Circuit Court for Baltimore City
Case No.: 116215005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2434

September Term, 2016

RAYMOND DRUMGOOLE

v.

STATE OF MARYLAND

Graeff
Berger,
Krauser, Peter B.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by, Graeff, J.

Filed: November 21, 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.

Following a bench trial in the Circuit Court for Baltimore City, Raymond Drumgoole, appellant, was convicted of seven counts of possession of a firearm by a disqualified individual, one count of possession of ammunition by a disqualified individual, and one count of wearing, carrying, or transporting a handgun. The court sentenced appellant as follows: ten years' imprisonment on the conviction for possession of a regulated firearm after a conviction of felony drug distribution (Count 1), the first five years to be served without the possibility of parole; ten years, concurrent, on the conviction for illegal possession of ammunition (Count 9); and another concurrent ten-year term on the conviction for wearing, carrying, or transporting a handgun (Count 8). The remaining convictions were merged for sentencing purposes.

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

1. Did the trial court err in proceeding to trial in the absence of any effective waiver of Appellant's right to the assistance of counsel or any effective waiver of Appellant's right to a jury trial?

2. Did the trial court err in denying the motion to suppress?

3. Did several of Appellant's convictions violate constitutional and/or common law principles of double jeopardy?

4. Was the evidence legally sufficient to sustain the convictions?

For the reasons that follow, we shall reverse appellant's convictions because the circuit court did not comply with the rule governing waiver of the right to counsel.[1] We will then address the sufficiency of the evidence claim "because a retrial may not occur if

[1] In light of the reversal of the convictions, we will not address the second and third questions presented. Appellant can revisit those issues, if appropriate, on remand.

the evidence was insufficient to sustain the conviction in the first place." *Benton v. State*, 224 Md. App. 612, 629 (2015).

FACTUAL AND PROCEDURAL BACKGROUND

On July 5, 2016, at approximately 3:50 p.m., the Baltimore County Police Department received an anonymous call, reporting that there was an armed individual in the vicinity of North Charles Street and East 20th Street, an area that was known to police "for heavy drug activity," as well as shootings, homicide and armed robberies. The caller described the individual as a black male, five feet three inches tall, wearing a black beanie, a black sweatshirt, black cargo shorts, gray and turquoise sneakers, and "a gun on his waist." The individual was accompanied by another male wearing a "black T-shirt."

Officer John Marley responded to that location, where he observed two individuals who matched those descriptions. Appellant was wearing gray and turquoise sneakers, along with black shorts, a "knit winter hat" and a hooded sweatshirt.[2] Officer Marley "found it suspicious that [appellant would] be wearing such an outfit on such a hot day."

Officer Marley exited his vehicle and asked the two men "if they would come over and talk to [him]." At that time, appellant "bladed his body and then took off running," while "holding the right side of his body." Appellant "grabbed his waistband with his right hand in order to prevent an object from moving or falling."

Officer Marley chased after appellant, who ran into an alley, out of the police officer's sight, and then re-emerged two to three seconds later. Appellant was placed in

[2] The caller gave the individual's height as 5'3," and Officer Marley listed appellant's height on the police report as 5'6".

handcuffs while the officer investigated the alley. On the other side of a locked fence in the alley, the officer observed a handgun. The handgun was recovered, along with "ten cartridges that were in the magazine."

Officer Marley arrested appellant, at which time he noticed that appellant's sweatshirt was "dark navy blue" (instead of black, as the caller had indicated), and that the knit hat was "actually a face mask." Appellant was wearing two belts underneath his clothing, which in his experience people used instead of a holster to conceal illegal weapons, using the belt "to hold the weapon in place to secure it." The gun, magazine, and cartridges were later processed for latent fingerprints, with negative results.

On August 2, 2016, appellant was charged, by criminal indictment, with seven counts of possession of a firearm following a disqualifying conviction, one count of possession of ammunition by a disqualified individual, and one count of wearing, carrying, or transporting a handgun. An attorney from the Office of the Public Defender entered his appearance, along with a plea of not guilty, on behalf of appellant on September 9, 2016. Six days later, on September 15, 2017, that attorney filed a motion to strike his appearance, without setting forth any reason.

On September 23, 2016, appellant, an unrepresented litigant, filed an omnibus motion, which included a motion to waive counsel pursuant to Md. Rule 4-215, stating that he "never sign[ed] any document requesting a[n] attorney" and he was "moving forward Pro se." On October 12, 2016, the court entered an order granting the public defender's motion to strike his appearance.

On November 16, 2016, the court held an arraignment hearing. It advised appellant that he had a constitutional right to have an attorney represent him, stating that an attorney "can be of great assistance to you in explaining all of the legal matters to you including your rights, your defenses, court procedures, [and] any [e]ffect the Court's decision would have upon you." Appellant was advised that he could request representation from the Office of the Public Defender, hire a private attorney, or request a court-appointed attorney.

Appellant advised the court that he wanted to represent himself, and the following colloquy then ensued:

> THE COURT: Do you understand all of the advantages of having an attorney?
>
> [APPELLANT]: Yes.
>
> THE COURT: Is there a reason that you want to represent yourself?
>
> [APPELLANT]: Because it's my constitutional right to - -
>
> THE COURT: It is your constitutional right. It is, it is the choice that you may make. It is not a wise choice, but it is a choice that you may make. But at the arraignment right now as to who is going to represent you, are you telling me you are going to represent yourself?
>
> [APPELLANT]: Yes.
>
> THE COURT: All right.

When asked how he wanted to plead, appellant replied: "I do not make a plea. I stand a claim of innocence at this moment." The court directed the clerk to enter a plea of not guilty.

The court then informed appellant and the prosecutor that the trial would have to be set for another date because there were no judges available to hear the case that day. At that point, appellant expressed an intent to waive his right to a jury:

> [APPELLANT]: You didn't ask me did I want a judge trial or a jury trial.
>
> THE COURT: Well, when I get you a court, you can, that judge is going to ask you that. But obviously, a Court trial is quicker than a jury trial. So I really should know that. Do you, have you made a decision yet about whether you want a Court or a jury trial?
>
> [APPELLANT]: Yes.
>
> THE COURT: What do you want?
>
> [APPELLANT]: A judge trial.
>
> THE COURT: You want a judge trial. Ms. Malcolm, how long would a judge trial take?
>
> [PROSECUTOR]: Your Honor, I don't think any more than a day.

Trial was then scheduled for January 9, 2017.

On the day of trial, the parties first appeared before the "reception" court. The prosecutor advised the court that appellant had already waived his right to counsel, that the waiver had been put on the record, and that appellant had requested a bench trial. Appellant confirmed this information in response to the court's questions:

> THE COURT: Okay. It's my understanding, counsel has represented so I'm not going to go through the actual litany, but it's my understanding you've given up your right to have an attorney and you wish to represent yourself; is that correct?
>
> [APPELLANT]: Yes. I make a motion to be able to properly take these handcuffs off so I can properly represent myself and properly - -

> THE COURT: You're, you're going to, you're going to have that opportunity here in a second, sir. I just need to know and my understanding [is] that you are, you wish to go ahead with a Court trial; is that correct, sir?
>
> [APPELLANT]: I was actually going to ask if the State was willing to offer a nol pros in this matter?
>
> THE COURT: Well, it's my understanding, you're not going to, are you going to dismiss the matter?
>
> [PROSECUTOR]: No, Your Honor.
>
> THE COURT: Okay. So they're not going to dismiss the matter, Mr. Drumgoole. Are you asking for a jury trial or a Court trial?
>
> [APPELLANT]: I'm requesting a judge trial.
>
> THE COURT: Okay. All right.

The court then directed the parties to another courtroom to begin trial. It advised appellant that, in the trial court, he was going to have to make "an election":

> THE COURT: … I am going to tell them, so you're going to have to make what we call an election. You're going to have to put on the record that you are knowingly and voluntarily giving up your right to a jury trial and you're going ahead with a Court trial. Do you understand that, sir?
>
> [APPELLANT]: Yes, sir.

When the case was called for trial, the record reflects that the court addressed appellant's waiver of his right to an attorney and waiver of jury trial as follows:

> THE COURT: Okay. When I reviewed the file, Mr. Drumgoole, it looks like you waived your right to counsel previously, correct?
>
> [APPELLANT]: Yes.
>
> THE COURT: And you waived your right to trial by jury, correct?
>
> [APPELLANT]: Yes.

At trial, in addition to the testimony of the facts set forth, *supra*, the parties stipulated as follows:

> The DEFENDANT has been charged with possessing a regulated firearm after having been previously found guilty of a crime under state law that would prohibit his possession of a regulated firearm. The parties hereby stipulate that the DEFENDANT has been previously found guilty of a crime that would prohibit his possession of a regulated firearm.

Prior to rendering its verdict of guilty on all counts, the court asked to see the stipulation, and the following occurred:

> THE COURT: Ms. [prosecutor], you're charging him with being in possession of a regulated firearm after being convicted of a drug felony, but you didn't offer the Court [ ] any evidence of his having been convicted of a drug felony.
>
> [PROSECUTOR]: And Your Honor, I have true test - -
>
> THE COURT: I know, but you didn't offer it to the Court.
>
> [PROSECUTOR]: But usually, I'm sorry, Your Honor. But usually when we do stipulations, the Court has never requested that I present true test.
>
> THE COURT: Well, I know, but, even if you do a stipulation. If someone has been convicted of a, all a stipulation says is, he's been charged with possessing a regulated firearm after being found guilty of a crime which under State Law would prohibit his possession of a regulated firearm. Well, that's one of the charges. That's charge five on your sheet, but you offered the Court no evidence that he had been convicted of a drug felony. You offered the Court no evidence that he was convicted of a crime of violence. So how can I find somebody guilty when there's no evidence of their guilt having been presented to the Court?
>
> Raymond Drumgoole, case number 116215005 based on the evidence before the Court, the Court is satisfied the evidence is sufficient to establish guilt beyond a reasonable doubt. That on July 5, 2016, at about 3:50 p.m., 1900 block of St. Paul Street you did possess a regulated firearm after having been convicted of a disqualifying crime. The Court is further satisfied that the evidence is sufficient. Um, that's, finds you guilty of count six, possession of a regulated firearm after having been convicted of a

> disqualifying crime; count seven, possession of a regulated firearm after having been convicted of a disqualifying crime although those would merge. Count eight, you did wear, carry and transport a handgun on or about your person and count nine, you did possess ammunition after being disqualified [from] doing so under Maryland Law. So it's count five, six, seven, eight and nine.
>
> All right, we ready for sentencing? I don't have the statute. I'm going to have to get the statute. All right. So I got to get the statute. Um, let me do this. I think Judge Brown has the statute back here. I just have to see, but I also have to look at what she charged him with. I need the Court file because I need to see the indictment. So I'll just take a short recess and grab the statute and look at it.

After a brief recess, the court stated the following, before proceeding to sentencing:

> THE COURT: I did review the provisions of Public Safety Article 5-133 and uh based on the stipulation, the charges were all drug felonies as opposed to a crime of violence, but with the stipulation, that verdict is guilty as to all of the charges. But for purposes of disposition, some of them would merge.

As indicated, the court imposed sentences on Counts 1, 8, and 9, and it merged the remaining convictions for sentencing purposes. This appeal followed.

DISCUSSION

I.

Waiver of Right to Counsel

Appellant contends that the circuit court erred in proceeding to trial without a valid waiver of the right to counsel and the right to a jury trial. The State agrees, and so do we.

The Sixth Amendment to the United States Constitution, and Article 21 of the Maryland Declaration of Rights, guarantee a criminal defendant the right to legal counsel, which "seeks to protect a defendant from the complexities of the legal system and his or her lack of understanding of the law." *Brye v. State*, 410 Md. 623, 634 (2009). A criminal

defendant also has "the corresponding right to proceed without the assistance of counsel." *Id.*

Maryland Rule 4-215 protects "both the right to the assistance of counsel and the right to self-representation." *Pinkney v. State*, 427 Md. 77, 92 (2012). "The Rule 'explicates the method by which the right to counsel may be waived by those defendants wishing to represent themselves … and the necessary litany of advisements that must be given to all criminal defendants before any finding of express or implied waiver of the right to be represented by counsel may be valid.'" *Id.* at 92-93 (quoting *Broadwater v. State*, 401 Md. 175, 180 (2007)). "[T]he requirements of the Rule are mandatory" and demand strict compliance. *Id.* at 87. The "'interpretation of the Maryland Rules is a question of law; as such, we review a trial court's determinations on matters of interpretation without deference.'" *State v. Taylor*, 431 Md. 615, 630 (2013) (quoting *Pinkney,* 427 Md. at 88).

In pertinent part, Rule 4-215 provides as follows:

> **(a) First Appearance in Court Without Counsel.** At the defendant's first appearance in court without counsel, … the court shall:
> (1) Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel.
> (2) Inform the defendant of the right to counsel and of the importance of assistance of counsel.
> (3) Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any.
> (4) Conduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel.
> (5) If trial is to be conducted on a subsequent date, advise the defendant that if the defendant appears for trial without counsel, the court could determine that the defendant waived counsel and proceed to trial with the defendant unrepresented by counsel.
> (6) If the defendant is charged with an offense that carries a penalty of incarceration, determine whether the defendant had appeared before a judicial officer for an initial appearance pursuant to Rule 4-213 or a hearing

> pursuant to Rule 4-216 and, if so, that the record of such proceeding shows that the defendant was advised of the right to counsel.
>
> The clerk shall note compliance with this section in the file or on the docket.
>
> (b) **Express Waiver of Counsel.** If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel. If the file or docket does not reflect compliance with section (a) of this Rule, the court shall comply with that section as part of the waiver inquiry. The court shall ensure that compliance with this section is noted in the file or on the docket. At any subsequent appearance of the defendant before the court, the docket or file notation of compliance shall be prima facie proof of the defendant's express waiver of counsel. After there has been an express waiver, no postponement of a scheduled trial or hearing date will be granted to obtain counsel unless the court finds it is in the interest of justice to do so.

Here, the circuit court failed to comply with the mandatory provisions of Rule 4-215. The record does not reflect that the circuit court confirmed that appellant had received a copy of the charging document, or that appellant was advised of the nature of the charges, or allowable penalties, pursuant to subsections (a)(1) and (3) of the rule. Furthermore, the court did not make the requisite announcement on the record that appellant was knowingly and voluntarily waiving his right to counsel. Accordingly, reversal is required.

II.

Sufficiency of the Evidence

The first seven charges against appellant involved crimes making it illegal for persons convicted of certain crimes to possess a firearm.[3] To convict a defendant of such crimes, the State had the burden of proving: (1) that the gun involved was a "regulated firearm," a firearm, or a handgun; (2) that appellant possessed the gun; and (3) that appellant was precluded from doing so because of a disqualifying conviction.

Appellant contends that the evidence was insufficient to sustain his convictions for three reasons. First, he asserts that the evidence was insufficient to support his convictions for Counts 1-7 because the State failed to prove that he had been convicted of a drug felony or a crime of violence. Second, he asserts that he was "improperly convicted" of multiple

---

[3] Counts 1-3 of the indictment charged appellant with a violation of Public Safety Article (PS), § 5-133(c), which, in relevant part, prohibits possession of a "regulated firearm" by a person who has been convicted of a "crime of violence" or specific drug felonies. *See* PS § 5-133(c)(i)(ii). Count 4 charged a violation of Criminal Law Article (CR), § 5-622, which prohibits possession of a "firearm" by a person who has been convicted of any felony under Title 5 of the Criminal Law Article, which applies to controlled dangerous substances.

Counts 5-7 charged appellant with a violation of PS § 5-133(b), which prohibits possession of a "regulated firearm" by a person convicted of, *inter alia*, a "disqualifying crime[.]" "Disqualifying crime" is defined in PS § 5-101(g), and includes, as the State charged in the indictment, "a violation classified as a felony in the State" (Counts 5 and 6), and; "a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years" (Count 7).

Count 8 charged appellant with wearing, carrying, and transporting a handgun on and about the person, in violation of CR § 4-203. Count 9 charged appellant, under PS § 5-133.1, with possession of ammunition by a person who is prohibited from possessing a regulated firearm under PS § 5-133 (b) or (c).

counts of possession of a single firearm. Third, appellant argues that the evidence was insufficient to prove that he possessed the weapon.

As this Court has recently stated, we review a claim of evidentiary insufficiency as follows:

> The standard for appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone. Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence. This is because weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact. Thus, the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.

Darling v. State, 232 Md. App. 430, 465, *cert. denied*, 454 Md. 655 (2017) (quotation marks and citations omitted).

A.

Evidence of Prior Convictions

Appellant first contends that the evidence was insufficient to support his convictions for counts 1-7 because "they required proof of specific disqualifying convictions for either a drug felony or a crime of violence" as an element of the offense, and the evidence failed to prove that he had any of those previous disqualifying convictions. In support of this contention, appellant notes that the stipulation stated that he previously had been found

guilty of a crime that would prohibit his possession of a regulated firearm, which he argues "does not equate to a 'conviction' for legal purposes."[4]

The State contends that the evidence was sufficient to support the convictions. It asserts that appellant stipulated to convictions, "not mere guilty findings."

The record reflects that, on the second day of trial, the prosecutor proposed a stipulation regarding prior convictions:

> [PROSECUTOR]: . . . I just wanted to preliminarily [ ] ask Mr. Drumgoole [if] he would be willing to sign a stipulation of fact as to the fact that he has underlying convictions for which he's prohibited from being in possession of a firearm?
>
> THE COURT: Mr. Drumgoole, a stipulation is an agreement between the parties in the case that says rather than calling [ ] witnesses and … presenting evidence from the stand, the parties agree to that particular fact. The stipulation that the State is seeking is that you have previously been convicted of a crime which under Maryland Law prohibits you from possessing a firearm. You['re] not admitting guilt in this case. You would only be agreeing that you have such a previous conviction and what they're asking is, are you willing to stipulate that or do you want her to have to bring in witnesses to prove it?
>
> [APPELLANT]: No, stipulation is cool.
>
> THE COURT: Okay. Now in order for that to be done, she has a document she has prepared. You need to review it and then sign it.

As indicated, the stipulation that was admitted into evidence stated that appellant "has previously been found guilty of a crime that would prohibit his possession of a firearm."

---

[4] Appellant also argues that, "as the trial court proclaimed," the State failed to prove that appellant had a prior conviction for a drug felony or a crime of violence. In reviewing the sufficiency of the evidence, however, "we are measuring a verdict against the supporting evidence itself and not looking at what a judge might say in rendering the verdict." *Chisum v. State*, 227 Md. App. 118, 127 (2016).

Where, as here, the record clearly reflects an oral agreement to stipulate to a prior disqualifying conviction, the State is relieved from its burden of proving that element of the offense of illegal possession of a firearm. *Smith v. State*, 225 Md. App. 516, 528 (2015), *cert. denied*, 447 Md. 300 (2016). In *Smith*, defense counsel orally agreed, prior to jury selection, to stipulate that the defendant had a prior conviction that would disqualify him from possessing a regulated firearm. *Id.* at 521-22. The State did not address the issue of the disqualifying conviction in its case-in-chief, and defense counsel moved for a judgment of acquittal, arguing that "the stipulation has to be introduced into evidence." *Id.* at 523. Noting that the stipulation regarding the prior conviction "was made on the record," the trial court advised the jury that the parties had stipulated that the defendant was prohibited from possessing a firearm. *Id.* at 524. On appeal, we affirmed the conviction, holding that because Smith had stipulated to the prior disqualifying conviction, the State was not required to prove that element of the offense. *Id.* at 528.

Here, it is clear from the transcript that appellant expressly agreed, on the record, to stipulate that he had previously been <u>convicted</u> of a crime that would prohibit him from possessing a firearm. The effect of that stipulation is that the State was not required to introduce evidence to prove such a conviction. Consequently, having stipulated to a prior disqualifying conviction, appellant cannot now claim that the State failed to prove that element.

B.

Unit of Prosecution

Appellant next argues that the evidence was insufficient because he was "improperly convicted of multiple counts of possession of a single firearm[.]" As the State points out, however, this is not a challenge to the legal sufficiency of the evidence to support appellant's convictions, but rather, it is an argument regarding duplicity in the pleading. *See Albrecht v. State*, 105 Md. App. 45, 51–52 (1995) (appellant's unit of prosecution argument is a "pleading problem"). This argument can be raised, if appropriate, prior to appellant's retrial.

C.

Possession

Appellant also contends that the evidence was insufficient to prove any of the charges, including wearing, carrying, or transporting a handgun (Count 8) and possession of ammunition by a prohibited person (Count 9), because there was no evidence that he was in actual possession of the handgun. The State disagrees, asserting that there was "abundant circumstantial evidence" from which the court could infer that appellant had the handgun and disposed of it in the alley." We agree with the State.

In the light most favorable to the State, the evidence at trial was that the police received a report of an armed person in the area of North Charles Street and East 20th Street. Officer Marley responded to the area, where he saw appellant, who matched the caller's description of the suspect. When the officer attempted to speak with appellant, appellant "took off running," and grabbed his waistband in what appeared to be an attempt

to keep an object from falling. Officer Marley chased after appellant, who turned into an alley and reemerged a few seconds later. At that point, appellant was apprehended, and a loaded handgun was discovered on the other side of a locked fence in the alley. It also was discovered that appellant was wearing two belts underneath his clothing, which, in the officer's experience, was a method used, instead of a holster, to hold a weapon in place.

We conclude that, based on this evidence, a rational trier of fact could have inferred that appellant was in possession of the gun and discarded it in the alley during the police chase. *See State v. Suddith*, 379 Md. 425, 432 (2004) ("[i]t has long been established that the mere fact that the contraband is not found on the defendant's person does not necessarily preclude an inference by the trier of fact that the defendant had possession of the contraband."). The evidence was sufficient to support appellant's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.