Circuit Court for Prince George's County
Case No. CT050595X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 683

September Term, 2022

TAYLOR FOWLER

v.

STATE OF MARYLAND, et al.

Shaw,
Tang,
Meredith, Timothy E.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: March 16, 2023

*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.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellant, Taylor Fowler, appeals a resentencing by the Circuit Court for Prince George's County of Kenneth Thomas, during a post-conviction hearing. Thomas, in 2005, was convicted of the first-degree murder of Bryan Fowler, Ms. Fowler's father, and the use of a handgun in the commission of a crime of violence. He was sentenced to life incarceration with the possibility of parole and twenty-years concurrent to the life sentence.

Kenneth Thomas, later, filed a petition for post-conviction relief and several supplemental petitions. In May 2022, at a post-conviction hearing, he and the State presented the court with an agreement, amending his sentence to life suspend all but forty years, with five years' supervised probation and restitution, in exchange for the dismissal of his post-conviction claims with prejudice. The court accepted the agreement and resentenced him. Ms. Fowler timely appealed and presents the following questions for our review:

1. Whether the trial court erroneously vacated a long-closed murder conviction based upon a successor prosecutor's assertion that, even though no legal error was conceded or proven, the prosecution has discretion sixteen years later to negotiate a new plea bargain that reduces the defendant's sentence and imposes a new sentence that strips the victim's representative of various statutory victims' rights.

2. Whether a court without issuing any statement of reasons can deny a crime victim representative's documented request for restitution of the victim's lost earnings[.]

3. Whether the procedural handling of this post-conviction petition violated the Maryland Rules and the victim's Constitutional and statutory rights[.]

For reasons discussed below, we affirm.

BACKGROUND

On March 5, 2005, Bryan Fowler was fatally shot by Kenneth Thomas following a drug transaction. A jury convicted Thomas of first-degree murder and use of a handgun in the commission of a crime of violence, and he was sentenced to life incarceration, on the murder charge, and a twenty-year concurrent term for the use of a handgun. In 2008, Thomas filed a post-conviction petition, which was supplemented in 2009, claiming that his trial counsel was ineffective for failing to pursue a post-sentence reduction motion. In 2010, the petition was withdrawn without prejudice. Thomas filed a "Second Supplemental Petition" in October 2015, and he filed a "Third Supplemental and Consolidated Petition" in October 2018.

In his third post-conviction petition, Thomas raised five ineffective assistance of counsel claims and one *Brady*[1] violation claim. He claimed that his trial counsel rendered ineffective assistance by: 1) failing to introduce evidence of Thomas's alleged intoxication at the time of the offense; 2) failing to move *in limine* to exclude evidence of a witness' prior conviction; 3) failing to seek a mistrial after that witness was impeached with that prior conviction; 4) failing to file post-trial motions for sentencing review by a three-judge panel and for modification of sentence; and 5) failing to exclude evidence given to the jury that Thomas was incarcerated at the time of the trial. A post-conviction hearing was scheduled for May 2022.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

On May 12, 2022, Appellant, as the victim's representative, filed a "Crime Victim's Assertion of Rights and Opposition to the Proposed Post-Conviction Agreement," a written victim impact statement, and a written request for restitution. The hearing was held on May 16, 2022, and on that day, Thomas filed a fourth post-conviction petition. His fourth petition supplemented his third petition by adding a claim that his appellate counsel had rendered ineffective assistance of counsel.

During the hearing, the State and Thomas presented the court with a joint agreement that Thomas be resentenced in exchange for the withdrawal of all his post-conviction claims with prejudice and requested that the court sentence Thomas to life with all, but forty years suspended and five years' supervised probation, for the murder charge, and twenty years concurrent for the use of a handgun charge. Appellant opposed the agreement, but requested, alternatively, that Thomas have no contact with the victim's family and that restitution be ordered covering both funeral expenses and lost wages.

The court accepted the resentencing agreement and granted the no contact order. The court ordered Thomas to pay restitution for funeral expenses in the amount of $9,308.35 and took under advisement the restitution request for lost wages. Appellant filed a "Motion for Reconsideration and Supplemental Restitution Pleading" arguing that the court lacked "jurisdiction to vacate the earlier judgment without any factual predicate," and attached additional "material documenting the murdered victim's earnings" to support her request that the court order restitution for lost wages. No ruling was issued addressing Appellant's Motion for Reconsideration before she noted this appeal.

STANDARD OF REVIEW

"Maryland 'follows the general principles of statutory interpretation.'" *Uzoukwu v. State*, 252 Md. App. 271, 277 (2021) (citation omitted). "The interpretation of a statute is a question of law, which we review *de novo*. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature." *Thomas v. State*, 239 Md. App. 483, 489 (2018).

"A sentencing judge 'is vested with virtually boundless discretion' in devising an appropriate sentence. However, a judge's decision to admit certain victim impact evidence during a sentencing hearing is more akin to a trial court's ruling on the admissibility of evidence." *Lopez v. State*, 458 Md. 164, 180 (2018) (internal citation omitted and quotation marks). "When the evidentiary determination also involves a question of law, . . . under Maryland statutes, that legal issue is reviewed *de novo*." *Id.*

DISCUSSION

I. Motion to Dismiss

Maryland Rule 8-602(b) provides:

> The Court shall dismiss an appeal if:
>
> (1) the appeal is not allowed by these Rules or other law; or
>
> (2) the notice of appeal was not filed with the lower court within the time prescribed by 8-202.

Incorporated in its brief is the State's Motion to Dismiss Appellant's first and second appellate claims. The State argues that Ms. Fowler, as a representative, does not have

standing to challenge the court's authority to accept the resentencing agreement as a matter of law. According to the State, Appellant, as the victim's representative, is not a party to the criminal case, and therefore, does not have the "authority to challenge the underlying criminal proceedings on appeal." The State contends that violations of victim's rights do not confer standing "to litigate the State's authority to negotiate, and the court's authority to accept, an agreement to resolve postconviction claims."

Appellant argues that she has standing pursuant to Md. Code, Crim. Proc. ("CP") § 11-103(b) because the statute allows victims of crime to appeal an order that denies or fails to consider certain statutorily enumerated victim's rights. Appellant asserts, "the trial court refused to allow the victim's representative to address the court and have her arguments considered. . . . This ruling cutting off the victim's right to be heard was in violation of the victim representative's statutory right . . . to be heard at a court hearing when 'alteration of a sentence . . . is considered.'" *See* CP § 11-403(a).

Appellant also argues "the victim representative's appellate jurisdiction is based on the circuit court's refusal to afford the victim's representative notice that the defendant's Fourth Amended Post-Conviction Petition, . . . would be the subject of that hearing" since it was filed the same day. She contends "that ruling denied the victim's representative the advance notice that is provided for in CP § 11-104(f)(1)" and argues that "[a] violation of the victim's right to proper advance notice of the subject of a court hearing under CP § 11-104 is statutorily appealable under 11-103(b)."

In Maryland, "crime victims are vested with a number of 'specific, but narrow' constitutional and statutory rights in criminal proceedings." *Griffin v. Lindsey*, 444 Md. 278, 281 (2015) (citing *Hoile v. State*, 404 Md. 591, 606 (2008)). A victim, however, is not a party to a criminal prosecution. *Id*. Section 11-103(b) provides:

> Although not a party to a criminal or juvenile proceeding, a victim of a crime for which the defendant or child respondent is charged may file an application for leave to appeal to the Court of Special Appeals from an interlocutory order or appeal to the Court of Special Appeals from a final order that denies or fails to consider a right secured to the victim by subsection (e)(4) of this section, § 4-202 of this article, § 11-102 or § 11-104 of this subtitle, § 11-302, § 11-402, § 11-403, or § 11-603 of this title, § 3-8A-06, § 3-8A-13, or § 3-8A-19 of the Courts Article, or § 6-112 of the Correctional Services Article.

Section 11-104(f)(1) states:

> Unless provided by the MDEC system, the prosecuting attorney shall send a victim or victim's representative prior notice of each court proceeding in the case, of the terms of any plea agreement, and of the right of the victim or victim's representative to submit a victim impact statement to the court under § 11-402 of this title if:
> (i) prior notice is practicable; and
> (ii) the victim or victim's representative has filed a notification request form or followed the MDEC system protocol under subsection (e) of this section.

Under Section 11-403(b):

> In the sentencing or disposition hearing the court, if practicable, shall allow the victim or the victim's representative to address the court under oath before the imposition of sentence or other disposition:
> (1) at the request of the prosecuting attorney;
> (2) at the request of the victim or the victim's representative; or
> (3) if the victim has filed a notification request form under § 11-104 of this title.

In 2015, the Supreme Court of Maryland,[2] in *Griffin v. Lindsey*, examined a victim's right to appeal under CP § 11-103(b). 444 Md. at 281. In that case, Griffin was indicted on charges relating to a shooting and entered into a plea agreement with the State to provide testimony against his co-defendant. 444 Md. at 282-83. In exchange, he agreed "to a guilty plea for Count 4 . . . and a sentencing cap of 15 years, suspending all but 18 months." *Id*. At the plea hearing, the parties presented the agreement to the court, and the judge accepted it. *Id.* at 283.

"After satisfying the terms of the Agreement, Griffin returned to court . . . for sentencing[.] Acknowledging that 'there [was] nothing in the plea agreement about restitution,' the State nevertheless advised the court that [the victim] was seeking $9,700 in restitution." *Id.* (footnote omitted). The State argued that a victim had "an absolute right to request restitution regardless of whether it appeared in a plea agreement. The hearing court disagreed, concluding that it could not order restitution because it would violate the Agreement by adding to the penalty." *Id.*

In resolving the issue, Maryland's Supreme Court noted that any right of a victim to file an application for leave to appeal, "must originate from the General Assembly, not from this Court." *Id.* at 286 (quoting *Lopez-Sanchez v. State*, 388 Md. 214, 230 (2005)). The Court held that statutes granting the right to appeal, must be construed narrowly. *Id.*

[2] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

at 287. The Court ultimately determined that the statute did not include the right to appeal from a denial of a CP § 11-103(e) motion.[3] *Id.* at 289-90. The Court opined:

> Holding that a victim could appeal not only from the denial of or failure to consider a right secured by the 12 statutes enumerated in CP § 11-103(b), but also from a motion to reconsider the denial of or failure to consider these rights, would considerably increase victims' appellate rights. *Such a construction is anything but narrow and must be rejected.*

Id. at 291-92 (emphasis added).

In the present case, Appellant claims standing based on § 11-103(b), and requests this Court determine the merits of the trial court's disposition in accepting the resentencing agreement. Section 11-103(b), however, does not confer the right or provide the victim's representative with an appealable remedy to litigate the merits of the underlying criminal proceeding. CP § 11-103(b). The statute is specific and provides that an appeal may be filed where a court order "denies or fails to consider a right secured to the victim by subsection (e)(4) of this section, § 4-202 of this article, § 11-102 or § 11-104 of this subtitle, § 11-302, § 11-402, § 11-403, or § 11-603 of this title, § 3-8A-06, § 3-8A-13, or § 3-8A-19 of the Courts Article, or § 6-112 of the Correctional Services Article." Based on the statute and our construction, thereof, Appellant does not have standing to appeal the court's decision to resentence Mr. Thomas. We shall, therefore, dismiss Appellant's first claim, pursuant to Rule 8-602(b)(1).

[3] Following the Court's decision in *Griffin v. Lindsey*, the Maryland General Assembly amended § 11-103(b) to include § 11-103(e)(4) as an appealable enumerated right. 2016 Md. Laws Ch. 541 (H.B. 659).

The State also argues that the issue of restitution for the victim's lost wages is premature because the court has not ruled on the request. The circuit court took the matter under advisement and has not rendered a decision. The State contends that there has been no final ruling by the court.

Appellant asserts the court's failure to consider her request for restitution of the victim's lost wages, without explanation, is appealable pursuant to § 11-103(b) & (e)(4). In her brief, Appellant states, "[a]t the May 16, 2022 sentencing hearing, the court below took under *consideration* the victim representative's restitution request for lost earnings." (Emphasis added). In her reply brief, Appellant states, "[t]he failure of a circuit court 'to consider' and rule on a restitution request, as has occurred below for the last seven months, was made statutorily appealable under CP § 11-103(b) & (e)(4)." Appellant agrees that the court did consider the victim's representative's restitution request for lost wages.

During the hearing, the judge stated:

> THE COURT: The Court will order restitution – this will only, by agreement, cover the funeral costs of $6,370. With regard to the costs for lost wages –
>
> [THOMAS' COUNSEL]: Your Honor, . . . I thought there were two amounts, and it comes to $9,308.35. Is that right, [Appellant's Counsel]?
>
> [APPELLANT'S COUNSEL]: That's right.
>
> * * *
>
> THE COURT: All right. So the total costs that includes all costs related to . . . the expenditures of funeral, cemetery, burial, et cetera, that will be in the amount of $9,308.35. With regard to the cost for lost wages, the Court's going to take that issue under advisement.

We observe that statements made by a judge, that the "'issues are held under advisement'" mean that the court has not made a decision. *See Newborn v. Newborn*, 133 Md. App. 64, 97 n.6 (2000). It is "the legal equivalent of 'expressly reserv[ing]' the power to determine . . . ." *Id.* It does not constitute a denial or failure to consider.

In *Franklin v. State*, an ineffective assistance of counsel case, the Supreme Court of Maryland addressed a sub issue discussing whether a judge's "no action" notations on a motion to modify, with a keep under advisement request attached, constituted a denial of the motion. 470 Md. 154 (2020). Franklin's counsel filed a motion to modify his sentence pursuant to Md. Rule 4-345 and requested in his proposed relief that the motion be kept under advisement. *Id.* at 177-78. The judge made a "no action" notation on the motion, and it remained pending with the court until it statutorily expired after five years. *Id.* 177-79. Franklin claimed that his attorney rendered ineffective assistance of counsel by failing to request a hearing on the motion within the five-year period. *Id.* at 177.

The Court noted that "[his attorney] . . . should have concluded[] that Judge Harrington was keeping the motion for modification under advisement pending Franklin's completion of his probation." *Id.* at 179. "Had Judge Harrington meant to forever deny Franklin a hearing on the motion . . . we believe she would have rejected [his attorney's] request to hold the motion under advisement simply by denying the motion. Judge Harrington did not do so." *Id.* at 178-179. The *Franklin* Court noted that taking a matter under advisement is not an automatic denial, as the court retains jurisdiction to make a ruling. *See id.* at 178. In the larger case, the Court held that Franklin did not prove his

counsel rendered ineffective assistance in failing to request a hearing because it is an "exercise of the court's discretion to decide whether to hold a hearing in the first place." *Id.* at 197 (footnote omitted).

CP § 11-103(e)(4)(i) states:

> A victim who alleges that the victim's right to restitution under § 11-603 of this title was not considered or was improperly denied may file a motion requesting relief within 30 days of the denial or alleged failure to consider.

In its current posture, Appellant's appeal under § 11-103(b) pursuant to a subsection (e)(4) violation is not allowable because the matter was taken under advisement, and "'[p]remature notices of appeal are generally of no force and effect.' This is so because a premature appeal is a 'jurisdictional defect.'" *Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 662 (2014) (internal citations omitted).

II. Appellant's Constitutional and Statutory Rights were Not Violated

Appellant also argues that the circuit court violated her constitutional and statutory rights to be notified of and heard during the proceeding. Appellant argues that under § 11-104 she should have been notified by postal mail, and the hearing should have been continued until the State complied with the notice requirements. She asserts the circuit court stopped her attorney from arguing her objections. Appellant also argues the resentencing agreement deprived her of "her right to comment to the Parole Commission under CS [Correctional Services] §7-305" and § 7-805, and violated Article 2, Section 20 of the Maryland Constitution.

The State argues that Appellant's rights were not violated because she received actual notice of the proceeding through electronic mail, and she was heard through oral testimony and the victim impact statements. The State argues that the statute does not require notice be sent by postal mail, that notice via electronic mail is sufficient, and there were no constitutional violations of Appellant's right to be heard and appear in court.

The circuit court determined that Appellant's constitutional and statutory rights were not violated. In terms of Appellant's § 11-104 notice violation claim, the court found that Appellant received sufficient notice of the hearing by electronic mail. The court stated:

> THE COURT: How are you here today?
>
> [APPELLANT'S COUNSEL]: The procedure is very clear that –
>
> THE COURT: How did you know to be here today?
>
> [APPELLANT'S COUNSEL]: Well, I knew it informally from emails, but emails do not satisfy the statute unless you're an MDEC jurisdiction, and this is not a MDEC jurisdiction . . . .
>
> THE COURT: So what is proper notification?
>
> [APPELLANT'S COUNSEL]: It's by mail, and that's made clear in the statute.
>
> * * *
>
> THE COURT: With regard to the notification, you got the notification, you're here. I just think it would, quite frankly, not make any sense to reschedule this hearing for everybody, bringing – even having your clients having to arrange to come back here in, let's say, another two weeks so the notice could be met. Clearly you're well-prepared for this hearing, and I'm sure clearly you've spoken to your clients about this hearing and, your legal position on the State's ability to come to this agreement and set this hearing. So I'm also going to deny the request for a continuance. The Court doesn't find good cause to continue this hearing any further.

To be sure, § 11-104(f)(1) of the Criminal Procedure Code does require prior notice, but it does not mandate notice by U.S. mail. The applicable provision states:

> Unless provided by the MDEC system, the prosecuting attorney shall send a victim or victim's representative *prior notice* of each court proceeding in the case, of the terms of any plea agreement, and of the right of the victim or victim's representative to submit a victim impact statement to the court under § 11-402 of this title if:
> (i) prior notice is practicable; and
> (ii) the victim or victim's representative has filed a notification request form or followed the MDEC system protocol under subsection (e) of this section.

§ 11-104(f)(1) (emphasis added).

It is undisputed that Appellant and her counsel were notified of the hearing and the proposed post-conviction agreement before the proceeding by electronic mail. On May 12, 2022, Appellant filed her "Opposition to the Proposed Post-Conviction Agreement" and stated that "the resolution proposed by the parties for acceptance by this Court of the petitioner's post-conviction claims has no procedural or substantive merit. . . ." She argued that the court's acceptance of the proposed agreement would strip her of "mandatory statutory rights to be heard and comment upon the petitioner's readiness for release. . ." and "before deciding whether to accept the proposed agreement . . . an updated presentence report needs to be ordered that evaluates the petitioner's prison behavior over the last 17 years, . . . An updated presentence report would also necessarily include an updated victim impact evaluation."

Based on this record, it is clear that Appellant received notice, was aware of the proposed agreement, and filed her opposition prior to the May 16, 2022 hearing. The court did not find her rights to be violated.

Appellant, also, asserts that her statutory rights were violated when she was denied the opportunity to be heard at the hearing and to submit a victim impact statement. She cites *Antoine v. State*, 245 Md. App. 521 (2020) to support her argument. In that case, during the guilty plea and sentencing hearing, the circuit court agreed to enter probation before judgment for Mr. Bostic, without allowing the victim, Antoine, "'to be heard at a meaningful time' as required by §§ 11-402 and 11-403." *Id.* at 536. At a subsequent motions hearing, Antoine "asked that the court '[s]et aside the plea and disposition of [the first hearing] on account of the violations of victim's rights.'" *Id.*

> Nevertheless, the court expressed disbelief that it "c[ould] do a new sentencing," saying, "I don't believe I have the authority to vacate this and then impose a stronger, a more stringent sentence." The court offered to allow Mr. Antoine to speak before it proceeded to the issue of restitution, but Mr. Antoine's counsel argued that presenting victim impact evidence at that stage would "ha[ve] no meaning because the Court can't do what the statute requires which is to consider it."

Id. at 537.

On appeal, Antoine "contend[ed] that the trial court violated his rights: (1) under § 11-402(b), by denying him an opportunity to submit a victim impact statement to the court; (2) under § 11-402(d), by failing to 'consider the victim impact statement in determining the appropriate sentence'; and (3) under § 11-403(b), by declining to 'allow [him] . . . to address the court under oath before the imposition of sentence.'" *Id.* "The State 'largely agrees with [Mr.] Antoine's position.'" *Id.* at 538 (footnote omitted). In our review,

> We agree[d] with Mr. Antoine that the trial court improperly 'denie[d] or fail[ed] to consider' Mr. Antoine's rights as a crime victim, § 11-103(b), and that the court's error was not beyond its (or our) power to repair. Accordingly, we will vacate Mr. Bostic's sentence and the trial court's

> approval of the plea agreement and remand for the circuit court to consider approving the plea agreement after it allows Mr. Antoine the opportunity to present victim impact evidence.

Id. at 539.

Here, unlike *Antoine*, the Appellant had the opportunity to be heard during the hearing and to submit victim impact statements.

> THE COURT: If you could state your name for the record.
>
> [APPELLANT]: My name is Taylor Fowler.
>
> THE COURT: Can I ask you to spell your first and last name.
>
> [APPELLANT]: Yes. [spells name].
>
> THE COURT: And your relationship to this case?
>
> [APPELLANT]: I am the victim's daughter.
>
> THE COURT: And what would you like to say, ma'am?
>
> [APPELLANT]: I would just like to let the Court know that this—there is not a day that goes by that I do not think about my father and what happened to him. And having to cope with the fact of what happened to him, that somebody willingly took his life, you can't cope with that. It's impossible. It hurts me every single day. . . .
>
> THE COURT: Thank you, ma'am.
>
> [APPELLANT'S COUNSEL]: She's also filed a written impact statement, Your Honor, which you have.
>
> * * *
>
> THE COURT: All right. Thank you. So I just read the letter which matches what the young lady told the Court . . . .

Appellant also contends there were statutory violations of CS §§ 7-305 and 7-805, however, as previously discussed, Appellant received notice and submitted victim impact statements. Appellant further argues the court committed error in violation of the Maryland Constitution, pursuant to Md. Const. art. 2 § 20. We note that while this provision allows the governor to grant reprieves and pardons, it does not place a limitation on the revisory power of a court to accept a resentencing agreement, nor does it provide a victim's representative with an avenue to appeal a lower court's disposition.

In sum, we conclude that the court did not err, and Appellant's constitutional and statutory rights were not violated. The record clearly shows that Appellant received prior notice, filed an opposition prior to the hearing, was present at the hearing, and provided testimony and a victim impact statement for the court's consideration.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.