commitment record and the docket entries both give his sentence as 3 years unsuspended for carrying a dangerous weapon, and 25 years without parole for murder. Thus, there is a conflict between the transcript, which suspends the 3 year sentence, and the commitment record, which does not.

“When there is conflict between the transcript and the commitment record, unless it is shown that the transcript is in error, the transcript prevails.” *Douglas v. State*, 130 Md. App. 666, 673 (2000). Further, ambiguity in the sentence should be resolved in favor of the defendant, applying the more lenient interpretation. *Robinson v. Lee*, 317 Md. 371, 379-80 (1989). Here, the transcript reveals that the court suspended the 3 year term for carrying a dangerous weapon at the sentencing hearing, and it is this sentence that must prevail. When a sentence must be modified, the correct procedure is for us to vacate the sentence and remand the case to the circuit court to revise the sentence. *Cathcart v. State*, 397 Md. 320, 330 (2007). Accordingly, we vacate the sentence and remand to the circuit court to reenter the sentence for carrying a dangerous weapon to 3 years, suspended, with no parole restrictions.

SENTENCE FOR CARRYING A DANGEROUS WEAPON VACATED. JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED. THE CASE IS REMANDED FOR THE SENTENCE TO BE ENTERED CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EQUALLY BETWEEN APPELLANT AND THE MAYOR AND CITY COUNCIL OF BALTIMORE.