Circuit Court for Charles County
Case No. 08-K-16-000734

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 187

September Term, 2017

DANIEL EDMOND MADDEN

v.

STATE OF MARYLAND

Woodward,
Meredith,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: November 8, 2017

Daniel Edmund Madden, Appellant, was tried and convicted by a jury in the Circuit Court for Charles County (Simpson, J.) of possession of heroin and possession of drug paraphernalia. Appellant was sentenced to 90 days for possession of heroin and his sentence for possession of paraphernalia was suspended generally. Appellant filed the instant appeal, positing the following questions for our review:

> 1. Did the trial court abuse its discretion by inserting itself into the proceedings to assist the State in proving its case?
>
> 2. Can Appellant's convictions for possession of heroin and possession of paraphernalia stand, when the latter conviction is based solely on the possession of the baggie used to contain the heroin on which the former conviction is based?

FACTS AND LEGAL PROCEEDINGS

On January 30, 2016, Sergeant Gregory Stringer of the Charles County Sheriffs' Office was working at the Charles County Detention Center Annex, where inmates serving weekend sentences were required to check in and out. Regarding the check-in procedure, Sergeant Stringer explained that inmates are first patted down, then strip searched and given a jumpsuit to wear for the weekend. The inmates' belongings were also searched, inventoried and placed in a locker for safekeeping.

When Appellant arrived to serve his weekend, Sergeant Stringer proceeded to perform the intake, but no other officers were present. Sergeant Stringer acknowledged that he was familiar with Appellant from prior weekends that Appellant had served before January 30th and that he had "written up" Appellant on multiple occasions.

Sergeant Stringer testified that, on January 30th, he patted down Appellant, then went through Appellant's clothing and belongings in preparation for the strip search. When

Sergeant Stringer took one of Appellant's shoes and pulled the insole out, "a little baggie" fell out, whereupon Appellant said, "What's that? That's not mine." Sergeant Stringer seized the baggie and placed it in his pocket. He then completed the strip search of Appellant, then directed Appellant to put on a jumpsuit and handcuffed him to a bench. Sergeant Stringer called for a deputy and Corporal Jesse Walter was dispatched to the Annex.

When Corporal Walter arrived, Sergeant Stringer turned the baggie over to him. Corporal Walter took statements from Sergeant Stringer and from Appellant. Appellant denied that the baggie was his and asked that he be tested for heroin, explaining that he would test positive for only marijuana and methadone. Corporal Walter testified that he refused Appellant's request to take a urine sample because he had "never tested anyone for illegal substance in their urine."

Corporal Walter examined the substance in the baggie, but the field test he performed was inconclusive. Corporal Walter then returned to his station, where he packaged the baggie and requested that it be analyzed by the Maryland State Police crime lab. He did not request that the baggie be fingerprinted or tested for DNA.

Corporal Walter then prepared his incident report, which was marked as Defendant's Exhibit #2. The next day, January 31, 2016, Corporal Walter's supervisor signed off on his report. Corporal Walter testified that it was important for his supervisor to sign off on his report "[t]o make sure that it's accurate" and not just for typographical errors.

On February 29, 2016, Sasikala Kambhampati, a forensic scientist at the Maryland State Police crime lab, analyzed the item submitted by Corporal Walter, described as "a paper fold containing tan powdery substance." She identified the substance as heroin. The weight of the heroin, before sampling, was 0.07 grams, which she reported as a trace amount.

Appellant, testifying in his defense, explained that he had been convicted of driving on a suspended license and sentenced to 50 days, to be served on weekends. Around 7:45 a.m. on Saturday, January 30, 2016, his wife drove him to the detention center to serve his weekend. He left his cell phone and his wallet with his wife because those items were not permitted inside the facility. Appellant testified that other inmates had already been checked in by the time he arrived; the "pod" was almost completely filled up with two cells left. Further, he believed that Sergeant Stringer had been checking out inmates leaving for work release.

When Appellant arrived at the Annex, Sergeant Stringer asked him for his shoes. After the Sergeant inspected the first shoe and returned it to him, Appellant handed him his second shoe. Appellent testified: "While I turned around to place [the first shoe] in my locker and, as I was turning around to get the second shoe from him, he was reaching down underneath the chair picking up the . . . suspected drugs that he said that came out of my shoe." Appellant further testified that the Sergeant grabbed him by the wrist, slammed him against the lockers and marched him into an adjoining room, handcuffing him to a bench.

Appellant testified that he did not bring a baggie with a trace amount of heroin into

the jail. Although he used methadone as part of a treatment program, he did not use heroin. According to Appellant, he asked Corporal Walter and a nurse in the medical wing of the detention center to administer a drug test, but he was told that "[t]hey're not charging you, so you don't have to worry about it."

Appellant testified that he was "very familiar" with Sergeant Stringer because, on each of the four weekends previous to January 30th, the Sergeant had written him up for not making his bed or cleaning his cell. He described an incident with the Sergeant the weekend before January 30th in which Sergeant Stringer had asked him to leave his cell and go eat dinner, but Appellant refused. Sergeant Stringer "got extremely upset and angry" and said he would write Appellant up. Appellant told him to "go ahead" and Sergeant Stringer responded that, "[i]f I did not come out, he [would] . . . string me out on the bench."

On cross examination, Appellant clarified that he was not accusing Sergeant Stringer of planting evidence: "I'm saying that is a strip out room where everybody that comes in and out of that jail is stripped out. Now, I don't know when it's cleaned or when it's not."

After Appellant testified, the State recalled Sergeant Stringer in rebuttal. He denied planting heroin in Appellant's shoe and stated that there was no possibility that the heroin was already in the floor when he began his search of Appellant.

During cross examination of Sergeant Stringer, defense counsel inquired about the incident report he had prepared in this case, which was marked as Defendant's Exhibit #1. The Sergeant explained that he prepares incident reports as soon as possible after an

incident in the jail. The report is then held in "a pending stage" until a supervisor reviews and signs off on it. Sergeant Stringer provided his incident report to the State's Attorney's Office on March 8, 2017, one day before trial began, and over a year after the incident at the Annex. The report had not been signed by his supervisor, Lieutenant Kelly, and the Sergeant acknowledged that this meant that she had never reviewed it.

Defense counsel moved for the court to admit the report and the State objected. The court refused to admit the report, as follows:

> [PROSECUTOR]: I don't believe the document itself comes in. Everything that he said is consistent (inaudible) is in the report. So I think she can publish. I don't think it comes in as evidence.
>
> THE COURT: I think you're right.
>
> [DEFENSE COUNSEL]: No, I think it comes in as [sic] *Holcomb v. State*, 307 Md. 457. The defense can admit the report into evidence if they choose. But not the State. (Inaudible)
>
> THE COURT: So what are you admitting it for?
>
> [DEFENSE COUNSEL]: Because I want the jury to look at the fact that his supervisor (inaudible).
>
> THE COURT: He's testified to that. They don't need to see it. I will not allow it. It's not admissible.

On redirect examination, the Assistant State's Attorney asked Sergeant Stringer about the incident report procedure. He testified that the purpose of having a supervisor review the reports is to "look at it for any typographical errors, misspelled words, stuff like that and make sure we have the charges on it, and the person." He did not know why the incident report in this case had not been approved, but he testified that his report was an

accurate description of what had occurred on January 30, 2016.

After that redirect examination, the following occurred:

[THE COURT]: [Sergeant] Stringer, when you say your supervisor reviews it (inaudible), it's in a computer system, is that not correct?

[WITNESS]: Yes. Yes sir.

[THE COURT]: And your supervisor can pull it up a screen and review it there?

[WITNESS]: Can pull it up on the screen and review it right there.

[THE COURT]: Right. You don't hand them a piece of paper with it written out?

[WITNESS]: No, I don't
.
[THE COURT]: You, you input it into the computer?

[WITNESS]: Right. Yes sir.

[THE COURT]: Okay. Alright.

Defense counsel asked to approach the bench, and made the following objection:

[DEFENSE COUNSEL]: I'm gonna object to Your Honor asking these questions.

THE COURT: Why?

[DEFENSE COUNSEL]: Because—

THE COURT: It's pretty logical.

[DEFENSE COUNSEL]: —you're not the prosecutor in this case.

THE COURT: No. I think it's—

[DEFENSE COUNSEL]: I feel like he has the burden to prove it beyond a reasonable doubt. And you should not be helping him out.

[PROSECUTOR]: So, (inaudible) if the Judge feels the need to ask additional

questions the Judge can ask additional questions.

THE COURT: Yeah.

[PROSECUTOR]: For clarification of the Judge.

THE COURT: You were trying to confuse them that they should have signed off on that piece of paper.

[PROSECUTOR]: Right.

Appellant was ultimately convicted of possession of heroin and possession of drug paraphernalia. The instant appeal followed.

DISCUSSION

I.

Appellant's first assignment of error is that the trial court exceeded its role as a neutral arbiter and injected itself into the proceedings. Specifically, Appellant alleges that the trial court conducted direct examination of Sergeant Stringer and, thereafter, rehabilitated him as a witness.

The State responds that the trial court appropriately asked clarifying questions of Sergeant Stringer.

"It is well-settled that a presiding judge in a jury trial has discretion to question witnesses in order to ensure that the facts of the case are fully developed. The principal justification for a trial judge to inject himself or herself into the questioning of a witness is to clarify issues in the case." *Smith v. State*, 182 Md. App. 444, 480 (2008) (citing *Nance v. State*, 77 Md. App. 259, 263–64 (1988)).

"Although a trial judge, when presiding at a jury trial, is not required to sit like the proverbial 'bump on a log,' the preferable practice is for the court to defer its questioning until after each counsel has concluded his or her examination of the witness." *Id.* at 481. "It is a far more prudent practice for the judge to allow counsel to clear up disputed points on cross-examination, unassisted by the court." *Marshall v. State*, 291 Md. 205, 213 (1981).

> Moreover, "the power to participate in the examination of witnesses . . . should be sparingly exercised. Particularly when the questioning is designed to elicit answers favorable to the prosecution, 'it is far better for the trial judge to err on the side of abstention from intervention in the case.' If more than one or two questions are involved, the proper procedure is to call both counsel to the bench, or in chambers and suggest what (the judge) wants done."

Smith, 182 Md. App. at 482 (quoting *United States v. Green*, 429 F.2d 754, 760–61 (D.C.Cir.1970)).

However, the trial judge's ability to ask questions is not unlimited. "If a judge's comments during [the proceedings] could cause a reasonable person to question the impartiality of the judge, then the defendant has been deprived of due process and the judge has abused his or her discretion." *Id.* (quoting *Archer v. State*, 383 Md. 329, 357 (2004)).

> The partiality—or perception thereof—of the judge presiding at a jury trial may manifest itself in several ways. The sheer number of questions asked may signal the judge's disbelief of a witness' testimony. The questions themselves, *e.g.*, admonishing a witness that he or she is under oath, may convey to the jury the presiding judge's assessment of the witnesses' testimony.

Id. at 483 (citations omitted).

Convictions are "rarely reversed on the grounds that the judge has compromised his

or her impartiality by intervening in a case" *id.*; however, "there have been instances where the egregiousness of a trial court's intervention indeed warranted admonishment of the trial court or, even in some cases, a new trial." *Id.* This includes where a trial judge's questions illustrate his or her disbelief of the witness or repeated interjections throughout the proceedings. *Id.* This Court's analysis in *Smith, supra,* is instructive:

> [P]articipating freely and frequently in the direct examination of witnesses, assisting the Assistant State's Attorney in the presentation of his case, when he did not wish help, and, indeed, resisted it; interrupting cross-examination by defense counsel to assist State's witnesses in responding to questions; and explaining the testimony of State's witnesses. The trial judge also rephrased questions, rather than ruling on objections by defense. Moreover, in addition to correcting defense counsel in front of the jury and suggesting how questions should be phrased, the trial judge raised objections *sua sponte*. During the defense case, the judge, without regard to, and in fact, in spite of, the defense strategy, cross-examined defense witnesses during their direct examination. In some instances, the trial judge anticipated issues which had not yet been raised and, in at least one other, questioned a witness concerning his testimony in a prior trial.

Id. at 484 (quoting *Ferrell v. State,* 73 Md. App. 627, 645–48 (1988), *rev'd on other grounds by* 318 Md. 235 (1990)).

In the instant case, the trial judge did not inappropriately interject himself into the proceedings and, therefore, did not deprive the Appellant of a fair trial or due process. After direct and cross examinations of the witness, the judge asked four questions to clarify the procedure of filing reports at the Detention Center. The judge did not interrupt the defense counsel or assist the prosecutor in presenting his case. The questions posed by the judge were neutral and designed to clarify the Detention Center's reporting procedure. Accordingly, the trial court did not abuse its discretion.

II.

Appellant's final assertion of error is that his possession of the paraphernalia count was based solely on the receptacle used to contain the illegal substance that constituted his possession of heroin count. Appellant argues that this violates Maryland law and, therefore, his conviction for possession of paraphernalia must be vacated.

The State responds that Appellant failed to preserve this challenge for our review. Specifically, the State avers that Appellant "did not object, in *any* form or at any stage of his trial, to the charge, conviction or sentence on possession of drug paraphernalia[.]" (Second emphasis supplied).

Pursuant to Md. Rule 4–252(a)(2), the accused is required to file a pre-trial motion if there is an issue with his charges, *i.e.*, multiplicitous charges. Although a motion "asserting the failure of the charging document . . . to charge an offense may be raised and determined at any time," MD. RULE 4–252(d), a motion asserting a non-jurisdictional error with the charging document must be filed within 30 days of the appearance of counsel or the first appearance of the defendant before the circuit court following an arrest or summons. MD. RULES 4–252(b); 4–213(c). "Failure to make a mandatory motion within the prescribed time limits, absent good cause to forgive the dereliction, bars all claims, even those full of constitutional merit." *Davis v. State*, 100 Md. App. 369, 385 (1994) (citing *Carbaugh v. State*, 49 Md. App. 706, 709 (1981)).

In the instant case, we acknowledge that the Court of Appeals, in *Dickerson v. State*, 324 Md. 163, 173–74 (1991), held that a dual conviction of possession of a controlled

dangerous substance and possession of paraphernalia could not stand when the convictions were based on the drug and its vial or receptacle as "paraphernalia." However, Appellant is not asserting that the charging document failed to charge him or that there was a jurisdictional error, which would permit the issue to be raised at any time. To the contrary, Appellant asserts that his conviction for possession of paraphernalia is based solely on the receptacle that held the heroin that was the basis for his possession of a controlled dangerous substance conviction. Appellant does not dispute his failure to file a pre-trial motion pursuant to Md. Rule 4–252(a)(2), nor does Appellant offer "good cause to forgive the dereliction." Accordingly, his claim is barred. *Davis, supra.* We hold that the issue has not been preserved for our review.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.