UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0411

September Term, 2015

KENNETH RUSH

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: February 16, 2016

*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.

Appellant, Kenneth Rush, was tried and convicted by a jury in the Circuit Court for Baltimore City, of possession of heroin and attempted distribution of heroin. He was sentenced to fifteen years in prison, all but eight years suspended and he was placed on probation for three years, beginning with his release from prison. The count charging possession of heroin was merged. From the conviction and sentence, appellant filed the instant appeal, raising the following questions:

> 1. Did testimony that the man to whom appellant allegedly distributed heroin was "his co-defendant in another case" constitute plain error?
>
> 2. Did the trial court err when it sentenced appellant to eight years in prison based on the erroneous belief that a sentence of over six years in prison was required for the Patuxent Institution Youth Program?

FACTS AND BACKGROUND

Baltimore City Police Department patrolman, Gabriel Rimolo ("Officer Rimolo"), was qualified as an expert in "identification of street level CDS narcotics" and "distribution as well as the packaging of street level narcotics." Officer Rimolo testified that, on December 21, 2014, while at a "covert location" in the 1600 block of West North Avenue, he saw appellant standing on the sidewalk. Officer Rimolo testified that the distance between himself and appellant was equal to the distance of the inside of the courtroom. He further testified that he has 20/20 vision and that he had a "clear and unobstructed" view of appellant. According to Officer Rimolo, he saw appellant reach into his pocket and retrieve something. Based on his experience and expertise, Officer Rimolo suspected that it was heroin. Appellant quickly looked at the suspected heroin and put it back into his pocket. A

man, who was later identified as Brandon Peyton, approached appellant from the other side of the street. After they engaged in a brief conversation, the two men walked for a short distance beyond which Officer Rimolo was unable to hear the conversation. Officer Rimolo testified that appellant then handed Peyton the suspected heroin, but no money was exchanged between them.

After Peyton received the suspected heroin, according to Officer Remolo, he put the suspected heroin in his sock, whereupon Officer Rimolo directed his "arrest team" to approach the scene and place Peyton under arrest. Officer Rimolo did not instruct the arresting officers regarding appellant. Peyton ran into an alley when the uniformed officers arrived in marked patrol cars. Although Officer Rimolo and the officer chasing Peyton briefly lost sight of him, appellant was quickly apprehended. Once the arrest team apprehended Peyton, they were instructed, by Officer Rimolo, *via* radio, to search Peyton's left sock, where they found six gel caps containing heroin.

Appellant remained near the scene as the uniformed officers pursued Peyton. Appellant then walked toward where Peyton had been arrested and the arrest team placed appellant under arrest, pursuant to Officer Rimolo’s instructions. A search of appellant yielded thirty four dollars; however, the arrest team recovered no drugs or paraphernalia from appellant.

At trial, Officer Rimolo testified, on direct examination, that Peyton was appellant's "co-defendant in another case." The following colloquy occurred during direct examination of Officer Rimolo:

> Q: After you observed [appellant] pull drugs out of his pocket, what did you see him do?"
>
> A: At first, when I observed him he pulled it out of his pocket, appeared to be looking at it for a quick moment and then place it back in his pocket and then I observed another male, *I can say his co-defendant in another case*, he approached Mr. Rush, our defendant here from the even side of- from the odd side of the street. He was—the other defendant was on the south side of the street. Mr. Rush was on the north side of the street. They — the one from the south side of the street came to the north side. They — Mr. Rush and the other defendant engaged in a conversation and then they both walked over to the south side of the street at which time I observed Mr. Rush hand over the suspected CDS to the other defendant.

(Emphasis added). Appellant's counsel did not object to the testimony or to the introduction of other crimes evidence.

At sentencing, appellant's attorney noted that Peyton received just two years' probation and argued that appellant was no more culpable than he was. The State requested a sentence of fifteen years with all but five years suspended. The trial court, however, imposed a sentence of fifteen years with all but eight suspended. The court stated that it was imposing an eight-year prison term because it wanted appellant to be placed in the Patuxent Institution Youth Program ("Youth Program"), and it believed a term of at least six years was required:

> THE COURT: . . . I'm going to strongly recommend — and I'll put it on the commitment, the Youthful Offender's Program at Patuxent Institution. I will say this to you, [appellant's counsel], if he's not accepted to the Youthful Offender's Program, I will modify his sentence. *But he's got to have at least a six year sentence to get the*

> *benefit of the Patuxent Program* . . . [a]nd at the Patuxent Institution they have their own parole system, but he's got to have at least a sentence of six years before they'll consider him . . . .

(Emphasis added).

In addition to the fifteen year sentence of incarceration with all but eight years suspended, the Circuit Court also sentenced appellant to three years of probation after his release from incarceration. Appellant did not object to the sentence. On the Commitment Record, dated April 3, 2015, the date of birth for appellant is listed as January 21, 1994, indicating that appellant was twenty-one years and two months old at the time of sentencing.

On July 30, 2015, the court held a hearing regarding a motion to modify the sentence. At the hearing, appellant represented that he was still awaiting a decision regarding his entry into the Youth Program. The trial judge stated that he would not deny the motion outright, but reduced appellant's original sentence by 60-days so he could retain the case. The trial judge stated that he wanted appellant to return after a decision was made regarding his entry into the Youth Program. If he was ineligible, the trial judge repeated that he would modify appellant's sentence.

STANDARD OF REVIEW

"Where a trial court's determination requires the interpretation and application of Maryland's constitutional, statutory or case law, we must determine whether the trial court's legal conclusions are correct utilizing a *de novo* standard of review." *Pitts v. State*, 205 Md. App. 477, 486 (2012).

"Whether the circuit court correctly interpreted and applied the relevant sentencing statute is a question of law, which we shall review *de novo*." *Williams v. State*, 220 Md. App. 27, 32 (2014). *See Bonilla v. State*, 443 Md. 1, 6 (2015) ("We review the legal issue of the sentencing . . . as a matter of law.").

DISCUSSION

I. OFFICER RIMOLO'S TESTIMONY

Appellant asserts that Officer Rimolo's testimony was inadmissible "other crimes" evidence under Maryland Rule 5-404(b). Although appellant concedes that his trial counsel failed to object, he nevertheless contends that this Court should "consider the improper testimony as plain error." According to appellant, it cannot be deemed harmless beyond a reasonable doubt, and reversal is required.

The State responds that appellant's trial counsel never lodged an objection to the testimony of Officer Gabriel Rimolo regarding appellant's "co-defendant in another case," and any objection is, therefore, unpreserved. Furthermore, the State argues that the trial court did not err when it refrained from ruling on the admissibility of the testimony, *sua sponte*. The State further urges that, if the trial court's lack of intervention constitutes error, then it is not plain error—neither plain nor material to the outcome of the trial. Although the State does not expressly refute that Officer Rimolo's testimony constituted "other crimes" evidence, it argues that any prejudicial effect against appellant was "significantly

diminished" by the lack of detail concerning the other crime and the mandate of general jury instructions.

Md. Rule 4–323(a) provides, in pertinent part:

> An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.

Furthermore, Maryland case law expressly supports the requirement of an objection at the trial level in order to preserve the issue for appellate review.

> Support for the principles expounded in Md. Rule 4–323 can be found in *Leuschner v. State*, 41 Md. App. 423, 436 (1979) (holding that "[i]t is axiomatic that to preserve an issue for appeal some objection must be made or a party will be deemed to have waived an objection"); *Gaylord* [*v. State*, 2 Md. App 571, 575 (1967)] (declaring that "a defendant in a criminal prosecution cannot raise for the first time on appeal an objection which was available to him at the trial level and which he did not raise below"); *Caviness v. State*, 244 Md. 575, 578 (1966) (observing that "unless a defendant makes timely objections in the lower court or makes his feelings known to that court, he will be considered to have waived them and he can not now raise such objections on appeal"); *Davis v. State*, 189 Md. 269, 273 (1947) ("[S]ome objection [must] be made and . . . the court [must] rule upon the question. In the absence of such a ruling there is nothing for the [appellate court] to review.").

Conyers v. State, 354 Md. 132, 149–50 (1999).

Pursuant to Md. Rule 8–13l(a), appellate courts "ordinarily" will not address any issue unaddressed by the trial court. However, the term "ordinarily" "does grant an appellate court discretion, under some circumstances, to consider and decide questions not raised in the trial." *Richmond v. State*, 330 Md. 223, 235 (1993) (citation omitted), abrogated on other

grounds by *Christian v. State*, 405 Md. 306 (2008). One such circumstance is plain-error review.

> Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which 'vitally affect [] a defendant's right to a fair and impartial trial.' *Diggs v. State*, 409 Md. 260, 286 (2009) (internal quotation marks and citation omitted); *see also Morris v. State*, 153 Md. App. 480, 507 (2003). As Judge Wilner explained in *Chaney v. State*, 397 Md. 460 [, 468] (2007), plain error review
>
>> is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judiciary efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.
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> The Supreme Court summarized the plain error review process in *Puckett v. United State*, 556 U.S. 129, 135 (2009):
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>> [P]lain-error review involves four steps, or prongs. First, there must be an error or defect—some sort of [d]eviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, 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 [court] proceedings. Fourth and finally, of the above three prongs are satisfied, the [appellate court] 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. Meeting all four prongs is difficult, as it should be.
>
> The *Puckett* formulation has been expressly adopted by the Court of Appeals. *See State v. Rich*, 415 Md. 567, 578–79 (2010); *see also Kelly v. State*, 195 Md. App. 403,

> 432 (2010), *cert. denied*, 471 Md. 502, *cert. denied sub nom*. *Kelly v. Maryland*, 131 S.Ct. 2119 (2011).

McCree v. State, 214 Md. App. 238, 271–72 (2013) (citations and quotations omitted).

The Court of Appeals has explained the circumstances required for the exercise of plain error.

> We have characterized instances when an appellate court should take cognizance of unobjected to error as *compelling, extraordinary, exceptional or fundamental* to assure the defendant a fair trial. We further made clear that we would intervene in those circumstances *only when the error complained of was so material to the rights of the accused* as to amount to the kind of prejudice which precluded an impartial trial.

Collins v. State, 164 Md. App. 582, 603 (2005) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)) (citing *Trimble v. State*, 300 Md. 387, 397 (1984)).

Additionally, the Court of Appeals clearly outlined a trial court's role in managing the admission of evidence while maintaining the integrity of the adversarial process.

> When the court assumes the role of a party by ruling on the admissibility of evidence in the absence of appropriate objections, the court departs from the adversarial nature of our system where [a party], not the court, bears the burden of objecting to the testimony offered by the opposing party. Should [a party] fail to object, otherwise inadmissible evidence sometimes may be admitted to the detriment of its case because . . . such a failure to object is considered a waiver. This is not to say that [a party] will be allowed to present properly objected to testimony that violates the rules of evidence or procedure. It merely requires that exclusion take place at the appropriate time and in the appropriate manner. The responsibility of the trial court to control the proceedings before it *does not extend to the right to take over a party's case*. When that occurs . . . the court risks denying to a defendant the fair trial guaranteed to him by both the United States Constitution and Maryland's Constitution.

Kelly v. State, 392 Md. 511, 542–43 (2006) (Emphasis added).

In the case *sub judice*, we are asked to examine if one, unsolicited statement made by Officer Rimolo during his testimony, constituted an error that was so compelling, extraordinary, exceptional or fundamental as to deny the defendant a fair trial. We conclude that it does not.

The first prong of plain-error review, *i.e.*, whether there is an unintended defect or departure from a legal rule, is not met here. Although appellant concedes that his trial counsel did not object to the testimonial statement, he avers, nonetheless, that the trial court erred when it admitted the statement. We underscore that the evidence was uncontested at its admission. Essentially, appellant alleges that the trial court's error was its lack of intervention into the adversarial process. As stated, *supra*, it is not the proper role for a trial court to intervene into the case by ruling on the admissibility of evidence in the absence of an objection. Although appellant argues to the contrary, such judicial interventions would jeopardize the defendant's right to a fair trial.

Furthermore, there is no way for the trial court to know the defense counsel's strategy. Often, counsel fails to object for a strategic purpose. *See Oken v. State*, 343 Md. 256, 294 (1996) ("[Defense] counsel testified that his reasons for not objecting to the prosecutor's comments were tactical . . . he chose not to highlight the comments . . . ."). In the instant case, assuming, *arguendo*, that appellant's counsel had not objected to Officer Rimolo's statement for a tactical purpose and the trial court *had* ruled the evidence inadmissible, the court would have interfered in appellant's case and his right to a fair trial. This is precisely

why the onus is upon the party to affirmatively preserve those issues which he or she wishes this Court to review and not upon the trial court to guess at counsel's trial strategy.

Assuming, *arguendo*, that the trial court's lack of intervention into appellant's case does constitute an error, the remaining prongs of plain-error review are not met. The legal error is not clear or obvious. It is reasonably disputable, as we discussed *supra*, that the trial court does not have a duty rule on the admissibility of evidence absent an objection. The error was not material, *i.e.*, the trial court's lack of intervention did not affect appellant's substantial rights or the outcome of the proceedings. One unsolicitated statement made by Officer Rimolo did not affect appellant's substantial rights or the outcome of the proceedings. This Court has noted, albeit in a *harmless error* analysis, that "[o]ne factor that an appellate court considers, in determining whether the admission of inadmissible evidence was harmless error, is 'the use the State made' of the inadmissible evidence." *Yates v. State*, 202 Md. App. 700, 711 (2011) (quoting *Harrod v. State*, 423 Md. 24, 40 (2011)). In the instant case, the State did not introduce or rely upon the evidence at all. Furthermore, the general jury instructions, issued before deliberation, instructed the jury regarding the presumption of innocence. *See Dorsey v. State*, 185 Md. App. 82, 110 n.8 (2009) (noting the presumption that, unless proven otherwise, the jury will follow instructions). Finally, there is no precedent or authority that this Court must employ its discretion to use plain-error review to remedy an error that "seriously affect[s] the fairness, integrity or public reputation

of [the] judicial proceedings." *Puckett*, 556 U.S. at 135 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936) (citing *United States v. Olano*, 507 U.S. 725, 736 (1993).

For the foregoing reasons and in consideration of the overarching mandate that plain-error review be invoked only in the rarest of circumstances, we decline to review the unpreserved issue under plain-error review.[1]

II. SENTENCING

Appellant argues that the trial court based appellant's sentence of fifteen years in prison, with all but eight years suspended, on an erroneous belief that, for a defendant to be eligible for the Youth Program, he must receive a sentence of at least six years in prison. The court's error, appellant argues, constituted an abuse of its discretion because the sentence failed to recognize the full discretion of the court. Appellant also contends that the issue is preserved for review, despite the lack of objection at trial, because the Circuit Court effectively "decided" the issue, under Md. Rule 8–131(a), by repeatedly invoking the incorrect eligibility criteria during the sentencing colloquy. Appellant concedes, however,

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[1] Appellant, promulgates the following in a footnote in his appellate brief submitted to this Court:

> In the event this Court declines to consider this claim because defense counsel failed to object to the improper testimony, Appellant reserves the right to raise ineffective assistance of counsel on collateral review.

While we do not deem this prognostication to be a concession by counsel, it certainly is a recognition by counsel as to what may well be the more appropriate avenue to seek redress for his client.

that one of the requirements for the Youth Program is that an individual is under the age of twenty-one years and appellant was twenty-one years and two months old at the time of sentencing, thereby rendering him ineligibility for the Youth Program, notwithstanding the length of his sentence. Appellant maintains, however, that this does not impact his argument that the trial court erred in imposing a lengthy sentence based on its misinterpretation of the requirements of a sentencing statute.

Although the State concedes that the court was mistaken in its belief that the Youth Program required a minimum six year prison sentence, the State argues, however, that this issue is unpreserved and moot. The State notes that the original fifteen year sentence was imposed at the sentencing hearing on April 2, 2015 but, at the hearing, the court indicated that it would modify appellant's sentence if he was not accepted to the Youth Program. On July 30, 2015, the State notes, the Circuit Court heard and granted a motion to modify the sentence. Accordingly, the State argues, the original sentence that is the object of this appeal no longer exists and, since appellant raises no claim in relation to the modified sentence, the issue is moot.

In a reply brief received by this Court on January 5, 2016, appellant's counsel avers, "as an officer of this Court, that the sentence has *not* been modified." (Emphasis added). Appellant's counsel further represents that he has spoken with both appellant and trial counsel and that, "although [a]ppellant filed a motion for modification of sentence, the sentence has not been changed." (Appellant's reply brief remains silent regarding the status

of the motion.) Accordingly, appellant contends, the issue is not moot and this Court should address it.

Md. Rule 8–131(a) states, in pertinent part:

> . . . Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

The term, "issue," as referenced in Md. Rule 8–131(a), "is a point in dispute between two or more parties . . . [a]lternatively, an issue may be a concern or problem or the point at which an unsettled matter is ready for a decision." *Ray v. State*, 435 Md. 1, 20 (2013) (quotation and citation omitted). The term, "decide," as it pertains to Md. Rule 4–252 ("Motions in Circuit Court"), "means to make a final choice or judgment about; to select as a course of action; or to infer on the basis of evidence. The term implies previous consideration of a matter causing doubt, wavering, debate, or controversy." *Id.* at 21–22 (quotation and citation omitted).

The State maintains that the issue is unpreserved for our review. We agree. Appellant concedes that he did not object to the sentence. Furthermore, appellant's argument that the issue is preserved because it was "decided by" the sentencing court is unsupported by law. The Circuit Court did not decide any issue during the sentencing hearing. The sentencing requirement that the court asserted for eligibility for the Youth Program was incorrect. The State asserts, "[i]f this were enough to 'decide' an 'issue' under Rule 8–131(a), the

preservation requirement would be largely meaningless as nearly every statement by the court would 'decide' an issue.'" We agree and therefore hold that this issue was not preserved for our review.

Assuming, *arguendo*, that the issue was preserved for appeal, the issue is now moot. Md. Code Ann, Corr. Servs., § 4–401 states in pertinent part:

> (a) In this section,"Youth Program" means the Patuxent Institution Youth Program.
>
> (b) There is a Patuxent Institution Youth Program.
>
> (c) This section applies to an individual under the age of 21 years who is sentenced to a term of imprisonment of 3 years or more.

"Ordinarily, in order for a case to be heard and an appellate court to provide a remedy, there must be an existing controversy. If no existing controversy is present, the case is moot and an appellate court ordinarily will not consider the case on its merits." *Office of Public Defender v. State*, 413 Md. 411, 422 (2010) (citations omitted). "While it is true that mootness may obviate a review of an issue by this Court, mootness prevents our review only when 'the court can no longer fashion an effective remedy.'" *Hawkes v. State*, 433 Md. 105, 130 (2013) (quoting *In re Kaela C.*, 394 Md. 432, 452 (2006)) (citations omitted). We may dismiss an action, *sua sponte*, once it has become moot. Md. Rules § 8–602(a)(10).

In the case *sub judice*, assuming *arguendo,* that the issue is preserved, which we stated earlier that it is not, it is moot and should therefore be dismissed. Appellant concedes that he was at least twenty-one years old at the time of sentencing, rendering him ineligible for the

Youth Program regardless of the length of the sentence. According to the Circuit Court, if appellant was not eligible for the Youth Program, the sentence was to be modified. A sentence modification actually occurred pursuant to a motion before the court on July 30, 2015, thereby supplanting the original sentence. Since appellant did not raise an issue relating to the modified sentence, which would have inevitably occurred because appellant was never eligible for the Youth Program, appellant seeks our review of a controversy that does not exist, *i.e.*, the original, unmodified sentence.

Although appellant maintains, in his reply brief, that the original sentence has not been modified, this Court has procured the transcript for the July 30, 2015 hearing, which was made part of the record on January 14, 2016, and the sentence was indeed modified, *i.e.*, a 60-day reduction. The trial judge expressly stated that, although he would not deny the motion to modify the sentence outright, he wished to retain the case in order that he might consider a "*further* modification" of the sentence if appellant was ineligible for the Youth Program. (Emphasis added). At the time of the July 30th hearing, appellant was still awaiting entry into the Youth Program and the trial judge wanted appellant to reappear before him after a decision was made regarding his entry into the Youth Program.[2] Furthermore,

[2] At the July 30, 2015 hearing, the court was still unaware that appellant was ineligible for the Youth Program because of his age at the time of the original sentencing, *i.e.,* over the statutory age limit of twenty-one years. The record, as it has been submitted to this Court, makes no reference to any subsequent modification hearings and neither briefs for appellant or appellee reference any such additional sentence modification hearings. We are left to conclude that none occurred.

appellant made no objection regarding the original sentence or the sentence modification at the July 30, 2015 hearing.

In light of the facts that the issue is unpreserved and moot, appellant's argument concerning the Circuit Court's error and potential abuse of discretion, accordingly, fails. The Court of Appeals has stated that it is "well settled that only three grounds for appellate review of sentences are recognized in this State":

> (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.

Jackson v. State, 364 Md. 192, 200 (2001) (citations omitted). None of these grounds are at issue in the instant case.

Furthermore, appellant urges that we exercise our discretion to engage in plain error review. As stated, *supra*, we engage in plain error review only when errors are compelling, extraordinary, exceptional or fundamental, thereby denying the defendant a fair trial. *Yates*, 429 Md. at 130–31. "There is no fixed formula for the determination of when discretion should be exercised, and there are no bright line rules to conclude that discretion has been abused." *Id.* at 131 (quoting *Garrett v. State*, 394 Md. 217, 224 (2006).

Citing *Abdul-Maleek v. State*, 426 Md. 59 (2012), appellant argues that neither party would be greatly prejudiced by a remand of the case for resentencing, to support his assertion

that a primary concern in deciding whether to consider an issue raised as plain error is whether doing so "will work unfair prejudice to either party." *Id.* at 70.

This, however, is only a partial statement of the Court's reasoning in *Abdul-Maleek*:

> In the matter *sub judice* we see no prejudice to either party should we consider this issue. There is, of course, no prejudice to Petitioner, as he has sought and been granted review of his claim of error. *See Bible* [*v. State*, 411 Md. 138, 152 (2009] . . . . And there is only *de minimis* prejudice to the State, as our review would not broach the underlying judgment of conviction but rather would be confined to resentencing, at which the same sentence could be imposed, based on proper considerations. Moreover, by addressing the issue presented, we are able to comment on the sentencing issue in the context of *de novo* appeals and thereby promote the "orderly administration of justice." *See id.*. . . . We therefore choose to exercise our discretion to consider the merits of Petitioner's claim.

Id. Unlike *Abdul-Maleek*, in the instant case, there is no indication that the "orderly administration of justice" is at stake or that we must invoke our discretion to review the sentence under plain-error review because of a compelling, extraordinary, exceptional or fundamental error. Accordingly, we decline to exercise our discretion to engage in plain error review of this issue.

CONCLUSION

For the foregoing reasons, we hold that Officer Rimolo's testimony did not constitute plain error and that, although the trial court erred in its interpretation of the sentencing requirements of the Youth Program, the error was harmless because appellant's age at the time of sentencing disqualified him from the Youth Program. Furthermore, the issue is now moot after the original sentence has been modified with a 60-day reduction. As appellant is

ineligible for the Youth Program and authority for the trial judge to rule on the motion for sentence modification has been retained, appellant should, on remand, seek a ruling by the Circuit Court on the motion.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.