UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1884

September Term, 2015

---

FREDERICK VAUGHN

v.

STATE OF MARYLAND

---

Friedman,
*Krauser,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

---

Opinion by Krauser, J.

---

Filed: June 15, 2017

*Krauser, J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

After arriving at the scene of a reported fist fight involving five to six males, armed with wooden boards, police arrested Frederick Vaughn, appellant, for, among other offenses,[1] possession of a handgun by a disqualified person and possession of cocaine. The next day, Vaughn was held, without bail, by order of the District Court Commissioner. The day after that, a bail review hearing was held, for Vaughn, in the District Court. At the conclusion of that hearing, Vaughn's bail was set at $300,000.

Then, sometime later that same day, while the court was proceeding to engage in other bail review matters, Vaughn requested that the court reopen his bail hearing, as Vaughn wished to introduce the testimony of an eyewitness to his arrest, and a video of the incident, giving rise to the charges against him. When the court denied that request, Vaughn filed, in the Circuit Court for Baltimore City, a petition for a writ of habeas corpus, which was granted, on the grounds that the District Court had erred, by refusing, at Vaughn's bail review hearing, to consider the exculpatory evidence he had offered after his bail review hearing had concluded. The circuit court then conducted a de novo bail review hearing, at which time it reviewed photographic stills from the video, but denied

[1] Vaughn was charged with a total of six offenses: possession of a firearm with a crime of violence conviction; possession of firearm having been convicted of a drug felony; possession of a firearm having been convicted of attempted second-degree murder; possession of a firearm having been found guilty of a drug felony; and the wear, carrying and transportation of a handgun; and possession of a controlled and dangerous substance.

Vaughn's request to adduce the video and testimony at issue. It then set his bail in the same amount that the District Court had: $300,000.

Vaughn thereafter filed an application for leave to appeal from the circuit court's imposition of "excessive bail," in which he presented the following question: "May defendants present evidence at bail review hearings?"

However, we need not address the issue Vaughn raises, because, as the parties agree, the issue is now moot, as all of the charges against Vaughn have been disposed of, and Vaughn has been released. Moreover, the issue, as stated by Vaughn, is a little misleading, as he was permitted to present evidence by proffer as well as exhibit photographic stills, derived from the video at issue, at his de novo bail review hearing. Furthermore, the rule that he suggests permits him to adduce evidence at a bail review hearing, Rule 4-216, has undergone significant changes since his bail review hearing. Those changes take effect on July 1, 2017. We therefore shall decline his request to review the issue he presents and dismiss this appeal as moot.

*Arrest*

Following an anonymous phone call to police dispatch, advising that "five to six males in the alley [were] fighting with wood boards[,]" when police, from the Baltimore City Police Department, arrived at that location and observed, among other things, Vaughn "standing next to a pile of construction material that was covered in plastic." They then

observed Vaughn "quickly pull[] his arm away from the location where it appeared he had put something down," and run to the rear porch of his home. When, moments later, the police found a "small black handgun lying in the plastic," where Vaughn had been standing, officers arrested Vaughn, and, during the ensuing search of his person, they found that Vaughn was in possession of three small bags of cocaine.

*Bail Proceedings*

The next day, a District Court Commissioner ordered that Vaughn be held without bail, because he had been previously convicted of using a handgun in a violent crime and faced a new charge of possession of a handgun by a felon. Then, the following day, a bail review hearing was held before the District Court, in Baltimore City.

At that hearing, Pretrial Services provided the court with information concerning Vaughn's five prior convictions,[2] his six previous failures to appear, the conflicting information Pretrial Services had received as to Vaughn's current residence, his previous attempt to commit suicide, and his present lack of employment. Concluding that Vaughn posed a threat to public safety and that his "prior firearm conviction and a firearm recovered

[2] Specifically, Pretrial Services stated that Vaughn had "five prior convictions on record. Most recent is from February of 1999 for attempted second degree murder and handgun in commission of a felony; '95, battery; '93, theft 300 plus and rogue and vagabond; and '93, battery and deadly weapon with intent to injure."

mak[e] this a 5[-202(f)],"[3] Pretrial Services recommended no "change in bail." The State agreed, pointing out Vaughn had been observed by "multiple officers responding to multiple people fighting with wooden boards, [and officers] saw him placing what appears to have been a gun on top of a pile of construction material."

Defense counsel remonstrated that the case was "a weak one," noting that the statement of probable cause did "not say that the police officer saw him place a handgun. It sa[id] that they saw him remove his hand as though he put something down[.]" Given "that evidence . . . a reasonable bail [was] in order," insisted counsel. The court subsequently set bail at $300,000, in light of the "the nature of the charges of [Vaughn's] prior criminal history, his ties to the community, and the likelihood of [Vaughn] making his next scheduled court appearance," as well as "issues of public safety, arguments, and/or recommendations from both pretrial and from counsel."

Then, after the court had turned to other bail review matters, Vaughn's counsel requested that it reopen Vaughn's bail review hearing, as an eyewitness, Vaughn's friend, James Sarchiapone, had arrived with a video, which purportedly depicted the incident, and which, as Vaughn's counsel put it, "completely contradicts what the police say." Vaughn's counsel explained: "There's another man on the video which the witness says he was the

[3] Section 5-202(f) of the Criminal Procedure Article provides that, when a defendant is charged with a certain firearm-related offenses, after having been previously convicted of such a crime, there is a "rebuttable presumption" that the defendant "will flee and pose a danger to another person or the community."

person that put the gun there. [Vaughn] was not in the alley as the police stated." The video, according to defense counsel, would establish that the "very high bail [set for Vaughn] . . . was based on the State proffering certain facts which are contradicted by a videotape."

The Court, however, declined to view the video, and denied Vaughn's request to call Sarchiapone as a witness, stating: "But for purposes of the bail review, the Court's not going to go into any factual components of the case. That's going to be a matter that's going to be set for trial or it may be a matter that you may be able to show that information to the State's Attorney's office and make a request for a revisiting of the bail." Following that bail review hearing, Vaughn remained incarcerated, as he was unable to make bail.

*Habeas Corpus Petition*

On October 1, 2015, Vaughn filed a petition for a writ of habeas corpus, in the Circuit Court for Baltimore City, claiming the District Court's "refus[al] to admit the evidence or to review the evidence" that "would not only mitigate the court[']s concern for dangerousness, but also held exculpatory value" was "a clear violation of Maryland Rule 4-216(e)(1)(F)." Attached to that petition was a letter from Sarchiapone, Vaughn's purported eyewitness, asserting that, while Vaughn was on his own porch, his neighbor "walked over to the property next door . . . and raised the gun up to the air and showed [Sarchiapone] it was under the dry wall and wood in the back of the property." Then, when the police arrived, it was Vaughn's neighbor, and not Vaughn, according to Sarchiapone's

letter, who went "right to the gun." Nonetheless, the police ignored the neighbor's actions and arrested Vaughn, declared the letter, and, ten minutes later, an officer returned with the seized firearm, and, in the words of Sarchiapone's letter, "put it back where it was" in the alleyway, then took a picture of the firearm, and left again.

*Habeas Corpus Hearing*

Following the transfer of this case to the circuit court, upon Vaughn's request for a jury trial, a hearing was held, in the Baltimore City circuit court, on Vaughn's habeas corpus petition on October 23rd, 2015. At that hearing, the court framed the issue before it as follows: "whether or not the petition should be granted . . . [is] a question of what process is due at a District Court bail review." It then stated that "[i]f there's no evidence showing that [Vaughn] possessed a handgun, well then that should be a factor considered in the bail review." Then, declaring that the "defense does have a right to, as an officer of the court, present evidence by way of proffer[,]" the circuit court found that Vaughn "was [not] allowed to do that in a meaningful way." It therefore granted Vaughn's habeas corpus petition and held a de novo bail review hearing.

*De Novo Bail Review Hearing*

At the de novo bail review hearing, Vaughn was represented by two attorneys: Zina Makar, Esq., and Jill Trivas, Esq. After reiterating, at that hearing, its concerns over Vaughn's previous convictions, his living situation, his lack of employment, his

unsatisfactory parole, his previous probation violations, his six failures to appear, its belief that Vaughn was "a threat to public safety[,]" and that, if released, "he would not appear in court," Pretrial Services recommended "no change to the $300,000 bail." Then, though denying Vaughn's request to view the video, the court did view photographs, with timestamps, from the video, and Vaughn's attorneys described the events the video depicted, and proffered the substance of Sarchiapone's testimony.

Specifically, Ms. Makar stated that the video showed that Vaughn was "walking about the porch" when "he was stopped by police officers." Based on Vaughn's location as shown in the video and the location of the gun, "it would have been impossible," opined Ms. Makar, "for him to run" to the pile of construction materials in the alley where the gun was located. "He would have had to sprint within six seconds," explained Ms. Makar, "to get all the way down his porch, all the way down there, and then run and pick up this gun and drop it back." Therefore, Ms. Makar insisted, "this substantially refutes any clear and convincing evidence of [Vaughn's] involvement with the gun," adding that as to "the dangerousness aspect . . . this refutes any clear and convincing evidence of dangerousness."

Then, Ms. Trivas, Ms. Makar's co-counsel, stated: "I did want to proffer that our witness who took the video, [Sarchiapone,] who was present during the entire time, would tell Your Honor that it was the white male[, the neighbor, Brian Pound,] in the alley who had possession of the gun, picked the gun up underneath the plastic. . . . Meaning that the

plastic was covering the handgun and it wouldn't I presume leave any sort of evidence or prints on the gun." Continuing, Ms. Trivas said:

> [Vaughn] never had possession of the handgun. Was never down by that pile on the side that the gun was recovered and that he clearly saw with his own eyes, the white male handling the handgun. And then coincidentally or what not the white male intercepts the police immediately. You see the white man talking to the police on – in the alley. And the police, it's just interesting if they really see what they claim to have seen, two or three minutes would not have gone by for the arrest of my client. . . . if my client was actually pulling his hand away from the handgun at the time the police claim they rolled down the alley, they would have taken him into custody immediately. Instead, he was free to roam up and down the stairs while the police were talking with the white man. While they were messing up the crime scene. And while they were doing whatever they were doing.

At the conclusion of the hearing, the circuit court stated that "[t]hese are very serious offenses. Particularly for someone who has been prosecuted and convicted of attempted second-degree murder using a firearm." Then, after noting that "[t]he nature of the evidence against [Vaughn] . . . is at issue here," and that it understood Vaughn's position, that is, that "it was not his firearm," the court observed that Vaughn "would serve a mandatory minimum of five years without the possibility of parole and perhaps more, given the fact that he's been convicted of attempted second-degree murder" and that it was not clear what, if any, ties he had to the community, other than "some connection with his mother," and that he has "been in Baltimore." The court concluded that "if in fact it is true that he possessed this firearm, one who is committed this sort of criminal conduct in the past does represent a danger to the community. . . . So considering all that" the bail set at

Vaughn's first bail review hearing was, avowed the court, "appropriate," and set "the bail at $300,000."

*Trial*

Unable to make bail, Vaughn remained incarcerated until his trial, which was held on January 12th and 14th, 2016. After State presented its case, at trial, the court granted Vaughn's motion for judgment of acquittal on all counts, except a single count of possession of a firearm by a felon. Then, on behalf of the defense, Sarchiapone testified as to the events of the day in question, and the video he took was played for the jury. At the conclusion of the trial, the State entered a nolle prosequi as to the remaining charge, possession of a firearm by a felon, and Vaughn was released from custody.

**Discussion**

The State contends that, as the various charges against Vaughn are no longer pending and he has, consequently, been released, his claim is moot. Though Vaughn concedes that his claim is moot, he asserts that this Court "should address the issue presented in this case," which, according to Vaughn, is "[m]ay defendants present evidence at bail review," because "it is of paramount public important [sic]" and would otherwise evade review.

First, we must correct a statement made by Vaughn, that the court, at each of his two bail review hearings, "refused" his request to present evidence. That is not what

occurred. At his first bail review hearing, Vaughn did not make such a request until after his hearing was over, and the court had turned to other matters. Moreover, at his second bail review hearing, the court, while declining to view the video at issue or permit Sarchiapone to testify, viewed photographic stills from that video while Vaughn's counsel contemporaneously proffered the substance of Sarchiapone's testimony. As a result, it appears that Vaughn's request to present evidence was granted, although, clearly, not to the full extent of that request.

Moreover, this appeal is not the appropriate vehicle for resolution of this issue. We note that significant changes have been made to Maryland Rule 4-216, which governs pretrial release procedure and that those changes are to take effect on July 1, 2017. While retaining significant parts of the current version of that rule, the 2017 Maryland Court Order 0001 (C.O. 0001) of the Court of Appeals, divided that rule into two, Rule 4-216 and Rule 4-216.1, and altered, to some extent, the text of that rule by some additions and deletions.

As Vaughn's challenge concerns the language of the soon-to-be supplanted version of this rule, and, as the State asserts, there are approximately 153,000 bail reviews each year, a more appropriate case, concerning the interpretation of the revised Rule, appears likely to arise. For that reason, and the others that we have noted, we decline to address the issue Vaughn raises.

**APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.**