Circuit Court for Washington County
Case No. 21-K-17-053949

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1129

September Term, 2018

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ANTHONY LEON LATIMER

v.

STATE OF MARYLAND

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Graeff,
Arthur,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Arthur, J.

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Filed: August 4, 2020

Appellant Anthony Leon Latimer represented himself at a jury trial in the Circuit Court for Washington County. He was convicted of multiple counts of possession of controlled dangerous substances with intent to distribute them, and of lesser charges. After receiving a sentence of 40 years' imprisonment, with all but 10 years suspended, Latimer noted this appeal. He raises the following issues:

> 1. Did the circuit court fail to comply with Rule 4-215?
>
> 2. Did the trial court commit reversible error in admitting inadmissible evidence of other crimes?
>
> 3. Did the trial court err in admitting evidence that the car appellant was driving was uninsured with a suspended registration, and in barring and denigrating evidence that it was insured and registered and prohibiting defense argument on this point?
>
> 4. Did the trial court err by convicting and sentencing appellant for two separate counts of possessing cocaine with the intent to distribute?

We are compelled to hold that the circuit court failed to comply with Maryland Rule 4-215(a)(3). Accordingly, we must reverse the judgments and remand for further proceedings.

## BACKGROUND

Given our resolution of this appeal, we need not set forth a detailed factual exposition of the underlying crimes (*Teixeira v. State*, 213 Md. App. 664, 666-67 (2013)), except to say that the State adduced sufficient evidence at trial to prove that Latimer possessed cocaine and heroin with intent to distribute them and that he possessed

oxycodone and sundry items of drug paraphernalia. We must, however, set forth the pertinent procedural facts.

A crucial factor in this case is the adoption of the Justice Reinvestment Act (2016 Md. Laws, ch. 515), which reduced the maximum penalties for many of the offenses with which Latimer was charged. The reduced penalty provisions of the Justice Reinvestment Act became effective on October 1, 2017.

The case against Latimer began before the effective date of the Act, but the trial took place after the effective date. The Act's reduced maximum penalties applied in this case, because the legislation became effective before Latimer's trial. *See Waker v. State*, 431 Md. 1, 12-13 (2013) ("'[t]he law is settled that the lesser penalty may be meted out in all cases decided after the effective date of the enactment, even though the underlying act may have been committed before that date'") (quoting *People v. Oliver*, 1 N.Y.2d 152, 159-60 (1956)).

Latimer was charged by criminal information with 11 counts. Adopting the format from Latimer's brief, we set forth those counts in tabular form, together with the maximum penalties, both before and after October 1, 2017:

| **COUNT** | **Offense charged** | **Maximum Penalty before Oct. 1, 2017** | **Maximum Penalty on or after Oct. 1, 2017** |
|---|---|---|---|
| 1 | Possession of heroin with intent to distribute (CL § 5-602(2)) | 20 years, or a fine not exceeding $25,000, or both (CL § 5-608(a)) | 20 years, or a fine not exceeding $15,000, or both (CL § 5-608(a)) |
| 2 | Possession of cocaine with intent to distribute (CL § 5-602(2)) | 20 years, or a fine not exceeding $25,000, or both (CL § 5-608(a)) | 20 years, or a fine not exceeding $15,000, or both (CL § 5-608(a)) |

| | | | |
|---|---|---|---|
| 3 | Possession of cocaine with intent to distribute (CL § 5-602(2)) | 20 years, or a fine not exceeding $25,000, or both (CL § 5-608(a)) | 20 years, or a fine not exceeding $15,000, or both (CL § 5-608(a)) |
| 4 | Possession of heroin (CL § 5-601(a)(1)) | 4 years, or a fine not exceeding $25,000, or both (CL § 5-601(c)(1)) | 1 year, or a fine not exceeding $5,000, or both (CL § 5-601(c)(1)(i)) |
| 5 | Possession of cocaine (CL § 5-601(a)(1)) | 4 years, or a fine not exceeding $25,000, or both (CL § 5-601(c)(1)) | 1 year, or a fine not exceeding $5,000, or both (CL § 5-601(c)(1)(i)) |
| 6 | Possession of cocaine (CL § 5-601(a)(1)) | 4 years, or a fine not exceeding $25,000, or both (CL § 5-601(c)(1)) | 1 year, or a fine not exceeding $5,000, or both (CL § 5-601(c)(1)(i)) |
| 7 | Possession of oxycodone (CL § 5-601(a)(1)) | 4 years, or a fine not exceeding $25,000, or both (CL § 5-601(c)(1)) | 1 year, or a fine not exceeding $5,000, or both (CL § 5-601(c)(1)(i)) |
| 8 | Use of drug paraphernalia to store heroin (plastic bag) (CL § 5-619(c)) | Fine not exceeding $500 (CL § 5-619(c)(3)(i)) | Fine not exceeding $500 (CL § 5-619(c)(3)(i)) |
| 9 | Use of drug paraphernalia to store cocaine (plastic bag) (CL § 5-619(c)) | Fine not exceeding $500 (CL § 5-619(c)(3)(i)) | Fine not exceeding $500 (CL § 5-619(c)(3)(i)) |
| 10 | Use of drug paraphernalia to store cocaine (plastic bag) (CL § 5-619(c)) | Fine not exceeding $500 (CL § 5-619(c)(3)(i)) | Fine not exceeding $500 (CL § 5-619(c)(3)(i)) |
| 11 | Use of drug paraphernalia to analyze cocaine (digital scale) (CL § 5-619(c)) | Fine not exceeding $500 (CL § 5-619(c)(3)(i)) | Fine not exceeding $500 (CL § 5-619(c)(3)(i)) |

Latimer's initial appearance took place on October 5, 2017, four days after the effective date of the Justice Reinvestment Act. He appeared without counsel. At that time, the circuit court apparently used the superseded version of the applicable statutes to

advise Latimer of the maximum penalties that he faced. Thus, the court erroneously advised Latimer of the maximum penalties corresponding to the first seven counts of the charging document by overstating the maximum fines for Counts 1 through 3 and overstating both the maximum terms of incarceration and the maximum fines for Counts 4 through 7.

On December 5, 2017, the circuit court held a preliminary hearing. Once again, Latimer appeared without counsel. During the hearing, the court advised Latimer, again, of the maximum penalties that he faced on each count of the charging document. On Counts 1 through 7, the court correctly advised Latimer of the maximum terms of imprisonment that he faced in light of the amendments effectuated by the Justice Reinvestment Act. In addition, the court correctly advised Latimer of the maximum fines that it could impose on Counts 8 through 11, which do not carry a term of imprisonment. The court, however, did not advise Latimer of the maximum fines that it could impose on Counts 1 through 7. Hence, the court did not correct some of the erroneous information that Latimer had previously received about the maximum fines that he faced under Counts 1 through 7.

At the preliminary hearing, the court worked diligently to elicit Latimer's acknowledgement that he "comprehend[ed]" the maximum penalties he faced. The court then advised Latimer, in considerable detail, of his right to a lawyer and of the importance of having a lawyer, but it made no further mention of the maximum allowable penalties. Latimer ultimately stated, when asked by the court, that he wished to proceed

without a lawyer. The court tacitly accepted Latimer's waiver of the right to counsel and his election to represent himself.[1]

On January 26, 2018, the court held a motions hearing. Latimer appeared again without counsel. At the beginning of the hearing, the circuit court noted that Latimer had "the right to be represented by counsel"; that at the prior hearing the court had "fully" advised him of that right, including the right to apply to the Public Defender; but that he had chosen "to waive representation in the prior hearing." The court went on to deny Latimer's pretrial motions. The court, once again, "strongly" suggested that Latimer obtain legal representation for his upcoming jury trial, which was scheduled for March 22, 2018.

On March 22, 2018, Latimer appeared for trial without counsel. He did, however, inform the court that he had taken the court's advice and applied for representation by the Public Defender, but that he had not heard back. Accordingly, he sought a continuance so that he could obtain representation. After determining that Latimer had not applied for

[1] The court did not expressly "determine[] and announce[] on the record" that Latimer was "knowingly and voluntarily waiving the right to counsel," as required by Rule 4-215(b). Instead, the court simply proceeded as though a waiver had occurred and Latimer was representing himself. Although Latimer did not object to the court's failure to "determine[] and announce[] on the record" that he was "knowingly and voluntarily waiving the right to counsel," he raises it as an issue on appeal. In view of our disposition of the case, we need not decide whether Latimer can obtain appellate review of the court's failure to comply with the formal requirements of Rule 4-215(b), notwithstanding his failure, as a self-represented litigant, to register a timely objection. *See State v. Westray*, 444 Md. 672, 686 (2015) (stating that, "in many instances under Rule 4-215, it may be unfair to expect a lay defendant to know the rule and to require a contemporaneous objection if the defendant is *pro se – e.g.*, if counsel has never been appointed or has already been discharged").

representation until a few days before trial, the court denied his motion for a continuance and proceeded to trial that day.

The jury deliberated for approximately half an hour before finding Latimer guilty of all 11 charges. The court imposed a total sentence of 40 years' imprisonment, with all but 10 years suspended. This timely appeal followed.

## DISCUSSION

In a criminal case, a defendant's right to counsel "is guaranteed by the Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, and by Article 21 of the Maryland Declaration of Rights." *Brye v. State*, 410 Md. 623, 634 (2009). In addition, defendants have a "'constitutional right to proceed *without* counsel when' [they] 'voluntarily and intelligently elect[] to do so.'" *Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (quoting *Faretta v. California*, 422 U.S. 806, 807 (1975)) (emphasis in original); *see Fowlkes v. State*, 311 Md. 586, 589 (1988).

Maryland Rule 4-215 sets forth an orderly procedure to ensure that all criminal defendants appearing before the court are represented by counsel, or, if they are not, that they are advised of the constitutional right to the assistance of counsel, as well as the correlative constitutional right to self-representation. *See Knox v. State*, 404 Md. 76, 87 (2008) (quoting *Broadwater v. State*, 401 Md. 175, 180-81 (2007)). "The Rule 'explicates the method by which the right to counsel may be waived by those defendants willing to represent themselves, . . . and the necessary litany of advisements that must be given to all criminal defendants before any finding of express or implied waiver of the

right to be represented by counsel may be valid.'" *Womack v. State*, 244 Md. App. 443, 451 (2020) (quoting *Broadwater v. State*, 401 Md. at 180).

Part (a) of the rule provides:

> **(a) First Appearance in Court Without Counsel.** At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, the court shall:
>
> (1) Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel.
>
> (2) Inform the defendant of the right to counsel and of the importance of assistance of counsel.
>
> (3) Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any.
>
> (4) Conduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel.
>
> (5) If trial is to be conducted on a subsequent date, advise the defendant that if the defendant appears for trial without counsel, the court could determine that the defendant waived counsel and proceed to trial with the defendant unrepresented by counsel.
>
> (6) If the defendant is charged with an offense that carries a penalty of incarceration, determine whether the defendant had appeared before a judicial officer for an initial appearance pursuant to Rule 4-213 or a hearing pursuant to Rule 4-216 and, if so, that the record of such proceeding shows that the defendant was advised of the right to counsel.
>
> The clerk shall note compliance with this section in the file or on the docket.

As pertinent to this appeal, subsection (a)(3) mandates that a defendant be advised of "the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any." Subsection (a)(3) "'exists to ensure that a defendant is made aware of all pending charges and associated penalties.'" *Womack v. State*, 244 Md. App. at 453 (quoting *Brye v. State*, 410 Md. at 637). Here, the court did not accurately advise Latimer about the allowable penalties on seven of the charges against him, because it overstated the maximum amount of the potential fines that he might be required to pay if he were convicted of those charges.

On the facts of this case, it is admittedly difficult to see how Latimer's decision to waive the right to counsel was affected by the court's erroneous advice that some of the penalties he faced were greater than they were. Presumably, if Latimer was led to believe that the potential penalties were more severe than they really were, he would have been less inclined, not more inclined, to proceed without the assistance counsel.

This Court has held that some violations of Rule 4-215 – specifically, violations of Rule 4-215(a)(1), which requires a court to "[m]ake certain that the defendant has received a copy of the charging document containing notice as to the right to counsel" – are subject to a harmless error analysis. *Muhammad v. State*, 177 Md. App. 188, 255-56 (2007), *cert. denied*, 403 Md. 614 (2008). Those violations are grounds for reversal only if the appellate court cannot say that the error was harmless beyond a reasonable doubt. *See id.*

Similarly, some states hold that strict judicial compliance with rules governing waiver of the right to counsel is not required and that substantial compliance will suffice.

*See, e.g.*, *State v. Logan*, 101 N.E.3d 572, 583-84 (Ohio App. 2017) (stating that court substantially complied with rule regarding waiver of right to counsel even though it did not explicitly advise defendant of possible defenses to charges and circumstances in mitigation, as required by rule); *see also People v. Pike*, 53 N.E.2d 147, 177-78 (Ill. App. 2016) (stating that court substantially complies with rule regarding waiver of right to counsel "when any failure to fully provide admonishments does not prejudice defendant because either: (1) the absence of a detail from the admonishments did not impede defendant from giving a knowing and intelligent waiver; or (2) defendant possessed a degree of knowledge or sophistication that excused the lack of admonition[]"); *People v. Russell*, 684 N.W.2d 745, 751 (Mich. 2004) (stating that if trial court does not substantially comply with state rules, defendant does not effectively waive the right to counsel).

"[H]armless error analysis is," however, "inapplicable to a violation of Maryland Rule 4-215(a)(3)." *Moten v. State*, 339 Md. 407, 411 (1995); *accord State v. Camper*, 415 Md. 44, 58 (2010) ("refus[ing] to depart from the rule established in *Moten* . . . that a Rule 4-215(a)(3) violation is not subject to harmless error analysis"); *Brye v. State*, 410 Md. at 643-44 (rejecting the State's "[q]uasi-harmless error analysis" under Rule 4-215(a)(3), because it "conflicts directly with [the] clear mandate in *Moten*"); *Knox v. State*, 404 Md. at 87 (stating that "[f]ailure to comply with [Rule 4-215(a)(3)] constitutes reversible error" where the defendant had been misadvised of penalty enhancements for subsequent offenders); *Broadwater v. State*, 401 Md. at 182 (holding that "the requirements of Maryland Rule 4-215 are 'mandatory and must be complied with,

irrespective of . . . the lack of an affirmative showing of prejudice to the accused'") (quoting *Taylor v. State*, 20 Md. App. 404, 409, 411 (1974)); *Parren v. State*, 309 Md. 260, 282 (1988) (rejecting the proposition that the consequences of noncompliance with Rule 4-215(a)(3) can be determined "on an ad hoc basis"); *Womack v. State*, 244 Md. App. at 453 (stating that "[v]iolations of [Rule 4-215(a)(3)] are not subject to a harmless error analysis[]"); *see also Lopez v. State*, 420 Md. 18, 31 (2011) (stating in dicta that, "[w]hen applicable, [Rule 4-215's] provisions are mandatory, must be strictly complied with, and are not subject to a harmless error analysis").

Thus, for example, even when a defendant was assumed to have had actual knowledge of the maximum penalties he faced, the trial court's violation of Rule 4-215(a)(3) required automatic reversal. *State v. Camper*, 415 Md. at 57-58 & n.6. Similarly, even when a self-represented defendant referred to the maximum penalties in his opening statement (and thus obviously knew what they were), the trial court's failure to inform him of the penalties required automatic reversal. *Moten v. State*, 339 Md. at 409, 412. And even when the prosecutor had informed the defendant of the maximum penalties in open court (at the trial judge's direction), the judge's failure to inform him of the penalties also required automatic reversal. *Webb v. State*, 144 Md. App. 729, 742, 745-46 (2002); *accord Womack v. State*, 244 Md. App. at 459.

In this case, the circuit court did not accurately inform Latimer of the maximum penalties he faced. At the initial hearing, the circuit court judge misinformed Latimer of the maximum sentences on three of the charges against him and of the maximum fines on seven. At a subsequent hearing, at which Latimer was found to have waived his right to

counsel, a second judge corrected her colleague's misstatements about the maximum sentences,[2] but did not correct the misstatements about the maximum fines. It appears, therefore, that we have no choice but to reverse Latimer's convictions.

In advocating a contrary conclusion, the State argues that, so long as the court correctly informs a defendant of the maximum terms of incarceration, a misstatement about a potential fine does not result in a violation of Rule 4-215(a)(3). We disagree. Fines are part of the "allowable penalties" that a court must accurately disclose to a defendant under Md. Rule 4-215(a)(3). "Criminal fines," like terms of imprisonment, "are penalties inflicted by the sovereign for the commission of offenses." *Southern Union Co. v. United States*, 567 U.S. 343, 349 (2012). The term "'penalties' . . . undeniably embrace[s] fines." *Id*. at 350; *see also* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a "penalty" as a "[p]unishment imposed on a wrongdoer, usu[ally] in the form of imprisonment or fine"). Indeed, one stated purpose of the Justice Reinvestment Act was to "alter[] certain penalties for certain offenses relating to controlled dangerous substances" (2016 Md. Laws, ch. 515, preamble), and the legislation achieves that purpose by altering both the maximum terms of imprisonment for those offenses and the maximum fines. Thus, the General Assembly appears to have understood that the term "penalties" included "fines."[3]

[2] *See, e.g., Broadwater v. State*, 401 Md. at 200 (permitting advisements to be given "in piecemeal, cumulative fashion").

[3] On page 11 of its brief, the State itself refers to the fines as "potential penalties."

The State "acknowledges that compliance with Rule 4-215(a)(3) is not subject to harmless-error analysis." Nonetheless, the State attempts to confine the remedy of reversal to cases where "the error has been significant in nature," i.e., cases "where the advisement fails to ensure the defendant's awareness of his sentencing exposure and thus does not fulfill the purpose of Rule 4-215."

To inquire into whether an error is "significant" is, however, simply a backdoor method of inquiring into whether the error was prejudicial, which the Court of Appeals has repeatedly said we are not allowed to do. Furthermore, to limit the remedy of reversal to cases "where the advisement fails to ensure the defendant's awareness of his sentencing exposure" is inconsistent with *State v. Camper*, 415 Md. at 57-58 & n.6, where the Court reversed a conviction even though the defendant was assumed to have had "actual knowledge of the mandatory penalty he faced upon conviction." According to the *Camper* Court, it would also be inconsistent with *Moten* and *Parren*, because "evidence in the record" in those cases "indicated that the defendants had actual knowledge of the information omitted by the court during the Rule 4-215(a) inquiry." *State v. Camper*, 415 Md. at 58 (citing *Moten v. State*, 339 Md. at 412; *Parren v. State*, 309 Md. at 266-77). It would also be inconsistent with *Webb v. State*, 144 Md. App. at 742, 745-46, and *Womack v. State*, 244 Md. App. at 459, where the defendants were advised of the allowable penalties by the prosecutor at the judges' direction, but not by the judges themselves.

Because the circuit court erroneously overstated the amount of the fines that Latimer faced and erroneously informed him that he was subject to harsher penalties than

he actually was, the State argues that the court's misstatements could not "have lulled Latimer into proceeding without counsel." In *Camper*, however, the court's misstatements could not have lured the defendant into proceeding without counsel, because he was assumed to have already known everything that the court had failed to tell him. Yet, the Court still held that an automatic reversal was required. *State v. Camper*, 415 Md. at 57-58. The same is true here.[4]

In essence, the State argues that because Latimer was not deterred from representing himself even though the court erroneously overstated the maximum penalties that he faced, he would not have been deterred from representing himself had the court correctly informed him of the lesser penalties that he actually faced. In our view, this is another way of saying that the error was harmless or that the defendant suffered no prejudice as a result of it. Were we writing on a blank slate, we might credit that argument. The Court of Appeals, however, has repeatedly told us that these are not

[4] Although the court's erroneous advice may not have had any effect on Latimer's decision to waive the right to counsel, a court conceivably could interfere with the exercise of some rights protected by Rule 4-215(a) if the court mistakenly overstates the severity of the penalties that a defendant faces. Rule 4-215(a) protects both the right to assistance of counsel and the correlative right to represent oneself. In a typical case under Rule 4-215(a), the defendants do not want to represent themselves; they want to be represented by counsel – just not the counsel who has been assigned to their case. Similarly, in this case, Latimer was inconsistent about whether he wanted to represent himself or whether he wanted the assistance of counsel; he ultimately represented himself at trial because he had been dilatory in pursuing his right to legal representation. By contrast, some defendants truly do want to represent themselves, because they genuinely believe that they can do a better job than any lawyer. When a defendant wants to exercise the constitutional right of self-representation, the court may interfere with that right by misinforming the defendant that the maximum penalties are greater than they are, and thus motivating the defendant to acquiesce and to accept the assistance of counsel.

pertinent considerations when a violation of Rule 4-215 has occurred. Accordingly, we must reverse the convictions and remand for a new trial.[5]

**JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WASHINGTON COUNTY.**

[5] In view of our disposition of this appeal, we need not address the other issues that Latimer has raised. Nonetheless, we note the State's concession that Counts 2 and 3, which contained identical allegations of possession with intent to distribute heroin on the same day, in the same County, "are duplicative." According to the State, "the Double Jeopardy Clause requires that only one conviction and sentence can stand." *Accord Anderson v. State*, 385 Md. 123, 140-41 (2005). We trust that the parties will take note of the State's concession when this case returns to the circuit court.