

Circuit Court for Baltimore County
Case No. 86-CR-2057

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 616

September Term, 2018

ELMER MAURICE SNOWDEN

v.

STATE OF MARYLAND

Kehoe,
Geter,
Wilner, Alan M. (Senior Judge, Specially
Assigned)

JJ.

Opinion by Wilner, J.

Filed: April 4, 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.

Appellant is currently serving three different sentences imposed in two separate cases by two different courts. As presently construed by the State, subject to credits he may earn, eventual parole, or death, his incarceration will not end until 2106.¹ That is because, with one minor exception, those sentences have been declared to be consecutive to one another. He has been incarcerated since 1986 for crimes – very serious crimes – he committed during a one-week period in March of that year while a 17-year-old juvenile. He has sought, and received, relief in both courts, but the relief he has received has done him little practical good.

What brings the case to us is the refusal of the Circuit Court for Baltimore County to declare that the last revised sentence it imposed is to be served concurrently with sentences he received from the Circuit Court for Anne Arundel County. On the record before us, we are unable to provide him the relief he seeks.

Baltimore County proceeded first. In April 1986, appellant was charged in a 45-count indictment with first-degree rape and a variety of robbery, theft, and weapons offenses. He pled guilty to Count 1, charging first-degree rape. The other charges were *nol prossed*, and, on October 15, 1986, Judge Joseph Murphy imposed a sentence of life imprisonment. No appellate review was sought from that judgment, and appellant does not contend in this appeal that it was unlawful. In January 1987 – within the then-

¹ This is based on the premise that appellant is serving a sentence of life imprisonment, all but 30 years suspended, plus a consecutive sentence of 20 years, both imposed in Anne Arundel County (total 50 years), consecutive to a sentence of life imprisonment, all but 70 years suspended, commencing from March 11, 1986, imposed in Baltimore County.

required 90 days time limitation – appellant moved to modify that sentence. That motion was held *sub curia* until it was replaced by an amended motion heard in January 2011.

Anne Arundel County lagged a bit behind, presumably because that case proceeded to trial. On July 10, 1987, following the trial, appellant was found guilty of first-degree murder, robbery with a deadly weapon, and assault. He was sentenced to life imprisonment for the murder, consecutive to the Baltimore County sentence, 20 years for the armed robbery, and 20 years for the assault, the two 20-year sentences to be served consecutive to the life sentence for murder and consecutive to each other. That left appellant with two consecutive life sentences plus 40 years, also consecutive.

The first bit of relief appellant got came in his appeal from the Anne Arundel County judgments. The Court of Appeals held that the two 20-year sentences merged, leaving appellant with two consecutive life sentences and an additional consecutive 20-year sentence. *See Snowden v. State*, 321 Md. 612 (1991). What occurred next, and what brings us here, is what the attorneys for both sides, without any intent of disparagement, have analogized to a game of ping pong.

In June 2006, appellant filed a motion to modify the Anne Arundel County sentences. Judge Philip Caroom, impressed with appellant's progress in rehabilitation, modified the life sentence to 50 years, with all but 30 years suspended, plus the additional consecutive 20-year sentence, all consecutive to the Baltimore County sentence. That appeared to leave appellant with an effective sentence of life (Baltimore County) plus 50 years (Anne Arundel County). In February 2008, appellant was denied parole.

In December 2008, appellant filed an amended motion for modification of the Baltimore County sentence, which was not heard and acted on until January 2011. The matter came before Judge Murphy. Through counsel, appellant asked that the life sentence be either suspended entirely or revised to suspend all but 50 years and make the unsuspended portion concurrent to the sentence in Anne Arundel County, which Judge Caroom had declared was to be consecutive to the Baltimore County sentence.

Judge Murphy also acknowledged the progress appellant had made while in prison. He retained the life sentence he had imposed but suspended all but 70 years of it. He expressly denied appellant's request to make the unexpired 70-year term end concurrently with the Anne Arundel County sentence. Judge Murphy stated, on the record, that (1) the sentence was one of life imprisonment commencing on March 11, 1986, (2) all but 70 years of that sentence was suspended, (3) credit was given against that 70 years for 9,086 days of time already served, and (4) upon release, appellant would be on five years supervised probation "concurrent with any probation imposed on the sentence in Anne Arundel County if that sentence is ever made subject to probation."

Unfortunately, the Commitment Report form signed by the Circuit Court clerk did not reflect the five years of probation and, indeed, stated that there was to be no probation. It also stated that the new sentence was to be "concurrent with any other outstanding sentence and begin on 3/11/86." The Commitment Report clearly was in error in those respects.

Appellant had filed a second motion to modify the Anne Arundel County sentence within 90 days after the court had modified the sentence in June 2006 and had asked the

court to hold the motion *sub curia*. Judge Caroom denied that motion because he believed at the time that he had no authority to grant it. An amended motion was filed in 2014 but was not heard until November 2015. Judge Caroom acknowledged that he had been mistaken in his earlier ruling but, because of a change in the law that prohibited the court from revising a criminal sentence after the expiration of five years from the date of the sentence originally imposed (*see* Rule 4-345(e)), he held that he was unable to grant further relief. He did say that, if he had the power to do so, he likely would have made his sentence concurrent with that of Baltimore County. No appeal was taken from that ruling.

If all this was not complicated enough, in August 2017, the Maryland Parole Commission, relying in part on the erroneous Commitment Record form signed by the Baltimore County Circuit Court clerk in 2011, advised appellant that, (1) because, in its 2011 resentencing, the Baltimore County court omitted to order probation following expiration of the unsuspended sentence of 70 years, and (2) the Anne Arundel County sentence had been revised to a flat 50 years, with all but 30 years suspended, the Parole Commission regarded both sentences to be for a flat term rather than a life sentence. *See Cathcart v. State*, 397 Md. 320, 327 (2007). As a result, the Commission concluded that appellant was serving a combined sentence of 118 years, 7 months, and 18 days and was not eligible for a parole hearing at that time.

That produced a motion filed in the Baltimore County court in February 2018 to revise and clarify the revised sentence imposed by Judge Murphy in 2011. Specifically, he asked that the court (1) “clarify” that that sentence “is running concurrent with any

other outstanding or unserved sentence,” and (2) order the Division of Correction and the Parole Commission to revise their records to reflect that fact, and issue a revised commitment record to include a five-year probationary period. On February 27, 2018, the court, through Judge Nagle, entered an order directing that an amended Commitment Report be issued to reflect that the Baltimore County sentence was “life suspending all but seventy years with five years probation” but denying all other requested relief, including a declaration that the sentence was to run concurrent with the Anne Arundel County sentence.

On March 30, 2018, the clerk issued an amended Commitment Record that recorded the judgment as life all but 70 years suspended and probation for a period of five years but, ignoring the court’s denial of all other relief requested by appellant, continued to show the sentence as “concurrent with any other outstanding or unserved sentence and begin on 03/11/86.”

Contemporaneously, the State moved to correct the record in Anne Arundel County to impose a period of probation following the end of the unexpired term, as had been done in Baltimore County, and to correct the revised sentence imposed by Judge Caroom’s June 2006 Order. The State argued that the reduction of the life sentence to 50 years with all but 30 years suspended was illegal because the statutorily prescribed minimum sentence for first-degree murder was life imprisonment.

In May 2018, the court granted that motion and imposed a corrected sentence of life imprisonment with all but 30 years suspended, to be followed by five years of probation. A revised Commitment Record conforming to that ruling was issued. The

Commitment Record noted that the Anne Arundel sentence was consecutive to that in Baltimore County. Finally, in June 2018, appellant filed a motion for further modification of the Anne Arundel County sentence, without indicating the nature of the modification he sought. He noted that this appeal was pending and asked the court to hold the motion *sub curia* until the appeal was resolved, which the court, so far, has done.

DISCUSSION AND ANALYSIS

This appeal is from that part of Judge John Nagle’s February 27, 2018 order denying appellant’s request for a declaration and directive that the 2011 revised sentence in Baltimore County runs concurrent with the sentences in Anne Arundel County. That hinges, in part, however, on whether Judge Murphy intended his revised sentence imposed in January 2011 to be a concurrent one, or, when read together with the clerk’s Commitment Record, effectively made it so.²

The construct of appellant’s argument is that (1) Judge Murphy had discretion to make the revised sentence concurrent with the intervening Anne Arundel County sentence; (2) the transcript of the hearing that led to the revised sentence shows that Judge Murphy intended for the revised sentence to be concurrent; (3) if there is any ambiguity about that, both under the rule of lenity and when read in light of the clerk’s

² There also is the issue of whether Judge Murphy had the authority to make his revised sentence concurrent with the Anne Arundel County sentence in light of the fact that the Anne Arundel County sentence was expressly made consecutive to the Baltimore County sentence. Because we conclude that Judge Murphy did not intend or purport to make his sentence concurrent, we need not address that issue.

Commitment Record, the revised sentence must be read as concurrent; and (4) although no claim of fraud is made, construing the sentence as consecutive constitutes a jurisdictional mistake or an irregularity for purposes of Md. Rule 4-345(b) that should have been corrected by Judge Nagle.

We shall deal first with what Judge Murphy actually said when ruling on appellant’s motion for modification in January 2011. The crime for which appellant had been sentenced to life imprisonment involved his participation, with two other men, all armed with shotguns, in ransacking a house at gunpoint, terrorizing the family that lived there, and gang-raping the 17-year old daughter, whose poignant victim impact statement was read into the record at the modification hearing. A week before that event, appellant committed the murder in Anne Arundel County when, in the course of a robbery, he killed a restaurant employee. The Anne Arundel sentence, also initially for life (plus 40, then 20 years), was made consecutive to the Baltimore County sentence.

Defense counsel acknowledged that those sentences “were appropriate when imposed.” He argued, however, that appellant had been a model inmate for 25 years, which was largely, but not entirely, true,³ that he had furthered his education while in prison, had married, and had volunteered for several worthwhile projects, which was corroborated by testimony from appellant’s wife and mother. In seeking relief from the life sentence, counsel noted that parole of lifers required approval by the Governor and very few lifers in recent times had cleared that hurdle. The last presentation was from

³ Counsel acknowledged that appellant had several institutional violations but regarded them as minor.

appellant, who expressed remorse and asserted that he had changed while in prison; he had found religion and had furthered his education. He said that he understood the victim's grief and acknowledged that his life "may be over" and that he "might not have a chance to ever see freedom again."

The transcript reveals that Judge Murphy struggled with his decision. Having just heard the rape victim's impact statement, he said that, from the viewpoint of the victim, he would deny the motion "in thirty seconds." He said that he remembered the case and had exceeded the sentencing guidelines for "very good reasons." On the other hand, he was impressed with appellant's progress at rehabilitation, noting that "the mindless thug I sentenced back in 1986 has vanished and has been replaced by a person for whom *there may be some opportunity* at redemption." (Emphasis added).

On balance, Judge Murphy concluded that appellant "has earned a modification." He immediately added, however, that "[i]f the Defendant's allocution this afternoon is sincere, then he certainly understands why my modification *is simply not going to be concurrent with the Anne Arundel County sentence or suspending the balance of the time served on this sentence.*" (Emphasis added).

On that premise, Judge Murphy announced that the life sentence would remain intact, but all but 70 years of it would be suspended. Twice, he made clear that appellant would have to serve 70 years on the sentence, with five years of probation if he ever is released. The period of *probation*, he added, would be "concurrent with any probation imposed on the sentence in Anne Arundel County if that sentence is ever made subject to probation."

Stressing the “no-more-mindless-thug” comment, appellant contends that, notwithstanding anything else Judge Murphy said, he must have intended to make the new sentence concurrent with the Anne Arundel County sentence, and, even if that is not clear, when coupled with the clerk’s Commitment Report, it must be regarded as a concurrent sentence anyway. We disagree. Judge Murphy’s intent is perfectly clear. Twice, he expressly stated that the new sentence was not to run concurrent with the Anne Arundel County sentence, except with respect to any probationary period commencing upon appellant’s release. That five-year period, and that alone, was to run concurrent. Because there is no ambiguity, the rule of lenity is inapposite, and the clerk’s mistaken statement in her Commitment Reports and in a docket entry is of no consequence. A clerk has no authority to change a judge’s sentence, and a mistake in a document or entry she prepared cannot be given that effect.

Given this conclusion, (1) we hold that Judge Nagle was correct in refusing to find a jurisdictional mistake or irregularity and in denying the relief requested by appellant, and (2) we need not consider whether, in light of the Anne Arundel County sentences being expressly made consecutive to the Baltimore County sentence, both initially and as revised, Judge Murphy could have made his sentences concurrent with those in Anne Arundel County other than by suspending all but the amount of time on the Baltimore County sentence equivalent to what was left to be served on the Anne Arundel County sentences.

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.