

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0699

September Term, 2014

JERRY L. BURKETT

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: August 6, 2015

*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.

Jerry L. Burkett appeals from a judgment of the Circuit Court for Carroll County denying his motion to correct illegal sentence (hereinafter “the motion”). Mr. Burkett presents one question, which we rephrase for brevity’s sake: did the court err in denying Burkett’s motion to correct an illegal sentence?¹ We will affirm the court’s judgment.

In February 2005, Burkett was charged by indictment with armed robbery in violation of Md. Code (2002, 2004 Supp.), § 3-403 of the Criminal Law Article (“CL”),² first degree assault, and related offenses. In August 2005, the State filed a “Notice of State’s Intention to Request Subsequent Offender/Mandatory Sentence Treatment,” which stated:

The State will seek mandatory sentence treatment in the above-styled case in reliance upon the following previous convictions of crimes of violence as defined in [CL §] 14-101:³

¹Burkett’s statement of the issue includes a summary of the procedural posture of the case and is somewhat discursive. In the portion of his brief titled “Statement of the Case,” he frames the issue before us as follows: “[W]as the sentence made illegal by relying on a predicate conviction from outside the Maryland jurisdiction without fully qualifying that conviction as having the same or similar elements as Maryland’s Statutes[?]”

²CL § 3-403 states: “A person may not commit or attempt to commit robbery . . . with a dangerous weapon[.]”

³CL § 14-101 states in pertinent part:

(d) *Third conviction of crime of violence.* – (1) Except as provided in subsection (g) of this section, on conviction for a third time of a crime of violence, a person shall be sentenced to imprisonment for the term allowed by law, but not less than 25 years, if the person:

(i) has been convicted of a crime of violence on two prior separate occasions:

(continued...)

1. Case no. CR70-24 in the Circuit Court for King George County, Virginia

Charges: Count 1, Armed Robbery; Count 2, Unlawfully, Feloniously and Maliciously Shoot and Wound with Intent to Maim, Disable, Disfigure or Kill

Date of offense: August 12, 1970

Judge: Judge S. Bernard Coleman

Verdict: Guilty, Counts 1 and 2 (jury trial), March 11, 1971

Date of sentence: March 11, 1971

³(...continued)

1. in which the second or succeeding crime is committed after there has been a charging document filed for the preceding occasion; and

2. for which the convictions do not arise from a single incident; and

- (ii) has served at least one term of confinement in a correctional facility as a result of a conviction of a crime of violence.

- (2) The court may not suspend all or part of the mandatory 25-year sentence under this subsection.

- (3) A person sentenced under this subsection is not eligible for parole except in accordance with the provisions of § 4-305 of the Correctional Services Article.

CL § 14-101(a) states that armed robbery is a crime of violence.

Sentence: Count 1, 15 years to the Division of Correction; Count 2, 5 years to the Division of Correction, consecutive to Count 1; credit for 212 days served.

2. Case no. 83CR3887 in the Circuit Court for Baltimore County, Maryland

Charges: Count 1, Robbery with Dangerous and Deadly Weapon; Count 13, Handgun Violation.

Date of offense: October 15, 1983

Judge: Judge James S. Sfekas

Verdict: Guilty, Counts 1 and 13 (Plea) – Agreed Statement of Facts, May 1, 1984

Date of sentence: July 12, 1984

Sentence: Count 1, 10 years to the Department of Correction, beginning October 21, 1983; Count 13, 5 years consecutive to Count 1.

Original sentence amended/reduced by Judge Sfekas on September 27, 1984, pursuant to Motion for Modification: Count 1 reduced from 10 years to 7 years.

(Capitalization, boldface, and underlining omitted.)

Later that month, Burkett pled guilty to armed robbery, first degree assault, and related offenses. The court, pursuant to CL § 14-101(d), sentenced Burkett to a term of 25 years imprisonment without the possibility of parole for the armed robbery. The court also

sentenced Burkett to a consecutive term of 5 years imprisonment for the first degree assault, and concurrent terms of imprisonment for the remaining offenses.

In March 2014, Burkett filed the motion, in which he contended that “the State incorrectly applied the subsequent offender penalty by basing the predicate offense on a conviction that occurred in the State [sic] of Virginia.” The court subsequently denied the motion.

Burkett contends that the court erred in denying the motion. Apparently believing that he was sentenced pursuant to CL § 5-608(c),⁴ he claims that “[n]o proof was given

⁴CL § 5-608(c) states:

Third time offender. – (1) A person who is convicted under subsection (a) of this section or of conspiracy to commit a crime included in subsection (a) of this section shall be sentenced to imprisonment for not less than 25 years and is subject to a fine not exceeding \$100,000 if the person previously:

(i) has served at least one term of confinement of at least 180 days in a correctional institution as a result of a conviction under subsection (a) of this section, § 5-609 of this subtitle, or § 5-614 of this subtitle; and

(ii) has been convicted twice, if the convictions arise from separate occasions:

1. under subsection (a) of this section or § 5-609 of this subtitle;
2. of conspiracy to commit a crime included in subsection (a) of this section or § 5-609 of this subtitle;

(continued...)

that . . . the Virginia conviction . . . would be a crime included in [CL § 5-608(a)] if committed in” Maryland. (Quotation marks omitted.) But, the court did not sentence Burkett pursuant to CL § 5-608(c), which mandates a specific penalty for a third conviction for a narcotic drug offense. The court expressly sentenced Burkett pursuant to CL § 14-101(d), which mandates a specific penalty for a third conviction for a crime of violence. Hence, the requirements of CL § 5-608 are inapplicable.

In any event, Burkett’s argument is not persuasive. The language of the Virginia statute that prohibits armed robbery, as it read in 1970, is similar in substance to the language of CL § 3-403. *See* VA. CODE ANN. § 18.1-91 (1950, 1960 Repl. Vol., 1970 Supp.) (“[i]f any

⁴(...continued)

3. of a crime under the laws of another state or the United States that would be a crime included in subsection (a) of this section or § 5-609 of this subtitle if committed in this State; or
4. of any combination of these crimes.

(2) The court may not suspend any part of the mandatory minimum sentence of 25 years.

(3) Except as provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole during the mandatory minimum sentence.

CL § 5-608(a) states:

In general. – Except as otherwise provided in this section, a person who violates a provision of §§ 5-602 through 5-606 of this subtitle with respect to a Schedule I or Schedule II narcotic drug is guilty of a felony and on conviction is subject to imprisonment not exceeding 20 years or a fine not exceeding \$25,000 or both.

person commit robbery . . . by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever, he shall be punished with death, or by confinement in the penitentiary”), *recodified as* VA. CODE ANN. § 18.2-58 (1975). Also, the definition of robbery in Virginia is nearly identical to the definition of robbery in Maryland. *See Johnson v. Commonwealth*, 163 S.E.2d 570, 572-73 (Va. 1968) (defining robbery as “the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation”); *Darby v. State*, 3 Md. App. 407, 413 (1968) (defining robbery as “the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence, or putting him in fear” (citation and quotations omitted)). Hence, Burkett’s Virginia conviction for armed robbery constitutes a crime of violence as defined by CL § 14-101(a), and the court did not err in denying the motion.

THE JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY IS AFFIRMED; COSTS TO BE PAID BY APPELLANT.