

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 313

September Term, 2016

DONTE SIMMONS-BRIGHT

v.

STATE OF MARYLAND

Graeff,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: March 10, 2017

*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.

In this appeal, Dontae Simmons-Bright, appellant, challenges the ruling of the Circuit Court for Harford County denying his motion to dismiss charges that he violated the terms of his probation.¹ After the court denied the motion, it found that appellant violated his probation, and it reimposed the suspended portion of appellant’s sentence.

On September 23, 2016, this Court granted appellant’s application for leave to appeal, permitting appellant to raise the following question for this Court’s review:

Where the State fails to act with reasonable promptness in pursuing revocation of probation, does the probationer have to establish that he was prejudiced by the unreasonable delay to be entitled to a dismissal?

For the reasons set forth below, we answer that question in the affirmative, and based on the record here, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On November 21, 2011, appellant pleaded guilty in the Circuit Court for Harford County to conspiracy to commit robbery.² The court sentenced him to five years, all but time served (287 days) suspended, and three years of supervised probation.

On October 23, 2012, appellant was charged in the Circuit Court for Prince George’s County with a new robbery offense. On October 31, 2012, the Department of Public Safety and Correctional Services, Division of Parole and Probation, issued a report to the Circuit Court for Harford County, alleging that appellant had violated several conditions of his

¹ Appellant asserts that he spells his name “Dontae,” and the caption is a misspelling.

² The docket entries indicate that appellant pleaded guilty. In his Motion to Dismiss Violation of Probation and at the hearing on his motion, appellant characterized the plea as an *Alford* plea, which has been described as a “guilty plea containing a protestation of innocence.” *Bishop v. State*, 417 Md. 1, 19 (2010) (citations and quotation marks omitted).

probation, including the condition that he obey all laws, and requesting that the court issue a warrant to detain appellant, who was then being held at the Prince George's County Detention Center. On November 13, 2012, the Circuit Court for Harford County issued a writ of body attachment and a notice of intent to revoke probation for the alleged violations.

On May 1, 2013, appellant pleaded guilty to the October 2012 robbery charge. On August 1, 2013, the court sentenced him to fifteen years, all but five suspended, with 283 days credited for time served. The Division of Parole and Probation issued a report, informing the circuit court of appellant's robbery conviction.

On September 13, 2013, appellant filed a notice advising the Circuit Court for Harford County that he was committed at the Jessup Correctional Institution. The notice referenced the circuit court case number associated with this case on appeal and requested that the court "schedule any open criminal proceedings as soon as possible and forward all WRITS" to the address provided.

On January 14, 2014, appellant filed a motion to quash, notifying the court that he was serving a five-year sentence at Eastern Correctional Facility and "unable to receive any rehabilitative or release programs because of a detainer filed against" him. He requested that the court quash any warrants, attachments, or detainers "filed against [him] in a timely manner." The circuit court denied the motion.

On February 12, 2016, appellant was served with the November 13, 2012, body attachment. The next day, February 13, 2016, appellant was released from his sentence in

the 2013 robbery case. Due to the body attachment, however, he was detained and transferred to the Harford County Detention Center.

On February 17, 2016, the circuit court issued a second notice of intent to revoke probation, with a show cause order for appellant to appear in court in March and show cause why his probation should not be revoked. On February 23, 2016, appellant filed a Motion to Dismiss Violation of Probation. He alleged that, notwithstanding his previous motions informing the court of his whereabouts and requesting that it promptly schedule any open proceedings and quash any open warrants, attachments, or detainers, he had not been served the November 13, 2013, body attachment until February 12, 2016, “in advance of his release.” He contended that his right to due process was violated by the State’s “inexplicable delay in pursuing the violation of probation allegations.”

On March 18, 2016, the circuit court held a hearing. The State could not explain why violation of probation proceedings did not promptly take place after the Division of Parole and Probation reported to the court that appellant had been convicted of robbery while on probation. The State asserted that, once the court was notified of the violation, “at that point the ball is generally in the court’s court to set it in for a hearing,” but for reasons not known to the State, the court never scheduled a hearing.

Defense counsel argued that, based on the delay of close to three and a half years from the initial issuance of the writ, “fundamental fairness dictates this matter be dismissed.” He asserted that appellant suffered oppressive incarceration because he was

denied eligibility for parole due to the pending violation of probation matter, and appellant also suffered “undue anxiety and nervousness due to the pending charges.”

The State argued that appellant could not show actual prejudice in the defense of his case. It asserted that the issue was whether the delay prejudiced appellant in defending the violation of probation charge, and because appellant had been convicted of the new robbery charge, the answer was no. The State argued that appellant had “not shown or successfully proffered how he was actually . . . denied any kind of parole or other consideration because of this outstanding warrant for the violation of probation,” and there was “no fundamental right to have programs in the Division of Correction.”

The circuit court acknowledged that due process was required in violation of probation cases. It recognized that the State was required to bring the matter to court with reasonable promptness to avoid prejudice to the accused.

With respect to prejudice, defense counsel conceded that appellant could not demonstrate that his defense was prejudiced by the delay. Appellant, however, testified that he was prejudiced because he was twice denied parole, and he was not permitted to participate in several programs, including “Re-entry Shop” and “Job Readiness,” due to the detainer.

On cross-examination, appellant testified that his first parole hearing occurred in November 2013, approximately one month after he arrived at the correctional facility, which he conceded was a mistake because it was too early. Nevertheless, he maintained that he was told that the reason for the denial of parole was the detainer. Appellant stated

that the second parole hearing was held in the “beginning of 2015,” and he was denied for the same reason. Appellant admitted that he was aware of the detainer, which was lodged because of the violation of probation allegation, but he did not attempt to contact an attorney or do anything to resolve the matter other than writing to the court after his first denial of parole.³

The motions judge then stated that the record did not reflect that the original body attachment had been served on appellant to act as a detainer against him. Defense counsel responded that, although the 2012 body attachment had not been served on appellant, it was “out there and visible to anyone who looks for warrants and body attachments,” and its “existence . . . would be researched.” He argued that, even though appellant had not been served, it was “still there even though it had hadn’t been served on him. Someone just needed to get it served and get him to court. That’s the point of this argument.” Defense counsel also contended that, although it was uncommon, it was not unheard of for the Parole Commission to schedule a parole hearing prior to the inmate’s eligibility date.

The court then found, as explained in more detail, *infra*, that the delay in the revocation hearing did not result in prejudice to appellant. It then denied appellant’s motion to dismiss, found appellant in violation of his probation conditions, and re-imposed the suspended portion of his sentence.

³ Appellant admitted that, in his letter to the court after his robbery conviction, he merely asked that the detainer be quashed. He did not ask the judge to hear the allegation of a violation of his probation.

DISCUSSION

Appellant contends that the circuit court “erred in denying [his] motion to dismiss the charge for violation of probation,” asserting that the “State’s failure to act with reasonable promptness in pursuing the revocation of probation violated” his right to due process.⁴ He asserts that the State’s “egregious” delay in pursuing revocation of his probation warranted dismissal of the charge, even in the absence of a showing of prejudice. Alternatively, he argues that, even if a showing of prejudice is required, “he made the requisite showing,” asserting that he showed prejudice in the form of anxiety, the loss of the opportunity to receive a concurrent sentence, and the inability to qualify for parole and rehabilitative programs.

The State contends that the circuit court “properly denied [appellant’s] motion to dismiss his notice of violation of probation because he failed to persuade the circuit court that he was prejudiced by any unreasonable delay.” It asserts that a “due process violation can be sustained only if a probationer’s ability to defend against the violation has been prejudiced by an unreasonable delay,” and because appellant “conceded that he did not suffer such prejudice, the circuit court properly denied his motion to dismiss.” The State argues that, even if other forms of prejudice are relevant considerations, “the circuit court did not clearly err in finding [appellant’s] claims of prejudice to be incredible.”

⁴ The Fourteenth Amendment of the United States Constitution provides, in pertinent part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” *Harrison-Solomon v. State*, 442 Md. 254, 287 n.30 (2015).

The Maryland appellate courts have made clear that a probation revocation hearing must be conducted consistent with due process. *State v. Berry*, 287 Md. 491, 499 (1980); *Boone v. State*, 55 Md. App. 663, 667 (1983), *cert. denied*, 298 Md. 394 (1984).⁵ The State has the “obligation to initiate and consummate such hearings diligently and promptly,” so the probationer may receive “a fair hearing where he [or she] can confront his [or her] accusers and present his [or her] defense.” *Berry*, 287 Md. at 499.

Appellant argues that unreasonable delay, by itself and without a showing of prejudice, is sufficient to show a violation of due process. He has not, however, cited any case that specifically says that. Indeed, the Maryland cases indicate to the contrary.

The Court of Appeals in *Berry* stated: “To comply with the dictates of due process, the State must bring about the revocation hearing with due diligence or reasonable

⁵ The Court of Appeals explained the nature of a revocation of probation hearing as follows:

A probation revocation hearing involves an adjudication of whether an individual violated the terms of release and whether this violation should result in reconfinement. *See* Maryland Rule 4-347. It is firmly established that a revocation of probation hearing is a civil proceeding, in which the probationer is not cloaked with the full panoply of constitutional rights and procedural safeguards enjoyed by a defendant in a criminal cause. The trial court may revoke probation if it is reasonably satisfied by a preponderance of the evidence that a violation has occurred. A revocation of probation is not a second punishment added upon the original sentence; it represents, rather, the withdrawal of favorable treatment previously accorded the defendant.

Gibson v. State, 328 Md. 687, 689-90 (1992) (citations omitted).

promptness *so as to avoid prejudice to the defendant.*” *Id.* at 500 (emphasis added). The Court’s subsequent analysis makes clear that prejudice is a critical component:

The record of the revocation proceeding reveals almost nothing about the reasons for this delay except for an unsolicited and unsubstantiated remark by the court clerk that the delay was attributable to pending criminal charges which had resulted in several postponements of the revocation proceeding. *However, we need not engage in any lengthy analysis or balancing process because the defendant has alleged no prejudice as a result of the delay.* Indeed, we can envision few circumstances where a defendant would be able to show prejudice when as here the issue is a narrow one of compliance with the court’s order for support.

Id. at 501 (emphasis added).⁶

The Court of Appeals in *Clipper v. State*, 295 Md. 303 (1983), subsequently reaffirmed that delay in holding a probation revocation hearing does not deny the defendant due process if there was no prejudice caused by the delay. In that case, the Court stated as follows:

In the instant action, the delay was not unreasonable and, furthermore, *Clipper* was not prejudiced by the delay. . . . As in *Berry*, no prejudice could have resulted from the relatively short delay involved because of the limited nature of the issue at the probation revocation hearing-his violation of a condition of probation. The delay could not have affected *Clipper*’s ability to defend himself at this hearing. In our view this case does not represent an unreasonable delay such as to deny *Clipper* due process.

Id. at 312-13.

In *Boone v. State*, 55 Md. App. 663 (1983), this Court similarly recognized that prejudice was required before a delay in revocation of probation hearing would constitute

⁶ The Court earlier stated that the determination whether the State had been reasonable in proceeding with the revocation hearing should be decided on “a case by case basis,” depending on the efforts made to serve the defendant, as well as the availability of the defendant to receive such process. *State v. Berry*, 287 Md. 491, 500 (1980).

a deprivation of due process. This Court held that the State did not exercise reasonable diligence, and therefore, the question was whether the delay in the time between when “the revocation hearing should have been held, had the State exercised reasonable diligence, and when it was actually held *is sufficiently harmful to constitute a deprivation of due process.*” *Id.* at 669 (emphasis added). In that case, we cited *Berry* for the premise that prejudice plays a critical role in the analysis, concluding that, although the delay in initiating Boone’s revocation hearing did not impair his defense, he “suffered prejudice from anxiety and oppressive incarceration.” *Id.* at 669-70, 671.

Other jurisdictions similarly have concluded that delay in revocation of probation cases does not constitute a due process violation in the absence of prejudice. *See, e.g., State v. Hall*, 195 P.3d 220, 229 (Kan. 2008) (unreasonable delay in bringing probation revocation proceedings was insufficient to establish a due process violation; a showing of prejudice was necessary); *People v. Phillips*, 311 N.W.2d 301, 303 (Mich. Ct. App. 1981) (“[D]efendant is not denied due process by reason of the delay between the incident violating the probation and the hearing on the charge of violation of probation unless defendant demonstrates prejudice.”); *State v. Leavitt*, 617 A.2d 652, 652-53 (N.H. 1992) (requiring probationer to show actual prejudice to prevail on a delay-based due process claim); *State v. Clark*, 801 N.W.2d 732, 739 (N.D. 2011) (“The delay in time between when a probation revocation petition is filed and the arrest warrant is executed alone generally does not violate the probationer’s due process rights; rather, the probationer must show he was prejudiced by the delay.”); *State v. Ellis*, 542 A.2d 279, 282 (Vt. 1988) (to

establish due process violation based on delay in executing probation violation warrant, “defendant must show that a delay was both unreasonable and prejudicial to his rights”). *See also United States v. Sanchez*, 225 F.3d 172, 176 (2d Cir. 2000) (rejecting argument that delay without prejudice constituted a due process violation and holding that “delay between Sanchez’s violation of his supervised release and the issuance of the summons did not violate due process because Sanchez was not prejudiced by the delay”).

Having determined that, to prevail on his due process claim, appellant has to demonstrate prejudice, we look to the type of prejudice required to show a due process violation. The State contends that the only form of prejudice that properly should be considered in a due process analysis is whether the delay prejudiced the defendant’s “ability to defend against the revocation,” and because appellant “conceded that he did not suffer such prejudice, the circuit court properly denied his motion to dismiss.”

Appellant contends that this Court has defined prejudice in the context of delayed probation hearings “far more broadly.” He asserts that, “in addition to impairment of one’s defense, prejudice may also entail ‘oppressive incarceration’ or ‘anxiety and concern.’” (quoting *Boone*, 55 Md. App. at 670).

Appellant is correct that, in *Boone*, 55 Md. App. at 670, this Court assessed prejudice for a due process claim based on delay in a revocation hearing by looking to how “actual prejudice” was defined in another context, the right to speedy trial. We noted that prejudice in that context “comprises three elements of harm to the accused: (i) oppressive

incarceration, (ii) anxiety and concern of the accused, and (iii) impairment of the accused's defense." *Id.*⁷

Given this Court's holding in *Boone*, we reject the State's argument that prejudice in the context of a due process claim based on a delay in a revocation hearing is limited to impairment of the accused's defense. We thus turn to assess the prejudice alleged by appellant, which includes: (1) anxiety and concern; and (2) oppressive incarceration in the form of the inability to receive concurrent sentences and ineligibility for rehabilitative programs, and parole.⁸

The State contends that appellant's claim of "anxiety and concern" is not preserved for this Court's review because, although "defense counsel proffered that [appellant] suffered anxiety as a result of his inability to access prison programs," appellant subsequently testified, and he "never claimed to have suffered anxiety and concern." Moreover, the State argues that, in the "absence of any evidence of anxiety and concern, the circuit court properly found that [appellant] suffered none."

The record reflects that, although defense counsel argued that appellant had anxiety, appellant did not testify or produce other evidence regarding his alleged anxiety and

⁷ We stated in a footnote that, although we cited *Brady v. State*, 291 Md. 261 (1981), as a source of forms of prejudice, we were not "relying upon the Sixth Amendment, *Barker v. Wingo*, 407 U.S. 514 (1972), speedy trial principles because they are clearly inapplicable." *Boone v. State*, 55 Md. App. 663, 670 n.2 (1983), *cert. denied*, 298 Md. 394 (1984).

⁸ Appellant concedes on appeal, consistent with his position below, that the delay did not impair his defense.

concern. Thus, assuming *arguendo* that the issue was preserved, the trial court was within its discretion to reject this claim. *Cf. Wheeler v. State*, 88 Md. App. 512, 525 (1991) (“‘bald allegations’” of anxiety and concern have “‘little significance’” in a speedy trial analysis) (quoting *State v. Bailey*, 319 Md. 392, 417 (1990)).

With respect to this claim of prejudice, the court stated:

In terms of anxiety and concern over this matter, I don’t find I can make that finding either, based on his testimony and what I’ve seen here. Yes, he had notified the [c]ourt where he was but he asked the [c]ourt to quash things and I don’t find that this should have created any further anxiety or concern. While yes, the concern and anxiety of ‘I have the balance hanging over my head, what’s going to happen to me,’ the reality was the man was serving a sentence for another case. So when I balance all that, I find no prejudice to the defendant.

As the circuit court recognized, appellant already “was serving a sentence for another case.” The Kansas Supreme Court addressed, and rejected, an argument similar to that made here, stating:

The Court of Appeals found potential prejudice because of the “emotional anxiety” attached to waiting to learn of the outcome of the revocation motion. We disagree with the Court of Appeals’ conclusion that this created a right to due process. “A defendant incarcerated for a reason other than the delay in the hearings cannot properly attribute his anxiety at being incarcerated—or the prejudice it implies—to the hearing delays.” Moreover, under the circumstances of this case, Hall knew he had violated his probation because he was convicted of crimes committed while he was on probation.

Hall, 195 P.3d at 229 (citation omitted) (quoting *State v. Benjamin*, 929 A.2d 1276, 1283 (2007)).⁹ The circuit court did not err or abuse its discretion in rejecting appellant's claim of prejudice based on anxiety due to the delay in the revocation proceedings.

With respect to appellant's claim of oppressive incarceration, the circuit court found as follows:

In terms of the oppressive incarceration, the incarceration he has had is because he is serving another sentence. The record I have before me shows he ended up being locked up again because he committed another robbery and was sentenced. I don't credit his testimony as to all the information he has relayed to this [c]ourt today under oath concerning his inability to be released because of what is pending here in this court. Even if I were to accept that the Parole Commission said that to him, it would be contrary to knowing that he picked up a subsequent violent crime at the time he was on probation for another violent crime and shortly after he ends up at the Division of Correction, even though he had been incarcerated at a local detention center, that he immediately came up for a parole hearing in 2013 and was told, Well, you can't be paroled now because you've got this detainer against you. And again, as I previously said, there was no actual detainer, based on the [c]ourt's now awareness that he's only been held for only 35 days since I issued the writ for him.

⁹ This contrasts with the finding of prejudice in *Boone*, 55 Md. App. at 670, where the accused was not in jail:

[R]evocation of probation after such a significant delay could indeed generate anxiety and concern. A probationer, or one who has completed his probation, "can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." The longer he remains free to form these attachments, the greater is his interest in knowing that his liberty is secure and stable. If this security is threatened by a revocation hearing brought years after an alleged violation, the accused would naturally suffer an emotional stress that can be presumed to result in the ordinary person, upon learning that his freedom is at risk.

(citations omitted). Here, of course, appellant was incarcerated for another reason for most of the time of the delay.

Also, by his own correspondence to the [c]ourt after that in 2014, while he initially did make the correspondence saying, I'm at the Division of Correction, that initial correspondence first from 2013 didn't inform the [c]ourt of any issues that he was having. Then, number two, the second correspondence to the [c]ourt in 2014, again, had he had these parole hearings where he was being told, at least the first one he had, he can't go anywhere because of this is not evidenced by what is in the court file attached to your Motion.

So when I balance all that and I consider his testimony, I just don't credit that his incarceration has been oppressive as a result of anything that had been pending here. He's been incarcerated because he committed another crime and he's serving a sentence.

Based on the record, we cannot conclude that the circuit court's finding, that there was no oppressive incarceration due to the delay in the revocation hearing, was clearly erroneous. Indeed, despite testifying that he was denied parole due to his detainer two times, appellant stated that the first occasion occurred in November 2013, which he conceded was too early to be given parole. Moreover, appellant failed to provide any independent evidence to support his claim regarding the second parole hearing. Under these circumstances, we will not disturb the circuit court's finding that there was no prejudice shown based on appellant's claim that the State's delay rendered him ineligible for parole.

With respect to appellant's claim of prejudice as a result of the inability to receive a concurrent sentence, the State argues that this claim is not preserved. We agree. Appellant did not raise this claim to the circuit court below, and therefore, we will not entertain it on appeal. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *In re Kaleb K.*, 390 Md. 502, 513 (2006) ("The application of the rule

limiting the scope of appellate review to those issues and arguments raised in the court below ‘is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice.’”) (quoting *Medley v. State*, 52 Md. App. 225, 231 (1982)).¹⁰

Appellant next claims that the delay denied him the ability to participate in educational and vocational programs while he was incarcerated. The State contends that “[d]ue process does not protect speculative liberty interests that depend so heavily on the exercise of discretion by either the court or prison officials.” We agree.

In *State v. Dunn*, 859 P.2d 1169, 1173 (Or. Ct. App. 1993), *review denied*, 871 P.2d 122 (Or. 1994), the Court of Appeals of Oregon addressed a similar argument, i.e., that due to delay, Dunn “was prohibited from participating in community custody programs, half-way house placements, furloughs and educational opportunities.” The court rejected that

¹⁰ We do note that the United States Supreme Court rejected a similar claim in *Moody v. Daggett*, 429 U.S. 78, 87-88 (1976). In that case, the Court rejected Moody’s contention that denial of a prompt hearing deprived him of the opportunity to serve his sentences concurrently, explaining as follows:

[E]ven after completion of the homicide sentences the [Parole] Commission retains full discretion to dismiss the warrant or decide, after hearing, that petitioner’s parole need not be revoked. If revocation is chosen, the Commission has power to grant, retroactively, the equivalent of concurrent sentences and to provide for unconditional or conditional release upon completion of the subsequent sentence. Thus, deferral of the revocation decision does not deprive petitioner of any such opportunity; nothing in the statute or regulations gives him any “right” to force the decision of the Commission at this time.

Id. (citations omitted).

argument, concluding that Dunn’s “alleged prejudice [was] not of constitutional significance. The above conditions of incarceration are subject to the discretion of the prison officials. [Dunn] did not have an entitlement to those improved conditions of incarceration subject to the protection of either the state or federal constitutions.” *Id.*; see also *Moody*, 429 U.S. 88 n.9 (“Petitioner also argues that the pending warrant and detainer adversely affect his prison classification and qualification for institutional programs. . . . Congress has given federal prison officials full discretion to control these conditions of confinement, and petitioner has no legitimate statutory or constitutional entitlement sufficient to invoke due process.”) (citation omitted).

In any event, even if we concluded that appellant could claim prejudice from his ineligibility to participate in certain re-entry related correctional programs, appellant provided little testimony, and zero independent evidence, supporting his claim regarding his eligibility. Accordingly, on this record, the circuit court did not abuse its discretion in rejecting appellant’s claim of oppressive incarceration due to the delay in the revocation proceeding.

In sum, we conclude that appellant failed to demonstrate that he was actually prejudiced by the State’s delay. Accordingly, the circuit court did not err in denying appellant’s motion to dismiss.

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