Circuit Court for Prince George's County
Case No. CT080397X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1539

September Term, 2019

CORDARO ANDY DOCKERY

v.

STATE OF MARYLAND

Fader, C.J.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Graeff, J.

Filed: August 25, 2021

In 2008, Cordaro Andy Dockery, appellant, pleaded guilty to armed robbery and a related handgun charge, and the court sentenced him to a total of 20 years' incarceration, all but five years suspended. Following his release, he was found to be in violation of his probation based on a 2011 robbery. The court re-imposed the balance of his suspended sentence on the 2008 armed robbery conviction, i.e., 15 years, to run consecutive to the sentence on the 2011 robbery conviction. Appellant subsequently filed an Application for Three Judge Panel to Review his sentence. In 2019, the review panel denied his application without a hearing.

On appeal, appellant presents the following question for this Court's review:

> Did the sentence review panel err or fail to properly exercise discretion in ruling on appellant's request for review of his sentence?

For the reasons set forth below, we agree that appellant was denied review of his sentence and that the denial constituted reversible error.

FACTUAL AND PROCEDURAL BACKGROUND

On July 15, 2008, appellant pleaded guilty in the Circuit Court for Prince George's County to armed robbery and use of a handgun in the commission of a felony. The court sentenced appellant to 20 years' imprisonment, all but five years suspended, on the armed robbery conviction, and five years, concurrent, without the possibility of parole, on the handgun conviction. He was given 315 days of time-served credit and placed on three years' supervised probation to commence upon his release.[1]

[1] With credit for time served, appellant's sentence began to run on September 4, 2007.

On March 21, 2011, appellant was released from incarceration. On April 13, 2011, he was arrested and charged with armed robbery, assault, and related offenses (CT11-0739X). He subsequently was convicted of armed robbery and sentenced to 10 years' imprisonment.

On February 16, 2012, the court found appellant to be in violation of the probation imposed for his 2008 robbery conviction. The court sentenced appellant to serve the suspended portion of his sentence, 15 years, to run consecutive to the 10-year sentence imposed for the 2011 robbery.

On February 27, 2012, appellant filed an application for review of the re-imposed sentence, alleging that the "sentence imposed [was] unduly harsh under the circumstances." He renewed his request in 2019. In support of his request to reduce his sentence, he asserted that the State had offered him a "global plea deal" for the 2011 robbery case, which included a consecutive five-year sentence for the violation of probation in the 2008 robbery case, but "he did not receive the plea offer in a timely manner, which resulted in him not being able to accept it." Instead, "he pled guilty to the guidelines sentence" for the 2011 case, "without any agreement as to the violation of probation" in the 2008 case.

Appellant further stated, in support of his request that he had been a "lost soul" in his youth, "chasing drugs and doing anything he could to get the money to buy them," but he now wanted to have a chance "to be part of the world as a mature man." He noted that, during his incarceration, he had been working to earn his GED and maintain his sobriety, despite a difficult childhood experience. Appellant stated that he hoped to start his own landscaping business someday and help support his now 11-year-old son, and he knew he

needed to make better choices going forward. Appellant requested that the 15-year sentence imposed for his violation of probation in the 2008 case be reduced to the five-year sentence "contemplated by the original plea offer."

A three-judge review panel was appointed in May 2019. On June 18, 2019, the State filed a motion opposing reconsideration of appellant's sentence, alleging that the sentence was "reasonable in light of the facts," and the sentencing court properly "took into consideration all relevant factors in crafting an appropriate sentence."

With respect to appellant's contention that he did not receive the plea deal "in a timely manner," the State argued that appellant did not provide support for this contention. It asserted that the offer was sent to appellant on September 6, 2011, with the offer to expire either two weeks prior to trial (i.e., October 5, 2011) or if appellant litigated motions. Appellant did not accept the offer by the stated deadline, and he instead chose to litigate various pre-trial motions. The State argued that, once those motions were denied and the jury was selected, appellant "change[d] his mind."

On August 26, 2019, the three-judge review panel denied appellant's Application for Review of Sentence without a hearing. In a written order, the review panel stated as follows:

> A trial judge has very broad discretion in sentencing. *Jones v. State*, 414 Md. 686, 693 (2010). Nonetheless, the trial judge should tailor the criminal sentence to fit the facts and circumstances of the crime committed and the background of the defendant. *Id.* Only three grounds for appellate review of sentences are recognized in Maryland: (1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice, or other impermissible considerations; and (3) whether the sentence is within statutory limits. *Id.* The Panel may not set aside factual

findings of the trial court unless clearly erroneous, or disturb the trial judge's discretionary rulings absent a finding of abuse of discretion. *Langston v. Langston*, 135 Md. App. 203 (2000).

* * *

Defendant's review of sentence is not supported by any of the grounds recognized in Maryland for appellate review. Defendant does not argue that the sentence violates any constitutional requirements, that the sentencing judge was motivated by impermissible considerations, or that the sentence exceeds the statutory limits. However, Defendant did allege that he did not receive the State's global plea offer in a timely manner, which resulted in him not being able to accept it. The plea offer in case CT11-0739X, was sent to Defendant on September 6, 2011, and was set to expire either two weeks prior to trial or if Defendant litigated motions. Defendant did not timely accept the offer, and instead litigated four motions. Defendant's contention that the plea offer was untimely, is thus, unsupported and inaccurate. The Court also notes[] that Defendant's contention that he pled guilty to the guideline sentence without any agreement, as a result of the untimely plea offer, is also unsupported and inaccurate. Rather, the trial judge found Defendant guilty following a bench trial on a stipulated statement of facts. Furthermore, Defendant's argument of an untimely plea offer is not an argument that is supported by any of the three grounds recognized in Maryland for appellate review.

Defendant's arguments are insufficient to allow for a review of his sentence, as they are not supported by any grounds recognized in Maryland for appellate review.

This appeal followed.

DISCUSSION

Appellant contends that the "sentence review panel erred or failed to properly exercise discretion in ruling on [his] request for review of his sentence." Acknowledging that appellate review of a decision by a sentence review panel is limited, he asserts that it is permitted when the review panel does not conduct the requested review of the sentence. Here, he argues that, because the review panel utilized an incorrect legal standard, it denied

him "the review of sentence to which he was entitled." He requests that this Court consider his appeal and remand to the circuit court to resubmit the application for review of sentence.

Alternatively, appellant argues that, if this Court determines that the review panel did conduct a review, the review panel abused its discretion because it applied the incorrect legal standard, i.e., the standard for direct appeal, as opposed to the standard for review of a sentence by a three-judge review panel. As a result, he asserts that the review panel failed to consider the necessary factors. Appellant requests that this Court reverse the review panel's judgment and remand for appointment of a new review panel to review his sentence.

The State contends that this Court has jurisdiction to consider only appellant's contention that the sentencing review panel "unlawfully declined to review his sentence altogether." It argues that we should reject this claim because the review panel's order shows that it considered appellant's claims on the merits and rejected them. Nevertheless, it argues that, even if this Court determines that it is appropriate to consider whether the review panel abused its discretion, we should reject that claim. The State argues that the review panel properly exercised its discretion by "specifically addressing and rejecting on the merits some of [appellant's] claims, and in implicitly considering and rejecting [appellant's] other claims."

Maryland Code Ann., Crim. Pro. Article ("CP") § 8-102(a) (2018 Repl. Vol.), governs the right to review of a sentence. It provides, with limited exceptions not applicable here, that "a person convicted of a crime by a circuit court and sentenced to serve a sentence that exceeds 2 years in a correctional facility is entitled to a single sentence

review by a review panel." *See* Md. Rule 4-344 (An application for a review of sentence should be filed within 30 days of imposition of sentence.).

CP § 8-105(c)(3) provides as follows:

(3) A review panel:

> (i) with or without a hearing, may decide that the sentence under review should remain unchanged; or
>
> (ii) after a hearing, may order a different sentence to be imposed or served, including:
>
> 1. an increased sentence;
>
> 2. subject to § 8-107(c) of this subtitle, a decreased sentence;
>
> 3. a suspended sentence to be served wholly or partly; or
>
> 4. a sentence to be suspended with or without probation.

In Maryland, the right to seek appellate review is statutory, and the Maryland General Assembly may provide for or preclude the right of appeal. *See State v. Manck*, 385 Md. 581, 596 (2005) ("[Q]uestions of appealability have today become entirely governed by statutes." (quoting *State v. Green*, 367 Md. 61, 77 (2001)). Maryland Code Ann., Cts. & Jud. Pro. Article ("CJ") § 12-301 sets forth the general rule regarding appealability, as follows:

> Except as provided in § 12-302 of this subtitle, a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law. In a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended. . . .

This Court initially held that a decision of a sentencing review panel was not appealable on the ground that such a decision did not constitute a final judgment by a court. *Glass v. State*, 24 Md. App. 76, 79 (1974). *Accord State v. Ward*, 31 Md. App. 68, 71–72 (1976). This Court subsequently explained that this was not "entirely accurate," explaining:

> [W]here the panel merely confirms the existing sentence, the relevant inquiry ordinarily is into that sentence and the procedure leading to its initial imposition. The sentence either violates Constitutional or statutory requirements or it does not; the trial judge who imposed the sentence acted properly and complied with mandatory procedure or did not. Challenging what occurred before the review panel usually adds nothing of real substance. Where the panel *increases* the sentence, however, the focus is necessarily and quite properly on what occurred before the panel. *Its* sentence, not that initially imposed by the trial judge, is what must pass muster, because that is the effective sentence in the case. *That* is the sentence that must be within Constitutional and statutory limits; it is that proceeding that must comport with required procedure; it is the *panel* then that must be free of "ill will, prejudice or other impermissible considerations." *Teasley*, *supra*, at 370, 470 A.2d 337.
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> Viewed in this light, it is apparent that some of the legal underpinning of *Glass* and *Ward* is not entirely accurate and that the actual holdings in those cases cannot control the situation now before us. In particular, where, as here, the review panel effectively increases the sentence imposed (or directed to be executed) by the trial judge, the notion that the panel does not constitute a "court" or that its order does not constitute a "judgment" simply does not comport with either logic or reality. It is, and must be, a court. Only a court can sentence a convicted criminal to jail. That is peculiarly a judicial function (see *Ex Parte United States*, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916)) which, in this instance, is committed to the Circuit Court.

Rendelman v. State, 73 Md. App. 329, 335–36 (1987), *cert. granted*, 312 Md. 196, *appeal dismissed*, 313 Md. 610 (1988). "The decision of the panel, to the extent that it changes the sentence, is the decision of the court; indeed, by finally concluding the rights of the parties at that level, it is the final judgment of the court." *Id.* at 336.

In 1989, the General Assembly enacted CJ § 12-302(f). 1989 Md. Laws, Ch. 584. It provides:

> (f) Section 12-301 of this subtitle does not permit an appeal from the order of a sentence review panel of a circuit court under Title 8 of the Criminal Procedure Article, unless the panel increases the sentence.

CJ § 12-302(f).

Although this statute permits an appeal only when, *after review*, the review panel increases a sentence, the Court of Appeals has held that, where a review panel *refuses to review* the sentence, the order foreclosing review is a final and appealable order pursuant to CJ § 12-301. *Collins v. State*, 326 Md. 423, 431–32 (1992). In *Collins*, as in this case, the defendant received a split sentence, and when he subsequently violated his probation by committing another crime, the court revoked probation and re-imposed the part of the initial sentence that had been suspended. *Id.* at 428–29. Collins filed an application for review of sentence. *Id.* at 429. An administrative judge denied the application, concluding that it was untimely because it was not filed within 30 days of the date on which Collins was originally sentenced. *Id.* The Court of Appeals held that this order was an appealable final order because "the order foreclosed Collins's absolute right to review." *Id.* at 431 (citing *Collins v. State*, 321 Md. 103, 110 (1990)). The Court went on to hold that the application was timely because it was filed within 30 days of the re-imposition of his sentence, and it "should have been submitted to a panel for review." *Id.* at 427, 430 (quoting *Collins*, 321 Md. at 110).

On remand, a three-judge review panel concluded that Collins' original sentence should not be modified, limiting its review to the "appropriateness of the original sentence

imposed," as opposed to the "reimposition of the previously suspended sentence." *Id.* at 430–31. Collins again appealed, and the State moved to dismiss the appeal. *Id.* at 431. It argued that, pursuant to CJ § 12-302(f), because the review panel did not increase Collins' sentence, the Court did not have jurisdiction to review the panel's decision. *Id.* The Court of Appeals disagreed, stating that Collins' argument was not that he was dissatisfied with the review panel's decision that the original sentence was proper, but rather, he was deprived of a review of the sentence imposed on him after he was found to have violated probation. *Id.* The Court held that the review panel's refusal to perform its duty to provide the requisite review of the decision deprived Collins of his right to review, and therefore, it was a final appealable order. *Id.* at 432. The Court remanded the case to the circuit court to vacate the order of the review panel and resubmit the application for consideration. *Id.* at 434.

Appellant contends that, similar to *Collins*, the review panel did not actually review the sentence imposed by the trial judge, but instead, it ruled that he did not raise claims that permitted review. We agree.

As indicated, the review panel's order stated that "[o]nly three grounds for *appellate review* of sentences are recognized in Maryland: (1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice, or other impermissible considerations; and (3) whether the sentence is within statutory limits." (Emphasis added.) This is the standard for appellate court review of a sentence on direct appeal. *See Jones v. State*, 414 Md. 686, 693 (2010). It is not, however, the standard by which a three-judge

review panel in the circuit court reviews an application for review of a sentence. As this Court explained in *Raley v. State*, 32 Md. App. 515, 528 n.2, *cert. denied*, 278 Md. 731 (1976), *cert. denied*, 431 U.S. 965 (1977), a review panel addressing a sentence does not have the same limited scope of review as an appellate court. "To modify a sentence, the review panel need not find that the sentencing judge abused his discretion, only that it does not agree that the sentence was appropriate under all the circumstances, including the accused's background and prior criminal record." *Id.*

Here, although the review panel discussed some of the claims and stated that the claims were "unsupported and inaccurate," the review panel did not discuss all of appellant's asserted grounds in support of a reduction in sentence, including his argument about his background and his claim that the sentence was unnecessarily harsh. The review panel's ultimate conclusion was that appellant's "arguments are insufficient *to allow for a review of his sentence*, as they are not supported by any of the grounds recognized in *Maryland for appellate review*." (Emphasis added.)

By the plain language of the order, the review panel made clear that the panel was refusing to review appellant's sentence. Accordingly, the order is appealable, and we vacate the judgment and remand for a new consideration of the application for review of sentence.[2]

[2] Appellant asks for appointment of a new three-judge review panel, but he provides no reason why that is necessary. We decline to require that a new review panel be appointed, but that does not preclude appellant from making that request in the circuit court.

JUDGMENT VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY TO RESUBMIT THE APPLICATION FOR REVIEW OF SENTENCE FOR CONSIDERATION IN LIGHT OF THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.