Circuit Court for Dorchester County
Case No. 09-K-15-015698

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 706

September Term, 2018

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AMBER NICOLE JESTER

v.

STATE OF MARYLAND

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Berger,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Zarnoch, J.

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Filed: July 18, 2019

Under the Justice Reinvestment Act of 2016 ("JRA"),[1] the first technical violation of probation merits no more than 15 days of imprisonment—unless a judge finds that the defendant would pose a risk to public safety, a "victim," or a witness. In this case, the Circuit Court for Dorchester County determined that Amber Nicole Jester, a convicted heroin distributor who had failed to successfully complete drug treatment, posed such a risk. Specifically, the court found that because Jester had borne a child who tested positive for drugs, Jester presented a danger to these victims: her newborn child and any prospective child she may have in the future. The circuit court erred in making this determination, and so we vacate the court's revocation of probation.

## BACKGROUND & PROCEDURAL HISTORY

In January 2016, Jester entered an *Alford* plea to one count of heroin distribution, for which she received ten years in prison, all but six months suspended, with four years of supervised probation. Later, in May 2018,[2] Jester pleaded guilty to violating a probationary requirement that she complete drug treatment.[3]

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[1] Laws of 2016, Chapter 515, codified in relevant part as §§ 6-223—6-224 of the Maryland Code (2018 Repl. Vol.), Criminal Procedure Article.

[2] The circuit court initially arraigned Jester for violating probation at a December 21, 2017 hearing. After being informed by the prosecutor that Jester had borne a baby who tested positive for meth and heroin (Jester's baby was born in August 2017), the circuit court ordered Jester incarcerated pending the revocation of probation hearing. The revocation of probation hearing was originally scheduled for February 2018 but was ultimately postponed until May 17, 2018.

[3] The court heard that Jester had been unsuccessfully discharged from one counseling center, had missed 11 doses of treatment at another treatment center, and had

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There is no dispute that Jester's failure to complete drug treatment was a "technical" violation of probation, and her first violation of probation. As we will describe further, under these circumstances the JRA calls for a circuit court to typically impose no more than 15 days' imprisonment—unless the circuit court finds that the defendant would pose a risk to public safety, a victim, or a witness. Here, the circuit court made such a finding. Because Jester had recently given birth to a child who tested positive for meth and heroin, the court determined that Jester "present[s] a danger to others"—not only to "[he]r newborn," but to "a prospective newborn" as well.

We include here a lengthier excerpt of the circuit court's comments on the matter, as it sheds further light on the circuit court's view toward Jester's actions, and the impact that a separate overdose fatality may have had on the court's thinking:

> So since we were here last a person I've been working with for years, much in your position, we get sober, then we would have problems, well, he was found dead. One of our three overdoses a couple weekends ago.
>
> So you can imagine how a judge feels when a judge works really hard to get somebody sober, and we have periods of sobriety, and then you get the news, they're dead.
>
> Now, there's a special place for people who expose their unborn children to meth and heroin.
>
> And the Court makes a finding that you present a danger to others. In this case your newborn, or a prospective newborn, by using such drugs. What a start for an infant to come into this world, exposed to meth and heroin.

left a third treatment center against medical advice. Jester did not contest those facts for purposes of her plea; however, she argued that some of the events in late 2017 were complicated by the fact of her pregnancy.

Based on this finding that Jester posed a risk to others (*i.e.*, her newborn and any prospective newborn), the circuit court revoked Jester's probation and imposed the balance of her suspended sentence of nine years and six months in prison, with credit for the time that she had served until then.[4]

Jester sought appellate review.[5]

[4] The circuit court added: "Now, what I want you to do is, you will go to prison, and you're going to think about this. And at some point I may be able to be convinced to send you into some sort of inpatient treatment, but you're way beyond a 15-day sanction when you do that to your child." The State had not made any specific sentencing recommendation, and a probation officer recommended that "at least part of her sentence [] be given to her because she really didn't do well on probation at all." Jester's counsel sought the continuation of supervision.

Jester's counsel did not object to the revocation of probation or re-imposition of her sentence at the hearing. The State has not raised the issue of non-preservation on appeal, and so the issue is waived. In any event, we would choose to exercise our discretion to consider Jester's claims. Md. Rule 8-131(a); *see Watson v. Peoples Sec. Life Ins. Co.*, 322 Md. 467, 483-84 (1991).

[5] The Court of Appeals has recently explained that to challenge a circuit court order that revokes probation for a technical violation and imposes incarceration, a probationer must file an application for leave to appeal, rather than a direct appeal. *Conaway v. State* and *Johnson v. State*, ___ Md. ___, No. 69, Sept. Term, 2018 and No. 76, Sept. Term, 2018 (July 11, 2019) (consolidated opinion). Here, Jester filed a "Notice of Appeal, or Alternatively Application for Leave to Appeal," and this Court issued a briefing notice. The State has not raised any objection, but in the event of any ambiguity as to whether this Court officially granted Jester's leave to appeal (as opposed to accepting a direct appeal), we hereby do so. *See Russell v. State*, 221 Md. App. 518, 525 (2015) ("…we note that this Court set the case in for briefing and argument but does not appear to have actually ruled on [appellant's] application for leave to appeal. To the extent that the application for leave to appeal has not yet been ruled on, we hereby grant [appellant's] application for leave to appeal the order modifying his probation . . . .").

## DISCUSSION

Under the JRA, there is a "rebuttable presumption" that no more than 15 days of incarceration should be imposed for the first technical violation of probation.[6] Md. Code (2018 Repl. Vol.), Criminal Procedure Article ("CP"), §§ 6-223(e)(1), 6-224(c)(2)(i). However, the presumption may be rebutted if a circuit court finds that a 15-day limit "would create a risk to public safety, a victim, or a witness[,]" and the court first considers the nature of the probation violation, the circumstances of the crime for which the defendant was convicted, and the defendant's history. CP §§ 6-223(e)(2), 6-224(c)(2)(ii). If the court finds such a risk, the court may impose a period of incarceration up to the length of time remaining on the original sentence. CP §§ 6-223(e)(3)(i), 6-224(c)(2)(iii).

As described above, the circuit court revoked Jester's probation and reinstated her full suspended sentence because it found that she presents a danger to her newborn and any prospective newborn. On appeal, Jester argues: (1) the circuit court misapplied the

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[6] The Maryland Code defines a "technical violation" as:

> (m) [a] condition of probation, parole, or mandatory supervision that does not involve:
>
> (1) an arrest or a summons issued by a commissioner on a statement of charges filed by a law enforcement officer;
> (2) a violation of a criminal prohibition other than a minor traffic offense;
> (3) a violation of a no-contact or stay-away order; or
> (4) absconding

Md. Code, (2017 Repl. Vol., 2018 Cum. Supp.), Correctional Services Article, § 6-101; *see* CP § 1-101 (incorporating the definition from Correctional Services § 6-101).

JRA in making this determination, and (2) imprisoning a woman to protect a prospective newborn would violate the Maryland Equal Rights Amendment's protection against impermissible sex-based classifications. *See* Md. Decl. of Rts., Art. 46.[7]

Although we review a court's ultimate decision to revoke probation for an abuse of discretion, *State v. Dopkowski*, 325 Md. 671, 678 (1992), the question of whether Jester's newborn or a prospective newborn should have been considered a "victim" under the JRA is a legal issue of statutory interpretation that we review *de novo*. "These two seemingly disparate standards of review are sometimes reconciled with the observation that it is an abuse of discretion for a court to base a decision on an incorrect legal standard." *Rodriguez v. Cooper*, 458 Md. 425, 437 n. 9 (2018). Additionally, an abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons . . . [t]he abuse of discretion standard requires a trial judge to use his or her discretion soundly and the record must reflect the exercise of that discretion. Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Kusi v. State*, 438 Md. 362, 385 (2014) (quoting *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006)) (Internal quotation marks and citations omitted).

[7] Given that we will conclude the circuit court otherwise misapplied the JRA, we need not resolve Jester's constitutional claim. *See VNA Hospice of Md. v. Dep't of Health & Mental Hygiene*, 406 Md. 584, 604 (2008) ("[T]he Court's strong and established policy is to decide constitutional issues only when necessary.") (Internal quotation marks and citation omitted).

Here, we see the circuit court's determination as an abuse of discretion—in no small part because the Court of Appeals has squarely held that the intentional use of illegal drugs by a pregnant woman cannot form the basis for a conviction for reckless endangerment of another person when the person in question is the woman's own child, following the child's live birth. *Kilmon v. State*, 394 Md. 168, 170, 173 (2006). In *Kilmon*, the Court of Appeals reversed the reckless endangerment conviction of a woman who was charged with ingesting cocaine while pregnant. After conducting a thorough review of numerous unsuccessful legislative attempts to criminalize certain aspects of a pregnant woman's drug use, the Court of Appeals concluded: "the General Assembly, despite being importuned on numerous occasions to do so, has chosen not to impose additional criminal penalties for the effect that [a pregnant woman's] ingestion of those [illegal] substances might have on the child, either before or after birth." *Id*. at 181 (Emphasis removed). The Court then added that instead of criminalizing pregnant women's drug addiction, the General Assembly has "deliberately opted, instead, to deal with the problem by providing drug treatment programs for pregnant women and using the child in need of assistance and termination of parental rights remedies if the women . . . were unable to provide proper care for the child." *Id*. at 182.

There is no reason to think that the General Assembly intended to establish more draconian punishments for drug use while pregnant via the Justice Reinvestment Act than through the rest of the criminal code. (We also note that in the CINA context, drug use can be a basis for terminating parental rights but does not compel the imprisonment of the

parent.). After all, "[t]he primary goal of the JRA was to *reduce* selectively Maryland's prison population and use the resultant monetary savings to provide treatment to offenders before, during, and after incarceration." *Conaway v. State* and *Johnson v. State*, ___ Md. ___, No. 69, Sept. Term, 2018 and No. 76, Sept. Term, 2018, Slip Op. at 14 (July 11, 2019) (Consolidated opinion) (Emphasis added).

We also presume that the Legislature acts "in pursuit of sensible public policy," and we "avoid construing a statute in a manner that would produce farfetched, absurd, or illogical results which would not likely have been intended by the enacting body." *Kilmon*, 394 Md. at 177. It cannot be that the General Assembly intended the JRA to create a dynamic where a woman who uses illegal drugs could be incentivized—even if inadvertently—to terminate a pregnancy, rather than face extensive jail time for bearing a child exposed to drugs. *See id*. at 182 ("[I]t would be an anomaly, indeed, if the law were such that a pregnant woman who, by ingesting drugs, recklessly caused the death of a viable fetus would suffer no criminal liability for manslaughter but, if the child was born alive and did not die, could be imprisoned for five years for reckless endangerment. A *non-fatal* injury resulting from reckless conduct would be culpable; a *fatal* injury resulting from the same reckless conduct would not be.") (Emphasis in original).

For the reasons described above, we conclude that Jester's child should not have been considered a "victim" (as contemplated by the JRA's exception for technical violations of probation) merely due to Jester's drug use while pregnant. Nor do we believe that a parent's own child would fit within the JRA's exception for risk posed to

the "public safety." Although the statute does not define "public safety," it makes sense that the phrase would refer to a wider, non-familial populace, and not to a member of the defendant's own family. After all, if the phrase "public safety" was broad enough to potentially include any individual person who might be at risk from the defendant, there would be no need for the statute's exception to also cover "victim[s]" and "witness[es]," as any victim or witness would by definition be included within the phrase "public safety." *See In re Tyrell A.*, 442 Md. 354, 365 (2015) ("We assume the General Assembly used consciously the term 'victim,' rather than some other term (such as 'affected person,' 'injured party,' or 'harmed individual'). '[O]ur rules of statutory construction require us to interpret the statute such that 'no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.'"") (Citation omitted).

Next, it is obvious that the circuit court based its finding (that Jester posed a threat to her child) on the fact that Jester's child was born exposed to drugs.[8] And yet, the

[8] We do note that the court heard at the earlier December 21, 2017 hearing that Jester had tested positive for drugs on dates that were subsequent to the date she gave birth in August 2017. We also note that in revoking Jester's probation on May 17, 2018, the circuit court mentioned that it was finding that Jester presented a danger to others "by using such drugs." Nevertheless, aside from this one ambiguous (time-wise) reference to "by using such drugs"—which the court, understandably upset, immediately followed by stating: "What a start for an infant to come into this world, exposed to meth and heroin"—the circuit court did not further specify whether it was referring to any post-pregnancy drug use as a basis for its risk determination. Unmistakably, the bulk of the circuit court's frustration was directed toward the exposure in utero—for instance (as noted above), the court's statement, "[w]hat a start for an infant to come into this world, exposed to meth and heroin." Additionally, we highlight the court's most heated

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JRA's exception regarding defendants who would pose a risk is written in the future tense: a judge may impose more than 15 days' imprisonment if he or she finds that the defendant "*would create* a risk to public safety, a victim, or a witness[.]" CP §§ 6-223(e)(2), 6-224(c)(2)(ii) (Emphasis added). To be sure, the JRA sets forth that a judge, when making this determination, should first consider several factors, including "the [probationer's or] defendant's history." §§ CP 6-223(e)(2)(iii), 6-224(c)(2)(ii)(3).[9] Along these lines, this Court has acknowledged that a parent's past actions can form the basis for predictions about his or her future conduct. *See, e.g.*, *In re Adriana T.*, 208 Md. App. 545, 570 (2012) ("It has long been established that a parent's past conduct is relevant to a consideration of the parent's future conduct.").

Nevertheless, the circuit court appears to have been more focused on punishing Jester for having previously exposed her child to drugs (while in utero) than on determining whether Jester might pose an ongoing threat to her child, now that the umbilical cord has been cut. For instance, when announcing the revocation of probation, the circuit court stated: "Now, what I want you to do is, you will go to prison, and you're going to think about this. And at some point I may be able to be convinced to send you into some sort of inpatient treatment, but you're way beyond a 15-day sanction when you

observation from the hearing: "Now, there's a special place for people who expose their unborn children to meth and heroin."

[9] Among the other factors that a court is to consider before making a risk finding are "the facts and circumstances of the crime for which the [probationer or] defendant was convicted[.]" §§ CP 6-223(e)(2)(ii), 6-224(c)(2)(ii)(2). Here, there was no discussion of the crime for which Jester was actually convicted—distributing heroin.

do that to your child." Referring to the re-imposition of Jester's full nine-and-a-half-year sentence in this manner—as "way beyond a 15-day sanction when you do that to your child"—conveys that the court was not assessing Jester's actual (future) risk to her child, but punishing her for her past actions. This is an incorrect application of the Justice Reinvestment Act's exception for technical violations of probation. *See Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 675 (2008) ("[T]rial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature").

Also, it was not even clear at the time of the probation revocation hearing whether Jester continued to have custody of her child.[10] If, as the State suggested, Jester did not have custody, it is not evident whether she would have been *able* to harm her child through further direct contact. Nor is it clear to us why Maryland's child services regime could not have been enlisted to adequately protect the child, rather than require Jester's imprisonment for a full nine and a half years. *See In re Adriana T.*, 208 Md. App. at 570 (discussing *In re Dustin T.*, 93 Md. App. 726, 733 (1992), an earlier case which concerned "whether a mother's pre-natal drug use was relevant to her ability to provide adequate care for her child." In *Dustin T.*, after a child tested positive for cocaine following birth, the child "was declared a CINA and the court continued the commitment

[10] The State noted at the December 2017 hearing that the child in question was living with Jester's father. Jester disputed that she lost custody, but the State responded that Jester's father had custody of the child. The court did not conclusively resolve the issue.

for placement in temporary foster care."); *see also Kilmon*, 394 Md. at 182. Given that the purpose of the Justice Reinvestment Act is to reduce incarceration for technical violations of probation, it was error here for the circuit court to fail to elaborate upon either issue, and to instead leap to imprisoning Jester for nine and a half years.

For the reasons described above, the circuit court erred in determining that Jester posed a risk to her child, as envisioned by the JRA, which compels us to vacate the court's revocation of probation. We briefly add in closing that it was inappropriate for the circuit court to additionally base its finding on the notion that Jester posed a risk to any "prospective newborn." There was no indication that Jester was pregnant at the time of the probation revocation hearing. We cannot accept that a judge would imprison a woman on the mere potentiality that she *might*, one day, get pregnant. Even if the judge was motivated by good intentions, the circuit court's reference to a hypothetical newborn cannot be upheld, as it was "manifestly unreasonable . . . exercised on untenable grounds, [and] for untenable reasons." *Kusi*, 438 Md. at 385. Though we in no way condone Jester's actions, we believe it was error for the circuit court to revoke her probation.

**JUDGMENT OF THE CIRCUIT COURT FOR DORCHESTER COUNTY VACATED. COSTS TO BE PAID BY DORCHESTER COUNTY.**