UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1105

September Term, 2014

LUTHER L. BROTHERS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: September 18, 2015

In the Circuit Court for Wicomico County, appellant Luther L. Brothers was indicted for possession of a controlled and dangerous substance ("CDS") with intent to distribute, and related offenses. At a pretrial hearing on April 8, 2014, the court denied appellant's motion to suppress evidence that had been seized from his pants pocket following a traffic stop in which he was the passenger. After a bench trial on April 30, 2014, appellant was acquitted of transporting heroin into the State, and convicted of possession with the intent to distribute, volume dealing, and simple possession of heroin. On July 24, 2014, after merging the sentence for simple possession, the trial court sentenced appellant, a subsequent offender, to 25 years' incarceration for possession with intent to distribute and a five-year concurrent sentence for volume dealing. In his appeal to this Court, appellant raises the following questions, which we quote:

> [I]. Did the motions court err in denying [a]ppellant's motion to suppress?
>
> [II]. Did the trial court commit plain error by admitting Corporal Williams'[] testimony concerning [a]ppellant's post-*Miranda* silence?
>
> [III]. Did the sentencing court err by failing to merge volume dealing into possession with intent to distribute?
>
> [IV]. Did the sentencing court err in not postponing sentencing?

For the reasons set forth below, we shall answer questions 1, 2, and 4 in the negative, and shall address question 3, *infra.*

FACTUAL AND PROCEDURAL BACKGROUND

Suppression hearing

On November 2, 2013, Corporal Burley Williams ("Corporal Williams"), was assigned to the Wicomico County Sheriff's Office Road Patrol when he observed a white Chevrolet Impala that appeared to be speeding near the intersection of U.S. Route 13 and Naylor Mill Road. After further observations with the use of a radar detection device, Corporal Williams determined that the car was traveling at 76 miles per hour in a 65-mile-per-hour zone. Accordingly, he activated the emergency lights on his unmarked patrol car and effected a traffic stop of the Impala on U.S. Route 50.

Corporal Williams approached the passenger side of the vehicle on foot and explained his reason for the traffic stop. The license of the driver identified him to be Stanley McKinnion ("Mr. McKinnion") and appellant, who was seated in the passenger seat, offered a Virginia learner's permit. When asked for vehicle registration, appellant stated that it was a rental car, but, after unsuccessfully searching for the rental agreement in the vehicle's console and glove compartment, explained that it had been rented by his girlfriend. Based upon his observations of "indicators" during the traffic stop, Corporal Williams contacted Deputy J.C. Richardson ("Deputy Richardson"), of the Wicomico County Sheriff's Office K-9 Patrol for the purpose of conducting a K-9 sniff of the vehicle.[1]

[1] The court sustained objections to the State's attempt to provide testimony regarding the specific "criminal indicators" observed by the officers.

Deputy Richardson testified that, after being briefed by Corporal Williams, he walked to the driver's side of the vehicle and explained that his purpose was to have a trained dog sniff the outside of the vehicle for the presence of any one of five odors – marijuana, cocaine, heroin, methamphetamine or Ecstasy. When he asked if there were any drugs in the car, the driver responded in the negative. Deputy Richardson's testimony continued as follows:

> WITNESS: I asked [the driver] to step from the car. *I asked him if I could pat him down.* He immediately turned around, put his hands out to the side. He never said yes or no to the consent, but when he put his –
>
> THE COURT: Did he get out?
>
> WITNESS: Yes, sir, he got out of the car . . . and put his hands right out to the side. And turned around from me. I took that as implied consent as to go ahead and pat him down. Which I did. I patted him down thoroughly. He had no weapons of any kind on his person.

(Emphasis added). Upon completion, Deputy Richardson instructed the driver to go stand with Corporal Williams by his patrol car, then approached the passenger's side of the Impala:

> WITNESS: I asked [appellant] to step from the vehicle. He also put his hands directly out to the side and turned right around from me.
>
> The difference with this pat-down and the other pat-down, as soon as [appellant] stepped from the vehicle and put his hands out to the side, he pressed his body extremely tight up against the car. Extremely tight . . . .

The deputy then exited the witness stand and conducted a performance in which he demonstrated how the search took place, testifying as follows:

> [W]hen I had the subject step out of the car, he came out just like that, arms straight out to the side, implied consent.
>
> The difference was, his body, upper body and torso was stepped back a little bit, but this area here (indicating) was pressed tight. I couldn't get into it at all.
>
> So when I went through his arms, I run through my pat-down, all through it, to check to make sure there's no weapons, I hit the waist band, and when I went down to here, I couldn't get my hands in any further because the car was right directly here. (Indicating.) And it was pressed directly up against his, the front of his groin area and thighs.
>
> Once I had him step back a little bit, then I kept right on going, not manipulating the pocket, not taking my hands or manipulating anything in the pocket, and I felt a large bulge in the pocket in the palm of my hand.
>
> (Witness resuming the stand).

When asked by the court if he recalled which pocket contained the bulge, Deputy Richardson responded that it was in appellant's left front pocket. He described the item as having three sharp edges, like the corner of a brick, which he immediately recognized as either cocaine or heroin. According to the deputy, as his hand went across the item, appellant let out a big gasp of air, his shoulders dropped, and his head slumped down as if to say, "uh-oh." At that point, Deputy Richardson removed the item which was, "in fact, a corner kilo, a corner of a key, of a kilo, and it turned out to be heroin."

When asked his purpose for the pat-down of appellant, Deputy Richardson testified that it was essentially a safety practice to always pat-down all persons ordered out of a vehicle prior to a K-9 sniff. He testified:

> [E]very time I get somebody out of a car, I do it. Driver and passenger. Or passengers. We're there with a drug dog. I had my back to everyone. I can't watch anybody. I'm watching the dog. It's our policy at the Wicomico County Sheriff's Office, it's what we do. That way we don't get shot. Drugs and guns run together.

Appellant was the only witness for the defense. Appellant testified that, after providing Corporal Williams with personal identifications for him and Mr. McKinnion, but not the vehicle itself, the following took place:

> So he went back to his car. And once he came back, he came back a couple minutes later to let us know that he was calling the K-9 dog up. So, once the K-9 officer arrived, he came to the car, he told us, you know, what the procedures was when he came out and he bring the dog out and everything.
>
> He told [Mr.] McKinnion to step out of the car and to have, and then told him to put his arms up. And he searched him, they said that they was doing a Terry frisk, that's what they actually said, he was going to do a Terry frisk. And when he came around to my side of the car, he just told me to step out of the car. So I stepped out of the car, he told me to throw my cigar that I had in my hand away, and to put my arms up. So, I did as I was told.

Corporal Williams proceeded with a pat-down and when he got to the pocket, he discovered CDS. When appellant's counsel asked if he were ever informed that he "had a choice" regarding whether he could leave, or be patted down, appellant answered in the negative. During cross-examination, appellant admitted to having two previous convictions – in Virginia Beach and Norfolk, Virginia – for possession with intent to distribute CDS.

Appellant's counsel did not dispute that the vehicle was speeding or that the driver consented to being patted down for weapons. However, counsel argued that appellant's pat-down was different in that it was given without any consent, and, moreover, based upon the

totality of the circumstances, the officer had no reasonable articulable suspicion to conduct the pat-down and exceeded the acceptable boundaries of a pat-down for weapons by going into appellant's pockets. The court denied appellant's motion to suppress, ruling as follows:

> All right. Summarizing, there was reasonable articulable suspicion on the part of [Corporal] Williams to make the traffic stop. The traffic stop was not of unreasonable duration. It was permissible to require each occupant of the vehicle to step outside of the vehicle. There was implied consent on the part of this Defendant to allow himself, well, first of all, to step out of the vehicle and, secondly, to allow himself to be patted down.
>
> There was a necessity, in the Court's opinion, for the pat-down given the fact that the K-9 search was about to ensue, and one officer's attention might be diverted from the observation of the two occupants who were standing outside of the vehicle while there's one remaining law enforcement officer watching them.
>
> It was permissible to do a pat-down of each individual for weapons. There was nothing unusual about the manner in which the pat-down was conducted by Deputy Richardson.
>
> Under the Plain-feel doctrine of [*Minnesota v. Dickerson*, 508 U.S. 366 (1993)], . . . and also the case of [*McCracken versus State,* 429 Md. 507 (2012)], . . . what Deputy Richardson felt, based on his training, knowledge, and experience, as well as this own judge's contact and familiarity with his experience and expertise, he clearly recognizes . . . the corner from a brick of heroin.
>
> There was a sufficient factual predicate for him to make that identification, and having made that identification he had every right to remove the item from the pocket of [appellant].

The court concluded that, although it was a "close call," it was "proper search and seizure, or a frisk and seizure" and therefore denied the motion to suppress.

Bench trial

At appellant's bench trial on April 30, 2014, Corporal Williams and Deputy Richardson offered essentially the same testimony as presented before at the motions hearing. Corporal Williams also testified that, after being asked twice, neither appellant nor the driver responded to his question regarding where they were driving from. At that point he requested that his partner conduct the K-9 sniff of the vehicle for the presence of illegal drugs. After Deputy Richardson conducted what was described as an "uneventful" pat-down and discovered the corner of heroin in his pocket, he also found over $600 cash on appellant, as well as two cell phones and a phone charger. The arrest took place at 11:41 p.m.

Jessica Taylor of the Maryland State Police Forensic Science Division testified for the State as an expert in the field of chemistry and identification and CDS identification. She identified State's exhibit 1, the item recovered from the pants pocket of appellant, as what she had analyzed and determined to be 41.5 grams of heroin.

Finally, Trooper Michael Porta of the Maryland State Police Criminal Enforcement Division Gang Unit testified for the State. The parties stipulated to his qualification as an expert in the fields of narcotics valuation, identification, and investigations, as well as the common practices users and dealers of CDS, including heroin. Based on his review of the police reports, evidence and testimony in appellant's case, it was his expert opinion that the amount of heroin recovered was consistent with an intent to distribute, but not for personal use.

At the close of the State's evidence, appellant's counsel made a motion for judgment of acquittal as to all four counts. The court granted this motion as to importing CDS into the State, but denied the motion as to the other three counts. No evidence was offered on behalf of appellant, so the court convicted appellant of the three remaining counts: CDS possession with intent to distribute, volume dealing, and simple possession of heroin.

Sentencing

Prior to sentencing, the State filed a notice of intent to seek a third-time offender penalty enhancement pursuant to Section 5-608(c) of the Criminal Law Article, which would subject appellant to a mandatory minimum sentence of 25 years' incarceration for the offense of possession with intent to distribute. At the July 25, 2014, sentencing hearing, appellant's counsel challenged both appellant's status as a subsequent offender and the State's compliance with the notice requirement of Maryland Rule 4-245. Counsel also argued that the court should merge the counts for possession with intent to distribute and volume dealing. The sentencing court determined that appellant qualified as a third-time offender under Md. Code (Repl. Vol. 2012), § 5-608 (c) of the Criminal Law Article ("Crim. Law"), and imposed a sentence of 25 years for possession with intent to distribute. The court merged the count of simple possession, but rejected appellant's argument that volume dealing should also merge, imposing a concurrent sentence of five years for that count.

Additional facts shall be provided, *infra,* to the extent they prove relevant in addressing the issues provided.

DISCUSSION

I. Whether the motions court erred in denying the motion to suppress.

Appellant's first argument is that the evidence seized during the pat-down should have been suppressed because he did not freely and voluntarily give his consent to be searched, and because the search violated the Fourth Amendment. In the event that he did consent to be searched, appellant argues that the officer exceeded the scope of any implied consent. In addition to maintaining that appellant failed to preserve this argument based upon his failure to fully comply with the requirements of Maryland Rule 4-252, the State maintains that the court properly determined that appellant impliedly consented to the pat-down.

When a motion to suppress is filed by a criminal defendant, Md. Rule 4-252 provides certain requirements that must be met, or else the motion is deemed to be waived. *Ray v. State,* 435 Md. 1, 13 (2013). Maryland Rule 4-252 provides, in relevant part, as follows:

> **(a) Mandatory motions.** In the circuit court, the following matters *shall be raised by motion* in conformity with this Rule *and if not so raised are waived* unless the court, for good cause shown, orders otherwise:
>
> * * *
>
> (3) An unlawful search, seizure, interception of wire or oral communication, or pretrial identification.
>
> * * *
>
> (e) **Content.** A motion filed pursuant to this Rule shall be in writing unless the court otherwise directs, *shall state the grounds upon which it is made,* and shall set forth the relief sought. . . . Every motion shall contain or be accompanied by a statement of points and citations and authorities[.]

(Emphasis added.) Initially, we agree with the State that the court erred by failing to vacate appellant's motion based upon his failure to properly comply with Md. Rule 4-252, which "governs the form, content, and timing of a motion to suppress evidence allegedly obtained as the result of an unlawful search." *Sinclair v. State,* 2015 WL 4509479 *5 (Md. July 27, 2015).

The purpose of Md. Rule 4-252 is "to alert both the court and the prosecutor to the precise nature of the complaint, in order that the prosecutor have a fair opportunity to defend against it and that the court understand the issue before it." *Denicolis v. State,* 378 Md. 646, 660 (2003); *accord Sinclair,* 2015 WL 4509479 at *6. When a party files an omnibus motion, as appellant did in the case *sub judice,* the motion can be described as one seeking "'a panoply of relief based on bald, conclusory allegations devoid of any articulated factual or legal underpinning.'" *Ray,* 435 Md. at 15 (quoting *Phillips v. State,* 425 Md. 210, 217 n. 4 (2012)). If the omnibus motion "fails to provide either a factual or legal basis for granting the requested relief, it *cannot be granted.*" *Denicolis,* 378 Md. at 660. (Emphasis added).

In *Sinclair,* the Court confirmed that, based upon its failure to set forth the legal authority upon which it was based, a motion to suppress failed to comply with Md. Rule 4-252. *Sinclair,* 2015 WL 4509479 at *6. *Accord, Ray,* 435 Md. at 15; *see also Miller v. State,* 380 Md. 1, 49 (2004) ("omnibus" motion that generally asserted evidence was seized in violation of constitutional rights did not satisfy Md Rule 4-252(e)). Just as a defendant

must file a motion which complies with Md. Rule 4-252, any "written response by the State must be filed promptly and also provide supporting legal authority." *Sinclair,* 2015 WL 4509479 at *6. In the case at bar, prior to the hearing on the motion to suppress, the State timely filed an authority-filled written Motion to Vacate the Motions Hearing, based upon appellant's failure to comply with Md. Rule 4-252. As in *Sinclair, supra,* appellant's omnibus motion was timely, but failed to comply with Md. Rule 4-252 because it "did not state the grounds upon which suppression of evidence was sought, as required by [Md.] Rule 4-252(e)." *Id.* at *7.

Although we consider this Rule to be a requirement, it may be waived by a court based upon a finding of a reasonable basis. In the instant case, the court made no such finding. The court denied the motion "for the sake of judicial economy, not because it lacks merit." This was an erroneous ruling. However, given that the court conducted the hearing on the motion to suppress, we shall consider appellant's arguments.

In reviewing a court's decision regarding a motion to suppress physical evidence, we base our decision solely upon the record of the suppression hearing, with great deference to the determinations of the trial judge. *In re Tariq A-R-Y,* 347 Md. 484, 488 (1997), *cert. denied,* 522 U.S. 1140 (1998). Thus, we are " limited to considering only that evidence and the inferences therefrom that are most favorable to the prevailing party on the motion, in this instance the State." *Tariq A-R-Y,* 347 Md. at 488. We review questions of law *de novo. Id., Ferris v. State,* 355 Md. 356, 368 (1999). The determination of whether there was a

constitutional violation "is an independent determination that is made by the appellate court alone, applying the law to the facts found in each particular case." *Belote v. State,* 411 Md. 104, 120 (2009) (citations omitted). As recently explained by the Court of Appeals:

> In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews for clear error the trial court's findings of fact, and reviews without deference the trial court's application of the law to its findings of fact. The appellate court views the trial court's findings of fact, the evidence, and the inferences that may be drawn therefrom in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress.

Varriale v. State, 2015 WL 4727105 at *4 (Aug. 11, 2015) (quoting *Hailes v. State,* 442 Md. 488, 499 (2015))

It is well settled that a search committed without a warrant "does not violate the Fourth Amendment if a person consents to it." *Varriale v. State,* 218 Md. App. 47, 53 (2014), *aff'd,* __Md. __, 2015 WL 4727105 (Aug. 11, 2015); *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973) (explaining that to be valid, consent to search must be voluntary, based on the totality of the circumstances); *Redmond v. State,* 213 Md. App. 163, 177 (2013) (voluntariness of search is based upon standards set forth in *Schneckloth, supra*); *Jones v. State,* 407 Md. 33, 51 (2008) ("A search conducted pursuant to valid consent, *i.e.,* voluntary and with actual or apparent authority to do so, is a recognized exception to the warrant requirement."). Whether a person consents to a search is a question of fact, for which the State has the burden of proof, based upon a totality of the evidence. *McMillian v. State,* 325 Md. 272, 284-85 (1992). Consent may be given expressly, impliedly, or by gesture. *Turner v. State,* 133 Md. App. 192, 207 (2000). Because a court's determination on consent is a

question of fact based upon the totality of the circumstances, we may not reverse the court's decision unless it is clearly erroneous. *McMillian,* 325 Md. at 285.

In the case at bar, the court made a factual determination that the vehicle's excessive speed provided Corporal Williams with reasonable articulable suspicion to make the traffic stop. Based upon this fact, together with the occupants' inability to provide vehicle registration, it was permissible for the officer to require each occupant to step out of the vehicle. *Rowe v. State,* 363 Md. 424, 432-33 (2001) (when police have probable cause to believe that a traffic violation has occurred, a traffic stop and the resultant temporary detention are considered legal); *Wren v. United States,* 517 U.S. 806, 810 (1996) (based upon totality of circumstances, temporary detention of motorist based upon traffic law violation is permissible, as long as not "unreasonable"); *Maryland v. Wilson,* 519 U.S. 408 (1997) (officers had legal basis to order occupants out of vehicle during traffic stop).

While the K-9 sniff was taking place, the officers had a reasonable concern regarding their safety, given that their attention would be averted from appellant and the driver to the actions of the dog. It is well established that "[p]ersons associated with the drug business are prone to carrying weapons." *Dashiell v. State,* 143 Md. App. 134, 153 (2002), *aff'd,* 374 Md. 85 (2003), and there can be no serious dispute that there is an intimate relationship between violence and guns, *Marks v. Criminal Compensation,* 196 Md. App. 37, 70 (2010); *U.S. v. Baker,* 78 F.3d 135, 137 (1996) (It was reasonable to neutralize potential threat by conducting pat-down for potential weapons, even where suspect did nothing to give the

officer any reason to believe he was threatened). As a result, given the officers' concern for their personal safety, the court reasonably concluded that they had a justifiable basis for conducting a pat-down prior to the K-9 sniff of the vehicle.

The court determined as a matter of fact that, prior to conducting the pat-down, Deputy Richardson obtained appellant's consent to do so. Based upon our review of the totality of the evidence, we conclude that the court did not err in its determination that appellant gave his consent to this pat-down. As the testimony indicates, viewed in the light most favorable to the prevailing party, he expressly consented to the request by Deputy Richardson to step out of the vehicle for a pat-down. Immediately thereafter, he indicated his implied consent to the pat-down for weapons itself by raising his arms to the side, without any evidence of coercion, just as the driver had done moments before. As reasonably determined by the court, the search took place within a reasonable time period, and did not exceed the limits of his consent to be pat-down for weapons.

While conducting this cursory search for weapons during a legitimate traffic stop, appellant further argues that Deputy Richardson violated any implied consent that he may have granted by the discovery of CDS. However, as properly determined by the court below, if the officer, while conducting a proper frisk, "comes upon an item that by mere touch is immediately apparent to the officer to be contraband or of 'incriminating character,' then the officer is authorized to seize that item immediately." *McCracken v. State,* 429 Md. 507, 510-11 (2012) (quoting *Minnesota v. Dickerson,* 508 U.S. 366, 375 (1993)). As an

officer with extensive experience working with CDS in his role as a K-9 officer and trainer, upon coming across appellant's mid-section during the consensual pat-down, Deputy Richardson, without first reaching into appellant's pocket, immediately recognized an item to be the corner kilo of CDS. This discovery was proper within the "plain feel" doctrine. *McCracken,* 429 Md. at 516. However, it was only after then that he reached into the pocket and found what was determined to be an actual corner kilo of heroin. Based upon the totality of the evidence, the court did not abuse its discretion in denying appellant's motion to suppress.

II. Post-*Miranda* Silence

Appellant's second argument is that the court committed plain error by admitting the following testimony by Corporal Williams during the bench trial:

> Q: What did you do after [placing the seized brick of heroin into an envelope in his patrol car]?
>
> A: Everybody was, or Mr. McKinnion and [appellant] were read their [*Miranda*] rights. [Appellant] declined to answer any questions. Mr. McKinnion answered a few questions that I asked. [Appellant] was placed under arrest, and [appellant] and the evidence was [sic] transported to the Sheriff's Office.

Appellant's counsel did not object to this statement, but appellant argues that it constitutes plain error, despite the fact that the trial was taking place before a judge. He argues that this testimony constitutes a single reference to his "post-*Miranda* silence," which he argues violated his "right to remain silent."

In order for us to review a case pursuant to the plain-error review, there are four requirements which must be met, as established by the Court of Appeals, as follows:

> First, there must be an error or defect – some sort of [d]eviation from a legal rule – that has not been intentionally . . . [or] affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the [D]istrict [C]ourt proceedings. Fourth, and finally, if the above three prongs are satisfied, the [C]ourt of [A]ppeals has the discretion to remedy the error – discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Rich, 415 Md. 567, 578 (2010) (quoting *Puckett v. United States,* 556 U.S. 129, 135 (2009) (citations and internal quotations omitted)). "Meeting all four prongs is difficult, 'as it should be.'" *Id.* (citations omitted).

In the case at bar, it is clear that neither the third nor the fourth prongs of *Rich, supra,* has been met. Corporal Williams' sole passing reference was the only reference to this silence during trial, with no reliance thereupon by the prosecutor during opening or closing arguments. Later in the trial, the court referred to appellant's right to remain silent in the following statement: "The [c]ourt is satisfied that [appellant] understands his right to testify or remain silent, and that the [c]ourt will not consider his failure or refusal to testify as evidence of guilt[.]" A trial judge is presumed to know the law in this area, *State v. Chaney,* 375 Md. 168, 180 (2003). Based upon the record before us, to which the prosecutor did not refer and the court expressly stated that it would not take into consideration, appellant fails to establish that the reference to his post-*Miranda* silence affected either the outcome of the

court proceedings or affected the "fairness, integrity or public reputation" of his trial. As a result, plain-error review is not warranted by this Court.

III. Merger of sentences

Appellant's third argument, with which the State agrees, is that his five-year concurrent sentence for volume dealing should merge into the 25-year sentence for possession with the intent to distribute. We agree. In *Kyler v. State,* 218 Md. App. 196, 201, *cert. denied,* 441 Md. 62 (2014), we concluded that "convictions for volume dealing merge, for sentencing purposes, with the convictions for possession with intent to distribute."

As explained by the Court of Appeals, a "merger does not serve to wipe out a conviction of the merged offense. The *conviction* simply flows into the *judgment* entered on the conviction of the merged offense." *In re Montrail M.,* 325 Md. 527, 533 (1992) (emphasis in original). "In a criminal prosecution a judgment consists of the conviction and the punishment imposed thereon[.]" *Id.* Therefore, where convictions merge for purposes of sentencing, "the *convictions* for both offenses 'stand inviolate, unaffected by the merger.'" *Moore v. State,* 198 Md. App. 655, 689 (2011) (emphasis in original) (quoting *Montrail,* 325 Md. at 533-34)).

Accordingly, we shall vacate the 5-year sentence for volume dealing and merge appellant's volume dealing conviction into the conviction for possession with intent to distribute CDS. This merger of the sentences will not affect appellant's convictions for volume dealing and possession with intent to distribute CDS, and we affirm those judgments.

IV. Sentencing

Finally, appellant argues that the court erred by failing to postpone the sentencing hearing, based upon the State's failure to provide "timely notice" of its intention to seek an enhanced penalty. A fifteen-day continuance is required by Md. Rule 4-245(c) if the sentencing court had determined the State provided insufficient notice,[2] so appellant now argues that the court erred by not postponing sentencing, despite the fact that he did not request any particular request for a postponement in the court below. Appellant's counsel did not challenge the validity of the report of previous convictions filed by the State containing both of appellant's Virginia convictions, as well as the sentences he served for each one. Moreover, counsel conceded that the State had provided pretrial notice of its intention to seek enhanced punishment. Appellant contends that because the notice provided by the State had been insufficient, the court erroneously failed to postpone sentencing.

Specifically, the State's pretrial enhanced penalty notice, mailed on January 30, 2014, referred to three prior offenses: a 2003 Virginia Beach Circuit Court conviction for distribution of marijuana, and two 1999 Norfolk Circuit Court convictions for possession with intent to distribute a narcotic. Appellant argues that because the notice failed to list the individual case numbers or conviction dates for each of the three convictions, or note which enhanced sentence the State would be seeking, the notice was insufficient in its compliance

[2] The State only requested such a postponement in the event that the court determined its notice to be insufficient.

with Md. Rule 4-245. At the sentencing hearing, the court rejected appellant's argument and determined the State's notice to be adequate, ruling as follows:

> [F]irst of all, no one knows better than the [appellant] when and where he was convicted of these offenses of distribution of cocaine. And I believe that the dates and the offenses are adequate to allow him notice of the State's intention to seek [sentencing as a] subsequent offender.

We note that, during the pretrial motion to suppress hearing that is part of the record in this case, appellant testified[3] that he had the following previous Virginia convictions: (1) possession with intent to distribute marijuana; 2003 in Virginia Beach; (2) possession with intent to distribute; 1999 in Norfolk. As a result, the court did not err by ruling that appellant was a subsequent offender, pursuant to Crim. Law § 5-608(c), and we agree with the court's conclusion that the State complied with Md. Rule 4-245 by providing a sufficient notice of its intention to seek enhanced penalty.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY ARE AFFIRMED. CONVICTIONS FOR VOLUME DEALING AND POSSESSION WITH INTENT TO DISTRIBUTE TO MERGE FOR PURPOSES OF SENTENCING. SENTENCE FOR VOLUME DEALING IS VACATED AND MERGED WITH THE SENTENCE IMPOSED FOR POSSESSION WITH INTENT TO DISTRIBUTE. COSTS SPLIT BETWEEN THE PARTIES 50% TO BE PAID BY APPELLANT AND 50% TO BE PAID BY WICOMICO COUNTY.

[3] This cross-examination testimony was for the purpose of impeachment.