Circuit Court for Baltimore County
Case No. 03-K-95-000464

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 866

September Term, 2017

MILLER T. KIRKLAND

v.

STATE OF MARYLAND

Leahy,
Friedman,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: March 26, 2019

On October 19, 1993, Miller T. Kirkland was convicted in the Circuit Court for Baltimore City of robbery with a deadly weapon and use of a handgun in the commission of a crime of violence. While on probation for that case, he pled guilty in Baltimore County to robbery with a deadly weapon. He presents the following questions for our review, which we have rephrased slightly:

> Did the circuit court err in denying the appellant's Motion to Modify Commitment Order?

The State has filed a motion to dismiss this appeal because appellant has not filed an adequate record for this Court to consider this appeal. We shall grant the State's motion to dismiss.

I.

This case has a long history in the courts of this State. It began in 1993. In February 1993, appellant was indicted by the Grand Jury for the Circuit Court of Baltimore City for robbery with a deadly weapon and related charges. On October 19, 1993, appellant pled guilty to robbery with a deadly weapon before Judge Kenneth Johnson. The court sentenced him to a term of incarceration of twelve years with eleven years, five months, and twenty-nine days suspended, with five years supervised probation, to begin April 11, 1993. On May 17, 1995, while on probation for that sentence, appellant was convicted in the Circuit Court for Baltimore County of use of a handgun in the commission of a crime of violence and robbery with a deadly weapon. Judge Lawrence R. Daniels sentenced appellant to a term of incarceration of twenty-five years without parole, concurrent to any

outstanding or unserved sentence. For the handgun offense, the court sentenced appellant to a term of incarceration of twenty years without the possibility of parole. For robbery, the court sentenced appellant to a term of incarceration of fifteen years, all but five years suspended, without the possibility of parole, followed by five years probation.

On August 30, 1995, in the Circuit Court for Baltimore City, the State filed a petition to revoke appellant's probation as a result of his convictions in Baltimore County. Judge Johnson imposed the suspended sentence of eleven years, five months and twenty-nine days to run consecutive to any outstanding sentences.

On July 8, 2003, appellant filed a *pro se* "Request for Treatment Pursuant to Maryland Anno. Code Title 8, Subtitle 5, Section 8-507[1] of the Health General Article of Maryland," requesting drug treatment. On June 5, 2007, Judge Daniels signed an order for evaluation of appellant to determine whether he was suitable for drug treatment under Maryland Code, Health-General Article § 8-507. Appellant contends that at the same hearing, Judge Daniels orally "commuted" his Baltimore County sentence from twenty-five years without parole to "zero."[2] Appellee disputes this fact. Because a decade has

[1] All subsequent statutory references herein shall be to Maryland Code, Health-General Article unless otherwise specified.

[2] The State points out that a Maryland judge does not have the power to commute a sentence. We agree. That power resides in the executive. Md. Const., Art. II, § 20; *see Walker v. State*, 186 Md. 440, 445 (1946) ("Under our system the power to commute sentences resides in the executive."); Md. Code, Corr. Servs. § 7-601(a). Commutation of sentence is defined as "an act of clemency in which the Governor, by order, substitutes a lesser penalty for the grantee's offense for the penalty imposed by the court in which the grantee was convicted." Corr. Servs. § 7-101(d).

elapsed since the hearing and the court reporter died without leaving notes, a transcript of the hearing is unavailable.

On June 8, 2007, the Department of Health and Mental Hygiene ("DHMH") requested additional time to evaluate appellant for drug treatment. Following the evaluation, on July 9, 2007, Judge Daniels signed an order committing appellant for long-term residential treatment at the Alcohol and Drug Abuse Administration of DHMH pursuant to § 8-507. DHMH did not implement the order, and appellant remains incarcerated. DHMH sent a letter to Judge Daniels, copying appellant, on July 11, 2007, explaining that the Department was unable to implement the § 8-507 Order because appellant had an additional "case" in the Circuit Court for Baltimore City which was unaffected by the order. Between July 2007 and August 2016, DHMH and multiple court personnel told appellant on at least two further occasions that DHMH could not implement the § 8-507 Order because Judge John Themelis for the Circuit Court of Baltimore City declined to suspend appellant's sentence for drug treatment.[3]

On August 4, 2016, appellant filed a *pro se* Petition for Habeas Corpus in the Circuit Court for Baltimore County. The court denied the motion, stating that appellant is not entitled to habeas relief for the reasons given above—committing a defendant to DHMH

[3] In October 2007, Judge Daniels replied to two letters from appellant regarding the judge's treatment order, stating that "I have no authority to act on your behalf and intercede with Judge Themelis in Baltimore City." In May 2011, Judge Nagle's judicial assistant informed appellant that Judge Daniels retired in October 2009 and that, as appellant's Baltimore City sentence was not suspended for treatment, "the 8.507 commitment has no effect on your time, neither on [the Baltimore County] sentence, nor [the Baltimore City] sentence."

for treatment is discretionary for each sentencing court, i.e., appellant is not entitled to a § 8-507 order from the Circuit Court of Baltimore City merely because he received one from the Circuit Court of Baltimore County. Additionally, the Circuit Court for Baltimore County found that appellant had delayed unreasonably in filing his habeas petition, thereby prejudicing the State.

On April 19, 2017, appellant filed in the Circuit Court for Baltimore County a Motion to Modify Commitment Order. He alleged that the Circuit Court for Baltimore County "commuted his sentence to zero" and asked the court to order the Division of Corrections to modify his commitment record to reflect "the commutation." On June 6, 2017, the court denied the motion, and appellant noted this appeal.

II.

Before this Court, appellant argues that the circuit court erred in failing to grant his Motion to Modify Commitment Order. He contends that Judge Daniels committed him for long-term residential drug treatment pursuant to § 8-507.

Regarding the State's motion to dismiss his appeal, appellant argues that he has "continuously sought a corrected commitment" and that he is therefore not at fault for the limited record he presents on appeal. Appellant contends that even though the transcript for the June 5 hearing is not available, Judge John J. Nagle's August 4, 2016 denial of appellant's habeas petition in the Circuit Court for Baltimore County acknowledges Judge Daniels's modification of sentence and lends credence to his motion for modification. Combined with a copy of the order in which Judge Daniels attempted to commit appellant

to DHMH for treatment, appellant argues that Judge Nagle's opinion provides a sufficient basis for our review.

As to the merits, appellant argues that, because Judge Daniels signed a § 8-507 order, he intended to comply with the statutory prerequisites to commit appellant for treatment. At the time of the hearing before Judge Daniels, the statute required both an evaluation of the defendant's suitability for drug treatment by DHMH, § 8-507(b)(3), which DHMH carried out, and that any "sentence of incarceration for the defendant is no longer in effect," § 8-507(e)(1)(iii), which appellant argues that Judge Daniels satisfied with his June 5 oral ruling. In ordering the evaluation and "commuting" his sentence, appellant argues that Judge Daniels attempted to ensure that appellant, if amenable to treatment, could also "seek relief" from his sentence in the Circuit Court for Baltimore City.

What appellant is seeking is immediate release, but for him to be released now, the commitment order must be modified because the commitment order reflects that he is serving Judge Daniels's original sentence of twenty-five years without parole. He argues that even though he was not committed for drug treatment, Judge Daniels "commuted" his sentence to zero and the only sentence he was then serving was the eleven year, five month, twenty-nine day sentence for violation of probation. Because he has served that entire sentence, he contends that his commitment order should be amended and he should be released immediately.

The State moves to dismiss appellant's appeal, arguing that appellant has failed to provide an adequate record containing all necessary information for this Court to decide

appellant's appeal. The State argues that Maryland Rule 8-602(c)(4) allows the court to dismiss an appeal when the contents of the record do not comply with Rule 8-413. The State maintains that appellant is responsible for ensuring that the record on appeal is adequate and that, in this case, no transcript of the June 5, 2007 hearing is available because appellant waited nine years to litigate the issue. Additionally, the State argues that appellant did not take steps to fill the gaps in the record with supporting documentation such as affidavits from those present at the June 5 hearing or an agreed statement of facts.

If we reach the merits of the case, the State argues that there is no factual basis to substantiate appellant's claim that Judge Daniels orally suspended his twenty-five year Baltimore County sentence. The State dismisses the comment on Judge Daniels's oral ruling in Judge Nagle's denial of appellant's habeas petition, describing Judge Nagle's reference to Judge Daniels's modification of appellant's sentence as a chance phrasing of "background" information.

The State argues that even if Judge Daniels intended to commute appellant's sentence to zero, the action was a legal nullity because he did not have the power to "commute" appellant's sentence. That power lies exclusively with the governor. If, alternatively, Judge Daniels attempted to suspend the unserved balance of appellant's Baltimore County sentence, the State contends that any modifications he made at the June 5, 2007 hearing would have to be pursuant to and in accordance with § 8-507. Under § 8-507, a court has the discretion to commit a defendant to DHMH as a condition of release, but only if and when any pending sentence of incarceration is no longer in effect. The State argues that a defendant serving multiple prison sentences is eligible for commitment to

DHMH only if all sentencing judges consent to suspend the sentences for treatment. Because the Circuit Court for Baltimore City refused to suspend appellant's sentence for commitment to DHMH, appellant did not secure the agreement of all sentencing judges to suspend his sentences for treatment. Therefore, the State argues, the so-called sentence modification has no impact on appellant's commitment order, and the circuit court's judgement should be affirmed.

III.

We address first the State's motion to dismiss this appeal because the record is inadequate for this Court to decide the appeal. The State requests that this case be dismissed because, as a result of appellant's failure to provide the transcript from the proceeding before Judge Daniels, the record is not adequate for this Court to decide his appeal. The State points out that the burden is on appellant to establish error and to rebut the "general presumption of regularity in the proceedings below." *State v. Chaney*, 375 Md. 168, 184 (2003). Without the transcript, the State contends, the presumption cannot be rebutted. Therefore, the State requests that we exercise the discretion afforded us pursuant to Rule 8-602(c)(4) to dismiss an appeal if the record is inadequate.

Rule 8-602 provides as follows:

> "(a) On Motion or Court's Initiative. The court may dismiss an appeal pursuant to this Rule on motion or on the court's own initiative.
> (b) When Mandatory. 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 Rule 8-202.

(c) When Discretionary. The court may dismiss an appeal if:

(1) the appeal was not properly taken pursuant to Rule 8-201;

(2) the appellant has failed to comply with the requirements of Rule 8-205;

(3) the record was not transmitted within the time prescribed by Rule 8-412, unless the court finds that the failure to transmit the record was caused by the act or omission of a judge, a clerk of court, the court reporter, or the appellee;

(4) the contents of the record do not comply with Rule 8-413;

(5) a brief or record extract was not filed by the appellant within the time prescribed by Rule 8-502;

(6) the style, contents, size, format, legibility, or method of reproduction of a brief, appendix, or record extract does not comply with Rules 8-112, 8-501, 8-503, or 8-504;

(7) the proper person was not substituted for the appellant pursuant to Rule 8-401; or

(8) the case has become moot."

This Court has discretion to dismiss an appeal either on motion or on the Court's initiative. Rule 8-602(a). We may dismiss an appeal if the record does not "include . . . the transcript required by Rule 8-411." Rule 8-602(c)(4); Rule 8-413(a)(2).

Rule 8-411 provides as follows:

"a) Ordering of Transcript. Unless a copy of the transcript is already on file, the appellant shall order in writing from the court reporter a transcript containing:

(1) a transcription of (A) all the testimony or (B) that part of the testimony that the parties agree, by written stipulation filed with the clerk of the lower court, is necessary for the appeal or (C) that part of the testimony ordered by the Court pursuant to Rule 8-206 (c) or directed by the lower court in an order;

> (2) a transcription of any proceeding relevant to the appeal that was recorded pursuant to Rule 16-502 (b); and
> (3) if relevant to the appeal and in the absence of a written stipulation by all parties to the contents of the recording, a transcription of any audio or audiovisual recording or portion thereof offered or used at a hearing or trial."

Appellant has the burden of producing the transcript. Rule 8-411(a). Alternatively, if the parties agree that the issues presented in an appeal can be determined without referring to a full transcript, appellant may produce a statement of the case in lieu of the record, showing "how the questions arose and were decided, and setting forth only those facts or allegations that are essential to a decision of the questions." Rule 8-413(b).

In this case, appellant did neither. Appellant claims that Judge Daniels modified his sentence orally and committed him to the Alcohol and Drug Abuse Administration of DHMH. While the record contains the order purporting to commit appellant for treatment pursuant to § 8-507, there is no written record of the alleged oral sentence modification. Appellant's argument that he has "continuously sought a corrected commitment" and that he is therefore not at fault for the limited record he presents on appeal is meritless. Had he filed this motion to correct the commitment order when he was first informed that he could not be referred to DHMH, he would likely have had the necessary record. Without the transcript of the June 5, 2007 hearing or an order setting out the judge's ruling, we cannot discern the judge's intention.[4] Clearly, under § 8-507, a court may not order that a

[4] Contrary to appellant's argument, it is not clear that Judge Nagle, in his August 4, 2016 denial of appellant's habeas corpus petition, made a finding of (footnote continued . . .)

defendant be delivered for treatment until the Department recommends treatment, § 8-507(b)(5), and until any sentence of incarceration for a crime of violence is no longer in effect.[5] Section 8-507(e)(1)(ii). Without a transcript, we cannot address appellant's contention that Judge Daniels decided to reduce appellant's sentence to "zero" even if he was not eligible for DHMH treatment.

Moreover, appellant finds himself without a transcript because of his own delay in addressing this issue. The transcript is missing largely because of the appellant's nine-year delay in filing his Motion to Modify Commitment Order.[6] Although a request for treatment pursuant to § 8-507 does not require a timely Motion for Reconsideration of Sentence under Rule 4-345, § 8-507(a)(1), submitting a timely motion to correct the commitment is nonetheless important to preserve the record. Appellant's delay, coupled with a lack of an agreed statement of case or even "substitute statements or affidavits . . . to replace or to supplement the record," indicate a "failure of the appellant to demonstrate that he has been

fact that Judge Daniels "commuted to zero" appellant's sentence. To the extent that Judge Nagle made such a finding of fact, he had no basis for doing so.

[5] The version of the statute in effect at the time Judge Daniels allegedly modified appellant's sentence did not allow treatment while "any sentence of incarceration" was in effect; the current version does not allow treatment while a defendant is serving a sentence "for a crime of violence." Section 8-507(a)(2)(i). Either provision applies to appellant's Baltimore City conviction for robbery with a deadly weapon.

[6] In response to appellant's argument against dismissal that he "has continuously sought a corrected commitment," we note that appellant's various letters to the courts and DHMH between the imposition of his sentence and his habeas corpus filing on August 4, 2016 failed to preserve a record of the oral ruling for judicial review. Appellant was informed clearly by Judge Nagle's judicial assistant on May 20, 2011 that Judge Daniels's § 8-507 order would have no effect on his sentences. Despite this, he waited over five years before filing a habeas corpus petition intended to remedy the commitment order.

diligent in his attempt" to replace the missing transcript. *Smith v. State*, 291 Md. 125, 136–38 (1981).

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.