Circuit Court for Anne Arundel County
Case No.: C-02-CR-19-001601

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1474

September Term, 2020

KYLE MURRAY

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: November 4, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2019, Kyle Murray, appellant, appeared in the Circuit Court for Anne Arundel County and pleaded guilty to aggravated cruelty to animals (Count 4), dogfighting (Count 7), training a dog for dogfighting (Count 11), and possession of an implement used in dogfighting (Count 18). In pronouncing sentence, the court stated:

> Count 4, I will impose a three-year sentence to the Division of Corrections.
>
> ***
>
> Count 7, three years to the Division of Corrections consecutive to Count 4.
>
> Count 11, three years suspended in its entirety.
>
> Count 18, 90 days suspended in its entirety. That is consecutive to Count 11.
>
> When you are released you will be on five years of supervised probation. All standard conditions of probation apply.

Prior to the conclusion of the proceedings, the courtroom clerk inquired: "Count 11 is suspended. But is it consecutive to count 7? Or just - -". The court responded: "No. It's suspended in its entirety so it's not consecutive to anything. Count 18 is consecutive to 11, though."

The commitment record reflects:

Count 4:	three years
Count 7:	three years, consecutive to Count 4
Count 11:	three years, entire duration suspended, concurrent with Counts 4, 7
Count 18:	90 days, entire duration suspended, consecutive to Count 11

"All but 6Y is/are suspended and the Defendant is placed on SUPERVISED probation" for a five-year period upon release from physical incarceration.

In 2021, Mr. Murray, representing himself, filed a motion to correct an illegal sentence pursuant to Md. Rule 4-345(a) in which he asserted that he "received an illegal

sentence when the court added a sentence of probation that is outside the limits on probation after judgment." Specifically, he argued that the term of probation was illegal "due to the fact that there's no suspension of sentence attached to it." He pointed out that Count 11 "was suspended but it ran 'concurrent' to Counts 4 and 7 which is the 6 year sentence." Because Count 11 was suspended and ran "concurrent to an actual term of imprisonment that is twice its length," Mr. Murray claimed that "its suspension is meaningless and moot." He asserted that the proper course would have been to sentence him "to 9 years and 90 days (the full sentence allowed for each charge being ran consecutive), all suspended but 6 years, with 5 years probation."

The circuit court summarily denied the motion. Mr. Murray noted a timely appeal and maintains that the court erred in denying his motion, and also erred in failing to hold a hearing and providing reasons for its decision. Although we disagree with Mr. Murray that the court was required to hold a hearing and explain its decision, we do agree with him that the term of probation is illegal. Accordingly, we shall vacate the judgment and remand with instructions to strike the probationary term.

DISCUSSION

The State asserts that Mr. Murray is "wrong," and his sentence is legal. The State maintains that, "[t]he *suspended* portion of Murray's sentence did not have to be consecutive to (or concurrent with) the sentence he was to serve immediately" because "a trial judge may not 'presume to bind the future' by ordering a sentence to be consecutive to (or concurrent with) a sentence not yet in existence." (Quoting *Scott v. State*, 454 Md. 146, 192 (2017)). "Rather," the State continues, "the judge sentencing for the future

hypothetical violation of probation, at *that time*, 'may make a sentence concurrent with, or consecutive to, whatever other sentence then exists, actually being served.'" (Citing *Scott*, at 192). The State also cites *DiPietrantonio v. State*, 61 Md. App. 528, 532 (1985) for the proposition that "the subsequent sentencing judge . . . may make his sentence concurrent with or consecutive to whatever other unsuspended sentence of confinement then exists."

In our view, the State's reliance on *Scott* and *DiPietrantonio* is misplaced. *Scott* addressed the situation "where an appellate court vacates a sentence to which another sentence is ordered to be served consecutively and remands for resentencing without vacating the consecutive sentence[.]" *Scott*, 454 Md. at 197. *DiPietrantonio* dealt with the court's authority, following revocation of probation, to order the execution of a previously suspended sentence to run consecutive to a sentence imposed in the interim—that is between the original, but fully or partially suspended sentence, and the sentence ordered executed following probation revocation. *DiPietrantonio*, 61 Md. App. at 529. Neither scenario is at issue here.

What we are confronted with in Mr. Murray's case is the effect of the court's failure to run the fully suspended sentences for Counts 11 and 18 consecutive to the non-suspended sentences for Counts 4 and 7. Although the court ran the 90-day sentence for Count 18 consecutive to the three-year sentence for Count 11, the court also announced that Count 11 was "not consecutive to anything." Accordingly, Mr. Murray is correct in maintaining that the three-year 90-day sentence for Counts 11 and 18 runs concurrently with the combined six-year sentence for Counts 4 and 7, as his commitment record, in fact, reflects. *See Collins v. State*, 69 Md. App. 173, 196-99 (1986) (If the court does not

indicate that a subsequently imposed sentence is to run consecutively to an earlier imposed sentence, it is deemed to run concurrently with it.).

What we are left with then, is the legality of the five-year term of probation ordered to commence upon Mr. Murray's release from incarceration. We addressed this issue in *Gatewood v. State*, 158 Md. App. 458 (2004) *aff'd* on other grounds, 388 Md. 526 (2005), a case with a strikingly similar set of facts.

In *Gatewood*, the court sentenced the defendant to a 20-year term of imprisonment for distribution of cocaine (Count 1); a fully suspended 20 years for a second count of distribution (Count 3); and a fully suspended and concurrently run sentence of 20 years for a third count of distribution (Count 5). *Id.* at 480. The court also imposed a five-year term of probation upon release from incarceration. *Id*. at 481. On appeal, Gatewood argued that because the court had not run his suspended sentence for Count 3 consecutive to the non-suspended sentence for Count 1, the three sentences were deemed to run concurrently with each other. *Id*. The State disagreed, claiming that it did not matter that the court had not announced that the sentence for Count 3 would run consecutively to Count 1 because a suspended sentence can be neither concurrent with nor consecutive to an unsuspended sentence. *Id*. This Court rejected the State's contention. We stated:

> It is clear, then, that the sentence announced from the bench for Count 3 was suspended generally and that the sentence for Count 5 was concurrent and suspended. Because of the court's pronouncement that the sentence for Count 3 was suspended, without having spoken the word "consecutive," the sentence is, perforce, concurrent. There is a presumption that if the court does not specify that a subsequently imposed sentence is to be consecutive to an earlier imposed sentence, the latter is concurrent. [citations omitted.]

Id. at 482.

In short, we concluded that the three 20-year terms were deemed to run concurrently with each other. We then addressed the five-year term of probation and the law that authorizes a probationary term only where the execution of a sentence, or portion thereof, is suspended. *Id*. We noted that, absent a suspension of sentence, imposition of probation is meaningless. *Id*. Applying that law to Gatewood's case, we held that, "because no part of any of the three sentences imposed by the court was *effectively* suspended, the order of probation is of no effect." *Id.* (emphasis added). Consequently, "[t]he net effect of the sentencing is that [Gatewood] received three concurrent 20 year sentences, no part of which was suspended." *Id*. at 483. We, therefore, remanded the case with instructions to strike the order of probation and to amend the commitment record and docket entries.

The same analysis applies here. Because the three-years and 90 days (Counts 11 and 18) were run concurrently with the six years (Counts 4 and 7), no part of the sentences for Counts 11 and 18 were effectively suspended. The order of probation, therefore, must be stricken, and the commitment record and docket entries likewise amended.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED. CASE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO STRIKE THE ORDER OF PROBATION AND TO AMEND THE COMMITMENT RECORD AND DOCKET ENTRIES CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.