UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2003

September Term, 2014

JERMAINE C. CAMPER

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Graeff, J.

Filed: June 3, 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.

After a bench trial in the Circuit Court for Talbot County, appellant was convicted of distribution and possession of crack cocaine, as well as illegally possessing ammunition for a regulated firearm. The court sentenced appellant on the distribution offense, as a subsequent offender under Md. Code (2012 Repl. Vol.) § 5-608(c) of the Criminal Law Article ("CR"), to the mandatory minimum term of twenty five years without the possibility of parole.[1]

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

1. Was the evidence insufficient to convict appellant of distribution or possession of cocaine?

2. Is a sentence of twenty-five years in prison without the possibility of parole a violation of both the United States and Maryland Constitutions when, even in the light most favorable to the State, the evidence showed less than .1 grams of cocaine being distributed, and appellant's two prior convictions were three years and twenty-one years, respectively, before the instant conviction?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

At trial, the State presented evidence that a police officer witnessed appellant deliver crack cocaine to an acquaintance. On February 13, 2014, at 6:50 p.m., Officer S. Tindall,

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[1] Appellant was sentenced to a concurrent term of one year on the ammunition charge; he does not challenge that conviction or sentence. The possession conviction was merged for sentencing purposes.

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a member of the Easton Police Department, was patrolling in an unmarked pickup truck in an area of Easton known as an "open air drug market." Appellant walked into the street, approximately ten to fifteen feet in front of Officer Tindall's truck, which required the officer to brake to avoid hitting appellant. Appellant continued walking toward an individual the officer recognized as Ricky Hammerbacher, who was standing against a fence. Mr. Hammerbacher "put his hand out, palm facing up," and appellant then "place[d] some white rocks into the palm of Ricky Hammerbacher's hand."

Officer Tindall got out of his truck, about six or seven feet away from appellant. As the officer approached the two men, Mr. Hammerbacher made "eye contact" with Officer Tindall and immediately threw the rocks "up in the air." They landed on the sidewalk approximately two feet away. Officer Tindall handcuffed both appellant and Mr. Hammerbacher, and he then picked up the rocks, which were not in any packaging. Forensic testing of the recovered rocks established that they were cocaine, weighing a total of .09 grams.

Prior to booking, appellant stated, without any questioning: "[Y]ou got us without a doubt. He already got served and I was just breaking a piece off for myself. I got a nickel and gave the rest to him." A "nickel" of crack cocaine is worth five dollars.

Neither appellant nor Mr. Hammerbacher had any money. Appellant did not have any drugs on his person.

While conducting a post-arrest search at the Talbot County Department of Corrections, Sergeant Steven Craig found, loose in the pocket of appellant's coat, four unfired .25 caliber bullets. These bullets were for a semiautomatic pistol, a regulated firearm.

Mr. Hammerbacher testified for the defense. On the day of this arrest, Mr. Hammerbacher expected to meet Kilmer, who owed him money, but Kilmer never showed up. As Officer Tindall arrived on the scene, appellant approached Mr. Hammerbacher and said that Kilmer had left the area. Appellant had Kilmer's phone number written on a white piece of paper, and he was about to hand it to Mr. Hammerbacher when Officer Tindall approached them. As the two men were detained, the piece of paper fell to the ground. Mr. Hammerbacher asked the officer to pick it up, but the officer did not do so. Mr. Hammerbacher testified that he gave the same account in his own trial, which resulted in a conviction for cocaine possession.

Appellant testified that, on the evening in question, he was on his way home when he saw Mr. Hammerbacher, whom he had met two months earlier. Appellant knew that Mr. Hammerbacher was trying to get in touch with "Kenneth," whose phone number appellant had obtained. It was written on a white piece of paper that was in his pants pocket. As appellant crossed the street, he saw "the officer coming up" the street, so he hurried across to give the number to Mr. Hammerbacher. Before appellant had the chance

to actually hand the paper to Mr. Hammberbacher, the officer "jump[ed] out" and said Mr. Hammerbacher had thrown something.

With respect to the bullets, appellant stated that he found them while working at a farm that was leased to hunters, who sometimes carry pistols. Appellant picked up a bag with the bullets in it from the ground and forgot they were still in his pocket.

The trial court found appellant guilty of possession and distribution of the crack cocaine recovered by Officer Tindall, finding the officer's testimony credible and the defense witnesses contradictory and not credible. Rejecting appellant's claim that the officer saw him delivering a piece of paper, the court determined that "what the officer saw happen is what happened." After finding that appellant had two predicate drug convictions, the court concluded that it was required to sentence appellant to the mandatory minimum term of twenty five years without the possibility of parole, under CR § 5-608(c).

DISCUSSION

I.

Sufficiency Challenge

Appellant contends that the evidence was insufficient to convict him of possession and distribution of cocaine. In support, he argues that

> neither man was in possession of a single cent, the amount in total was less than .1 grams and found on the ground in an admitted "open air drug market," the "rocks" of cocaine were picked off the ground with no testimony they

> were packaged in a manner that would have indicated a recent sale, and neither appellant nor Hammerbacher had any other drugs in their possession. . . . [W]ith such an insubstantial amount of the drug found and no evidence either the alleged seller or buyer had any money, there was insufficient evidence to prove beyond a reasonable doubt that anything was distributed.

The State contends that the evidence was sufficient to support the convictions, noting that the court credited Officer Tindall's testimony that appellant placed white rocks, later identified as cocaine, into Mr. Hammerbacher's hand. We agree with the State.

In evaluating the sufficiency of evidence, our task is to determine whether, on the evidence presented, considered in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Spencer v. State*, 422 Md. 422, 433 (2011); *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This is a question of law that we decide by making an independent judgment based on the evidence admitted at trial. *See Polk v. State*, 183 Md. App. 299, 306 (2008). "If the evidence 'either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt,' then we will affirm that conviction." *Bible v. State*, 411 Md. 138, 156 (2009) (quoting *State v. Stanley*, 351 Md. 733, 750 (1998)). This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

To establish possession of a controlled dangerous substance ("CDS"), the State must prove that the accused "exercise[d] actual or constructive dominion or control over" the CDS. See CR § 5-101(u) (defining "possess"); CR § 5-601(a)(1) ("a person may not . . . possess . . . a controlled dangerous substance"). To prove distribution, the State must show that the accused distributed CDS, which is defined as, with exceptions not relevant here, making a "transfer or exchange from one person to another whether or not remuneration is paid." CR § 5-101(i).

To convict appellant of these crimes, therefore, the trial court, as fact-finder, had to determine beyond a reasonable doubt that appellant handed Mr. Hammerbacher the cocaine that was later recovered from the ground. As noted, Officer Tindall testified that he observed appellant place white rocks into Mr. Hammerbacher's hand, and when he approached, Mr. Hammerbacher threw the rocks in the air, and Officer Tindall recovered those rocks, which were determined to be cocaine.

In Maryland, it is well-established that "the testimony of a single eyewitness, if believed, is sufficient evidence to support a conviction." *Reeves v. State*, 192 Md. App. 277, 306 (2010). Here, the circuit court specifically credited Officer Tindall's testimony.[2] The evidence was sufficient to support appellant's convictions.

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[2] Moreover, after appellant was arrested, he told Officer Tindall that he "got" them and he had just broken off a piece for himself before handing the rest to

II.

Sentencing Challenge

Appellant next challenges his sentence of twenty five years without the possibility of parole, arguing that it "amounts to cruel and unusual punishment when the State's evidence showed less than .1 gram of cocaine recovered and appellant's prior convictions were in 1993 and 2011." The State contends that appellant's constitutional challenge is not properly before this Court because appellant did not raise it when his sentence was imposed. In any event, the State argues that the contention is without merit, asserting that the Court of Appeals rejected a similar claim in *State v. Stewart*, 368 Md. 26, 38 (2002).

A.

Preservation

The State contends that this issue is not pereserved for this Court's review because appellant did not raise this claim below, citing *Corcoran v. State*, 67 Md. App. 252, 254-56 (1986) (absent objection below, and absent challenge to sentence on substantive grounds as an illegal sentence, a claim is not preserved). This Court, however, has made clear that a claim that or a sentence constitutes cruel and unusual punishment prohibited by the

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Mr. Hammerbacher.

Eighth Amendment constitutes a claim of an illegal sentence. *Randall Book Corp. v. State*, 316 Md. 315 (1989).[3]

B.

Mandatory Penalties

The Eighth Amendment requires "that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm*, 463 U.S. 277, 290 (1983). Thus, a criminal sentence may be challenged on the narrow ground that it is "grossly disproportionate." *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring); *Stewart*, 368 Md. at 31. In that regard, the Court of

Appeals has instructed:

> In considering a proportionality challenge, a reviewing court must first determine whether the sentence appears to be grossly disproportionate. In so doing, the court should look to the seriousness of the conduct involved, the seriousness of any relevant past conduct as in the recidivist cases, any articulated purpose supporting the sentence, and the importance of deferring to the legislature and to the sentencing court.

[3] Under the Eighth Amendment to the United States Constitution, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. CONST. amend. VIII. Article 25 of the Maryland Declaration of Rights similarly states "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted, by the Courts of Law." Further, Article 16 of the Maryland Declaration of Rights provides "[t]hat sanguinary Laws ought to be avoided as far as it is consistent with the safety of the State; and no Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereafter."

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> In order to be unconstitutional, a punishment must be more than very harsh; it must be *grossly* disproportionate. This standard will not be easily met.

Stewart, 368 Md. at 33 (quoting *Thomas v. State*, 333 Md. 84, 95-96 (1993)). Only if the challenged sentence raises "an inference of gross disproportionality" must the appellate court proceed to conduct the more detailed proportionality review outlined in *Solem*. *Stewart*, 368 Md. at 32.[4]

In Maryland, the General Assembly has enacted a mandatory sentencing statute, providing that a third-time drug offender, who "has been convicted twice, if the convictions arise from separate occasions," is subject to a mandatory minimum sentence of 25 years, without parole. CR § 5-608(c)(1)(ii). In reviewing a sentence imposed under this and other enhanced sentencing statutes, an appellate court "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes." *Solem*, 463 U.S. at 290. Moreover, the reviewing court should recognize that the "State is justified in punishing a recidivist more severely than it punishes a first offender." *Id.* at 296.

[4] The Supreme Court has explained that such a detailed proportionality review is "guided by objective criteria, including: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem v. Helm*, 463 U.S. 277, 292 (1983).

As the State notes in *Stewart*, 368 Md. at 34, the Court of Appeals addressed a challenge similar to that made here. In that case, the Court upheld the constitutionality of a mandatory minimum sentence imposed under the substantively identical predecessor to CR § 5-608(c).[5] Stewart was convicted of selling $150 of crack cocaine, his third conviction for purposes of the "three strikes" sentencing enhancement for drug offenses. *Id.* at 29. The trial court nevertheless refused to impose the mandatory minimum sentence of twenty five years without parole, ruling that a sentence of that length violated federal and Maryland constitutional protections against disproportionate sentences. *Id*. at 29-30.

The Court of Appeals reversed, holding that the mandatory minimum sentence was not unconstitutionally disproportionate. *Id.* at 34. The Court stated that "sentences based on recidivist history are generally permissible under the federal and state constitutions," and the mandatory minimum sentence under this statute represents the legislature's attempt to remedy serious dangers posed by drug offenses. The Court further explained:

> Appellee's conviction in this case is for possession and distribution of 3.5 grams of cocaine, commonly referred to as an "eightball." In *Harmelin*, Justice Kennedy summarized the danger created by illegal drugs as follows:
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> > "Possession, use, and distribution of illegal drugs represent one of the greatest problems affecting the health and welfare of our population. Petitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent, is false to the

[5] Maryland Code (2012 Repl. Vol.) § 5-608(c) was previously codified at Maryland Code (2001 Supp.) Art. 27 § 286(d).

> point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.
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> Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture."
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> *Harmelin*, 501 U.S. at 1002, 111 S. Ct. at 2705-06 (internal quotation marks and citations omitted).

Id. at 34-35.

The Court of Appeals expressly rejected Stewart's argument "that his conduct [was] not serious enough to justify the punishment mandated by [statute] because he did not possess or distribute a large amount of drugs" and there were no "aggravating" factors such as violence or weapons. *Id.* at 35. The Court identified "[t]he basic flaw" in that argument as "the failure to acknowledge that the gravity of this offense is aggravated by the fact that it is a repeat offense." *Id.* It then reiterated that "[t]he Legislature has determined that recidivism in the arena of controlled dangerous substances poses a grave danger to society and justifies the imposition of longer sentences, including sentences without possibility of parole." *Id*. at 35-36. In light of these drug recidivism factors, the Court of Appeals "has upheld harsh punishments in cases involving small amounts of drugs," such as in *State v. Bolden*, 356 Md. 160, 168-69 (1999), affirming "consecutive

prison sentences of 25 years and 32 years for a defendant who sold sixty dollars worth of crack cocaine to an undercover police officer." *Id.* at 36.

The Court recognized that "'[r]ecidivist statutes are enacted in an effort to deter and punish incorrigible offenders . . . . who have not responded to the restraining influence of conviction and punishment.'" *Id.* at 38 (quoting *Gargliano v. State*, 334 Md. 428, 444 (1994)). Stewart had "'been accorded a fair chance at rehabilitation in the prison system and had not responded.'" *Id*. at 37 (quoting *Jones v. State*, 324 Md. 32, 38 (1991)).

Accordingly, the Court held that, because "the sentence of twenty-five years without parole is not grossly disproportionate to [Stewart's] crime," "no further proportionality review is necessary," and "the trial court was required to impose the mandatory sentence under [the statute]." *Id.* at 38.

We agree with the State that "*Stewart* is directly applicable and controlling in this case." To be sure, appellant was in possession of a smaller amount of cocaine than Stewart, but the statute does not contain a threshold amount for the imposition of a minimum mandatory sentence.

In accordance with *Stewart*, 368 Md. at 37, appellant's prior convictions of drug distribution offenses establish that, at the time he committed the crimes at issue here, appellant had "'been accorded a fair chance at rehabilitation in the prison system and had not responded.'" (quoting *Jones v. State*, 324 Md. 32, 38 (1991)). These facts "weigh

heavily against a finding that the mandatory sentence under [CR §5-608(c)] is grossly disproportionate to his crime." *Id.* Because appellant's sentence of twenty five years without the possibility of parole is not grossly disproportionate, we shall affirm that sentence without conducting the more detailed proportionality review under *Solem*, 463 U.S. at 277.

In doing so, we acknowledge there is current debate regarding the advisability of mandatory minimum sentences. Granting appellant the re-sentencing relief he seeks, however, would require us to ignore the statute and *Stewart*. We cannot, and will not, do so.

We note that, pursuant to the Justice Reinvestment Act, Ch. 515 of the 2016 Laws of Maryland, effective October 1, 2017, the Maryland General Assembly eliminated the mandatory minimum sentence under which appellant was sentenced and which we hereby affirm. § CR 5-608(c). Moreover, in the same Act, the legislature created a new procedure to provide reconsideration of preexisting mandatory minimum sentences for drug crimes:

> (A) Notwithstanding any other provision of law and subject to subsection (C) of this section, a person who is serving a term of confinement that includes a mandatory minimum sentence imposed on or before September 30, 2017, for a violation of §§ 5-602 through 5-606 of this subtitle may apply to the court to modify or reduce the mandatory minimum sentence as provided in Maryland Rule 4-345, regardless of whether the defendant

> filed a timely motion for reconsideration or a motion for reconsideration was denied by the court.
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> (B) the court may modify the sentence and depart from the mandatory minimum sentence unless the state shows that, giving due regard to the nature of the crime, the history and character of the defendant, and the defendant's chances of successful rehabilitation:
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> (1) retention of the mandatory minimum sentence would not result in substantial injustice to the defendant; and
>
> (2) the mandatory minimum sentence is necessary for the protection of the public.

2016 Md. Laws, Chap. 515. Thus, after October 1, 2017 (and before September 30, 2018), appellant is permitted to file a motion under this procedure.

JUDGMENTS OF THE CIRCUIT COURT AFFIRMED. COSTS TO BE PAID BY APPELLANT.