UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2533

September Term, 2015

CHRISTOPHER MICHAEL REID

v.

STATE OF MARYLAND

Berger,
Shaw Geter,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: December 8, 2016

On August 7, 2015, appellant, Christopher Reid, pled guilty to a violation of Md. Code Ann., Crim. Law ("C.L.") § 5-621 (2012 Repl. Vol.) (possession of a firearm in connection with a drug trafficking offense) in the Circuit Court for Prince George's County. This case is an appeal of the decision of the circuit court to deny appellant's motion to withdraw his guilty plea prior to sentencing.

In this appeal, appellant presents the following question for our review[1] which we rephrase as follows:

> Whether the trial court abused its discretion in denying appellant's motion to withdraw his guilty plea.

For the reasons explained below, we hold that the trial court did not abuse its discretion and affirm the Circuit Court for Prince George's County.

BACKGROUND

On December 2, 2014 at approximately 7:00 a.m., the Prince George's County Police Department executed a court-ordered search and seizure warrant at 1912 Gaylord Drive in Suitland, Maryland. Mr. Reid was not present at the residence at the time the warrant was executed. His wife, Kimberly Reid, and three children were inside the home. After conducting a search of the residence, police recovered 459.5 grams of marijuana, two

[1] Appellant presented the following two questions for our review:

> (1) Whether the court abused its discretion in denying appellant[']s motion to withdraw his [guilty] plea.
>
> (2) Whether the court abused its discretion in denying appellant[']s motion to withdraw based on ineffective assistance of counsel?

digital scales, a box of "fold and close" sandwich bags, $3,500 in U.S. currency, and several rounds of ammunition. Critically, three handguns were found on the premises including a Glock 33, a Ruger, and a Taurus revolver that was mailed and addressed to appellant. After further investigation, the police discovered that one of the firearms was stolen outside of the county. The marijuana recovered from the premises was later confirmed to be marijuana and carried an estimated street value of $9,100. Although appellant was not present during the search, he called the officers and made arrangements to turn himself in. Based on tax records and other documents, he was later determined to be one of the owners of the premises.

Appellant was indicted on numerous drug and firearm-related crimes, including a violation of C.L. § 5-621, possession of a firearm in connection to drug trafficking. On August 7, 2015, in the Circuit Court for Prince George's County, appellant entered a plea of guilty to Count 2, a violation of § 5-621, in exchange for a sentence of "a flat five years without parole," the remaining counts to be entered nolle prosequi.[2] Nigel Scott, Esquire represented appellant at the guilty plea hearing, and Rashid Mahdi, Esquire appeared on behalf of the State. The circuit court accepted the guilty plea but postponed sentencing until October 9, 2015. The court also revoked appellant's bond immediately.[3]

[2] The plea agreement is absent from the record.

[3] The court revoked appellant's bond despite what appeared to be an agreement between the State and appellant's counsel that the State would not oppose the court leaving appellant out on his bond until his sentencing hearing.

On September 28, 2015, Marnitta L. King, Esquire entered her appearance on behalf of appellant, and on October 6, 2015, appellant filed a motion to withdraw his plea of guilty pursuant to Md. Rule 4-242(h). Ms. King appeared alongside Mr. Scott on behalf of appellant at his October 9, 2015 hearing in the circuit court. The court postponed appellant's sentencing and heard arguments on appellant's motion to withdraw his guilty plea, during which Ms. King argued that no one had advised appellant that the violation for which he pled guilty carried a mandatory minimum five-year sentence. The court denied the motion, and this appeal followed.

Appellant was sentenced on November 6, 2015 to eight years of incarceration, with all but five years suspended, and two years of supervised probation.[4] Additional facts are included below as they become relevant.

[4] We note that the proper path for appellant to appeal the circuit court's denial of his motion to withdraw his guilty plea should have been to file an application for leave to appeal. *See* Md. Code Ann., Cts. & Jud. Proc. § 12-302(e)(2) (2013 Repl. Vol.) ("Except as provided in paragraph (3) of this subsection, § 12-301 of this subtitle does not permit an appeal from a final judgment entered following a plea of guilty in a circuit court. Review of such a judgment shall be sought by application for leave to appeal.") Where, however, as in the instant case, the defendant is given conflicting information regarding his rights to an appeal, this Court may exercise its discretion to treat the notice of appeal as an application for leave to appeal. In *Gross v. State*, we did not find that appellant -- who had failed to file an application for leave to appeal -- had waived his right to appeal after he was given conflicting information about what he could file and within what period of time. 186 Md. App. 320, 331 (2009).

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion by Denying Appellant's Motion to Withdraw His Plea of Guilty.

At appellant's August 7, 2015 guilty plea hearing, the court confirmed that appellant understood the terms of the plea agreement, the maximum possible sentence for a violation of Md. Code § 5-621, and the rights appellant agreed to waive as a result of his guilty plea. The following exchange occurred:

> MR. MAHDI: Your Honor, this is going to be a plea to Count 2, which is Possession of a Firearm with Nexus to Drug Trafficking. Your Honor, the agreed-upon sentence is going to be a flat five years without parole. The remaining counts will be entered nolle prosequi, Your Honor.
>
> MR. SCOTT: That is correct.
>
> * * *
>
> THE COURT: I understand you wish to enter a plea of guilty to Count 2, possession of firearm in connection with drug trafficking.
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: What's the maximum statutory penalty?
>
> MR. SCOTT: The maximum statutory penalty, Your Honor, is a quarter to five. I have it right here, Your Honor. The Court's indulgence, Your Honor. It depends upon the --
>
> MR. MAHDI: The maximum penalty, I believe, Your Honor, is 20 years.
>
> THE COURT: Yes. Okay. Twenty years. Mr. Reid, do you understand the maximum statutory penalty for this charge is 20 years?
>
> THE DEFENDANT: Yes, Your Honor.

THE COURT: And your attorney advised you of all the elements of this charge the State would have to prove in order to gain a conviction in this case?

THE DEFENDANT: Yes, Your Honor.

* * *

THE COURT: In pleading guilty, you give up your right to remain silent; your right against self-incrimination. That's a very valuable right and no one can make you give that up. If you were to exercise your right to remain silent, the State would derive no benefit and I would draw no adverse inference against you.

If this matter were tried before a jury, not only would the jury be instructed to disregard the fact that you exercised your right to remain silent, they'd be specifically instructed no to even discuss it. But when you say I'm guilty, you're giving that right up.

Are you freely, knowingly, and voluntarily waiving your right to remain silent?

THE DEFENDANT: Yes, Your Honor.

THE COURT: By pleading guilty, you give up the right to challenge the manner in which the State gathered its evidence as well as the right to challenge any defects in the charging document.

THE DEFENDANT: Yes, Your Honor.

THE COURT: By pleading guilty, you give up your right to an automatic appeal to the Court of Special Appeals. You'd have 30 days within which to seek leave to appeal, and if the Court of Special Appeals grants that leave, they will consider any one or all of the four things. Those four things are: the voluntariness of your plea, the competence of your attorney, the legality of any sentence imposed, and the jurisdiction of this Court.

Do you understand your appeal rights?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Counsel, do you have a plea sheet there? There should be one right there. You can work on that while I ask Mr. Mahdi to give me a factual background.

Before I can accept your plea, I have to be satisfied that there is a factual basis for the plea. For that reason, I'll ask Mr. State (sic) to give me that factual basis at this time.

Have a seat and listen carefully to what he has to say. When he's finished, I'll ask if you have any significant additions or corrections.

[Mr. Mahdi recounted the facts that the State would be able to prove, had the matter proceeded to trial.]

* * *

THE COURT: A Taurus, Ruger, and Glock. Mr. Reid, have you discussed this thoroughly with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you satisfied with his services up to this point?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions of your attorney or the Court?

THE DEFENDANT: No, Your Honor.

* * *

THE COURT: Are you pleading guilty freely, knowingly, and voluntarily in connection with a firearm in connection with drug trafficking because in fact you are guilty and for no other reason?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I find the defendant has freely, knowingly, and voluntarily waived his right to a trial by jury. He's freely, knowingly, and voluntarily waived his right to remain silent. I find he's freely, knowingly, and voluntarily entered a plea of

guilty to County 2. I enter a verdict of guilty to Count 2 at this time.

* * *

THE COURT: Okay. We'll do a Presentence Investigation. We'll have sentencing October 9th. Bond is revoked. Go with the sheriff.

MR. MAHDI: We're going to let the defendant remain on bond.

THE COURT: You go with the sheriff. You come back October 9th. I've listened to the facts in this case. You're going with the sheriff. This is a firearms case. Sentencing will be October 9th.

THE DEPUTY CLERK: Short one or long one?

THE COURT: Long form. What part of this would be (sic) justify his remaining on bond? Not one thing.

MR. MAHDI: Your Honor, may we approach?

THE COURT: Come on up.

(Counsel approached the bench and the following ensued.)

THE COURT: He's doing a five-year sentence and it starts today. You're lucky it's only five. I'm not binding myself, obviously. There is no mention of an ABA plea. So it's not binding. I'll listen at the time of sentencing. This is a firearms case, three of them. One of them stolen.

[During the discussion at the bench, Mr. Mahdi and Mr. Scott both advocated for the court to allow appellant to remain on his current bond until his sentencing hearing.]

* * *

THE COURT: It's not a question of my concern about whether he'll return. This is a question of 459.9 grams of marijuana, scales, baggies. Do you know what a Taurus gun is? And it was loaded if I recall. [. . .]

> It fires a 410 shotgun round and .45 caliber handgun round all in the same cylinder. You pick it. They're a unique weapon. Look at all of these facts. There is no chance that -- I'm surprised that he was even released on bond originally given everything I've heard today. So he can start today and we'll be back October 9th.

At appellant's hearing on October 9, 2015, with the addition of new counsel on behalf of appellant, Ms. Marnitta King, the following colloquy occurred:

> MS. KING: Thank you. Your Honor, at the time of the plea Mr. Reid was represented by Mr. Scott. And I am positive that Mr. Scott did, in fact, convey all the information to Mr. Reid, conveyed the plea offer, conveyed the discovery. However, immediately after the plea in this case, Mr. Reid as well as his family contacted me because, obviously, Your Honor stepped it back. He didn't know that was an option that was going to happen at the time of entering the plea.
>
> In addition, he didn't really understand he was dealing with a mandatory minimum five years in this particular case.
>
> * * *
>
> THE COURT: The motion says that he did not have the benefit of all of the appropriate legal advice regarding the case. What—
>
> MS. KING: He didn't understand everything that was conveyed to him by Mr. Scott. Obviously, I was not there at the time. He did not know -- for example, he did not understand. I don't take the liberty to say that an attorney didn't say because I know attorneys properly, presumably give all the proper legal advice. He just did not understand, you know, just because the gun was found in the house you're not necessarily guilty. You are pleading guilty to a five-year mandatory minimum offense.
>
> The first day I met with Mr. Reid he thought, well, if my guidelines come under this, then I guess all will be well. I explained that's not the case. This is mandatory minimum. In fact, we now having seen the guidelines -- granted I saw them this week -- the guidelines are still above that.

> He didn't even know what his guidelines were at the time of entering a plea. I am not, of course, saying anything about Mr. Scott. I am saying maybe the comprehension level for what was conveyed to him he did not understand.
>
> THE COURT: I am looking at my own notes. I advised him at the time of the maximum statutory penalty as well as the mandatory penalty in this case.[5]
>
> MS. KING: I know that is Your Honor's practice, and I imagine no matter who it would have been that would have been the practice of the Court. But when I met with him, that was my very first visit with him, he had no idea. He knew there was some concept that there was five years in play. But he believed if his guidelines came under he could get less. It was a whole bunch of misunderstanding about what this actually means.
>
> So, I just think it was the comprehension level. Because it happened so close in time to the plea, I think it is unfortunate the family had to wait to retain me and had I been able to on a pro bono basis filed it immediately, I would have, but I wasn't.
>
> As a result, I filed it as soon as possible. As an officer of the Court, I am conveying that he did express these concerns immediately after he entered the plea.
>
> THE COURT: Thank you . . . .

On appeal, appellant contends that the trial court abused its discretion by denying his motion to withdraw his guilty plea because, as he asserts, he was never advised that the crime for which he pled guilty carried a mandatory minimum sentence of five years. Additionally, appellant points out that the prosecutor, rather than appellant's own attorney, advised him of the statutory maximum penalty for a violation of Md. Code § 5-621 at the hearing on August 7, 2015. Appellant also notes that the circuit court, itself, did not inform

[5] The court did advise appellant of the maximum statutory penalty associated with § 5-621 but did not advise appellant of the minimum statutory penalty.

appellant of the mandatory minimum sentence at his August 7, 2015 hearing, despite the circuit court's belief that it had advised appellant of both the maximum statutory penalty and the mandatory minimum penalty.

Under Md. Rule 4-242(h), "[a]t any time before sentencing, the court may permit a defendant to withdraw a plea of guilty, . . . when the withdrawal serves the interest of justice." Although it is permissible prior to sentencing, the decision to "grant[] . . . a motion to withdraw a guilty plea lies within the sound discretion of a trial judge." *Harris v. State*, 299 Md. 511, 515, 892 (1984). The trial court, however, has no "discretion to deny a motion to withdraw filed by the defendant whose guilty plea was not entered in compliance with Md. Rule 4-242 . . . ." *Dawson v. State*, 172 Md. App. 633, 639 (2007). Absent a failure to comply with the requirements of Rule 4-242, the trial court's "decision will not be overturned unless a clear abuse of discretion is shown." *Harris*, 299 Md. at 515. An "abuse of discretion" exists "where no reasonable person would take the view adopted by the trial court or when the trial court acts without reference to any guiding rules or principles." *Sindler v. Litman*, 166 Md. App. 90, 123 (2005).

Maryland Rule 4-242(c) describes the criteria that must be followed prior to the court's acceptance of a plea of guilty:

> The court may not accept a plea of guilty, including a conditional plea of guilty, until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that (1) the defendant is pleading voluntarily, with

> understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea.

Md. Rule 4-242(c).

As part of "pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea," the defendant must be informed of the maximum sentence he or she may receive as a consequence of pleading guilty. *See Bryant v. State*, 47 Md. App. 551, 555 (1981). When the terms of a binding plea agreement dictate a period of incarceration within the statutory limits, however, the maximum allowable sentence is that which is included in the plea agreement. The Court of Appeals explained in *Matthews v. State*:

> In short, we held in *Dotson* that, although generally the legislature determines the maximum sentence allowable by law, once a judge accepts a plea agreement, "the judge [is] required under the dictate of Rule 4-243(c)(3) to embody in the judgment the agreed sentence." Pertinent here, we emphasized in *Dotson* that, because the Maryland Rules "have the force of law," the maximum sentence "allowable by law" was dictated by the plea agreement.

424 Md. 503, 518 (2012) (quoting *Dotson v. State*, 321 Md. 515, 523 (1991)).

Although the best practice is to inform the defendant of the maximum penalty allowed by law for the offense charged, stating the length of incarceration dictated by the plea agreement satisfies the requirement of Md. Rule 4-242(c) to inform the defendant of the consequences of the plea agreement. *See Bryant*, *supra*, 47 Md. App. at 557.

In this case, the circuit court informed appellant of the statutory maximum penalty of 20 years in the following exchange:

> THE COURT: Yes. Okay. Twenty years. Mr. Reid, do you understand the maximum statutory penalty for this charge is 20 years?
>
> THE DEFENDANT: Yes, Your Honor.

Critically, appellant was apprised of both the minimum penalty and the maximum penalty he could receive as a consequence of his guilty plea -- "a flat five years without parole."

Appellant maintains that he did not plead "voluntarily, with understanding of the nature of the charge and the consequences of the plea" because he did not know the minimum sentence for a violation of Md. Code § 5-621. We disagree. The terms of the plea agreement, announced at appellant's August 7, 2016 hearing, included that appellant was to serve "a flat five years without parole." Five years, therefore, served as both the minimum and the maximum period of incarceration that appellant could receive. *See Matthews*, *supra*, 424 Md. at 518.

At appellant's October 9, 2015 hearing, the circuit court reviewed notes from appellant's guilty plea hearing and determined that appellant was informed of the consequences of his plea. The circuit court's decision to deny appellant's motion to withdraw his guilty plea was based on evidence within the record of appellant's plea proceedings that appellant reasonably understood the minimum and maximum sentences associated with the offense to which he pled guilty.

We note that ultimately the circuit court imposed a sentence inconsistent with the terms of appellant's plea agreement. The period of incarceration dictated by the plea agreement, as announced at appellant's August 7, 2015 hearing, was "a flat five years without parole." Nevertheless, the circuit court ordered appellant to serve an eight-year

sentence, with all but five years suspended, and two additional years of supervised probation. The Court of Appeals in *Cuffley v. State* announced the test for the court in determining whether the sentence imposed is inconsistent with the sentence bargained for in the plea agreement. 416 Md. 568, 582 (2010). The court must first decide "what the defendant reasonably understood to be the sentence the parties negotiated and the court agreed to impose." *Id.* This is an objective test and "the defendant's actual knowledge, gleaned from sources outside the plea agreement (in other words, extrinsic evidence), is irrelevant to the determination." *Baines v. State*, 416 Md. 604, 615 (2010).

If the sentence imposed by the court is inconsistent with the terms of the plea agreement, "then the defendant is entitled to the benefit of the bargain, which, at the defendant's option, is either specific enforcement of the agreement or withdrawal of the plea." *Id.* Critically, appellant does not make this claim in his appeal to this Court. Accordingly, appellant may be entitled to some relief, but in order to do so, he would need to file a motion to correct an illegal sentence pursuant to Md. Rule 4-345(a).[6] *See Cuffley*, 416 Md. at 574.

[6] Md. Rule 4-345 permits the court to "correct an illegal sentence at any time." Indeed, at oral argument, the State acknowledged that the appellant would be entitled to relief in the context of a motion to correct an illegal sentence because he received a sentence different from the "flat five years parole" agreed upon by the parties at the August 7, 2015 hearing. Of course, it is entirely up to the appellant whether he wishes to file such a motion to specifically enforce the agreement or seek withdrawal of the plea. *See Baines*, *supra*, 416 Md. at 615 ("If the agreement is breached, either by the prosecutor or the court, then the defendant is entitled to the benefit of the bargain, which, at the defendant's option, is either specific enforcement of the agreement or withdrawal of the plea.").

II. Ineffective Assistance of Counsel

Appellant further bases his appeal on a claim of ineffective assistance of counsel. We decline to review these grounds on direct appeal. Appellant relies on *Harris*, *supra*, in which the ineffective assistance of counsel claim was reviewed on direct appeal under rare circumstances. 299 Md. at 517-518. Ordinarily, however, "a collateral evidentiary hearing is generally needed to develop a complete record for proper determination of the issue." *Id.* at 517.

Generally, a defendant's attack of a criminal conviction due to ineffective assistance of counsel occurs at post-conviction review. *Tetso v. State*, 205 Md. App. 334, 377 (2012). The Court of Appeals has explained the reasoning for preferring post-conviction over direct appeal for ineffective assistance of counsel claims as follows:

> In essence, it is because the trial record does not ordinarily illuminate the basis for the challenged acts or omissions of counsel, that a claim of ineffective assistance is more appropriately made in a post conviction proceeding[.] Moreover, under the settled rules of appellate procedure, a claim of ineffective assistance of counsel not presented to the trial court generally is not an issue which will be reviewed initially on direct appeal, although competency of counsel may be raised for the first time at a [] post conviction proceeding. Upon such a collateral attack, there is presented an opportunity for taking testimony, receiving evidence, and making factual findings concerning the allegations of counsel's incompetence. By having counsel testify and describe his or her reasons for acting or failing to act in the manner complained of, the post conviction court is better able to determine intelligently whether the attorney's actions met the applicable standard of competence.

Harris, *supra*, 295 Md. at 338.

We have explained the extremely rare situations where ineffective assistance of counsel claims will be evaluated on direct appeal as follows:

> The rare instances in which we have permitted direct review are instructive, because they indicate our willingness to entertain such claims on direct review only when the facts in the trial record sufficiently illuminate the basis for the claim of ineffectiveness of counsel. As we explained in *In re Parris W.*, [363 Md. 717, 727 (2001)] direct review is an exception that applies only when "the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim."

Tetso, *supra*, 207 Md. App. at 378 (quoting *Mosley v. State*, 378 Md. 548, 566 (2003)).

In the instant case, appellant argues that his ineffective assistance of counsel claim should be heard on direct appeal rather than at a post conviction hearing. We disagree. The record above fails to demonstrate facts sufficient "to permit a fair evaluation of the claim" of ineffective assistance of counsel on direct appeal. *Id.* For instance, the record sheds no light on whether appellant's trial counsel "[f]ail[ed] to advise [appellant] of the clear nature and possible sentences available to him" as appellant now alleges. Therefore, this case does not present the unique situation where we should review an ineffective assistance of counsel claim on direct appeal. In other words, "[w]here, as here, why counsel acted as he did, direct review by this Court would primarily involve the perilous process of second-guessing, perhaps resulting in an unnecessary reversal in a case where sound but unapparent reasons existed for counsel's actions." *Id.* at 379 (quoting *Addison v. State*, 191 Md. App. 159, 175, *cert. denied*, 415 Md. 38 (2010)). "In the usual case," as in the instant case, "a post conviction proceeding is the most appropriate." *Harris*, 299 Md. at 517 (citations omitted).

Accordingly, we hold that a reasonable person could find that the record contained sufficient evidence to determine that appellant was informed of the consequences of his guilty plea, including the minimum and maximum sentence he might receive as a result of accepting the plea agreement. The circuit court, therefore, was well within its discretion to deny appellant's motion to withdraw his guilty plea.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.