UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2800

September Term, 2014

GARY WATKINS

v.

STATE OF MARYLAND

Graeff,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: May 18, 2017

A jury in the Circuit Court for Washington County convicted appellant, Gary Watkins, of two counts of possession of a controlled dangerous substance ("CDS") with intent to distribute, two counts of possession of heroin, two counts of possession of cocaine, and one count of possession of marijuana less than 10 grams. The circuit court sentenced appellant to the mandatory minimum sentence of 25 years on each of the two convictions of possession with intent to distribute, to be served concurrently. The court merged the remaining charges for sentencing purposes.

On appeal, appellant presents the following questions for our review, which we have rephrased slightly, as follows:

1. Did the circuit court abuse its discretion in permitting lay witness testimony regarding appellant's involvement in distribution?

2. Did the sentencing court err when it ordered forfeiture of money seized from appellant?

3. Did the sentencing court err in imposing enhanced sentences on two separate counts in the same case?

For the reasons set forth below, we shall vacate the forfeiture order and appellant's sentences, and otherwise affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On May 24, 2014, an informant for the Washington County Narcotics Task Force, acting at the direction of the police, contacted Steven Delauter, a suspected drug dealer, and requested a meeting to purchase illegal drugs. The informant arranged to meet Mr. Delauter at the Liberty Gas Station in Hagerstown to purchase $120 worth of crack cocaine. Prior to the scheduled meeting, police equipped the informant with electronic

surveillance equipment and provided her with $120 in $20 bills, which police previously had photocopied and recorded.

Prior to the scheduled meeting with Mr. Delauter, Agents Frank Toston and David Fortson drove the informant to a location close to the Liberty Gas Station. The informant went to the gas station and approached the driver's side of a red Ford Thunderbird. Mr. Delauter, who was seated in the driver's seat of the Thunderbird, told the informant to get into the passenger's seat of the car, which she did. Mr. Delauter drove a short distance to a nearby alley and turned off his vehicle. A moment later, a blue Ford pickup truck, driven by appellant, arrived in the alley and parked across from Mr. Delauter's vehicle. The informant gave Mr. Delauter the $120 in cash provided to her by police, and Mr. Delauter exited his vehicle and approached the passenger side of the Ford pickup truck. Approximately 30 seconds later, Mr. Delauter returned to his vehicle with two unwrapped pieces of crack cocaine, and he handed one of the pieces to the informant.

Mr. Delauter and the informant drove from the alley in Mr. Delauter's vehicle, and shortly thereafter, Agents Toston and Fortson stopped the vehicle and took Mr. Delauter into custody. Agent Brian Hook, who was also part of the task force surveillance team, received notification via the police radio to look for a blue Chevy pickup truck that was leaving the area. Agent Hook observed appellant's blue pickup truck leaving the Liberty Gas Station and attempted to stop it. Appellant did not stop, and a chase ensued. Appellant struck a median and crashed. Appellant then fled the vehicle and was apprehended and arrested by Agent Hook following a foot chase.

Police recovered $610 in cash from appellant's pocket and $123 from the floor of his truck, $100 of which matched the serial numbers of the bills provided to the informant by the Task Force. Agent Hook retraced his steps of the chase of appellant and recovered a plastic bag containing CDS which tested positive for heroin, cocaine, and marijuana, as well as a $20 bill that matched the recorded serial numbers of the Task Force bills.

DISCUSSION

I.

LAY WITNESS TESTIMONY

Appellant contends that the trial court erred in allowing Mr. Delauter, a lay witness, to testify that appellant "was involved in the distribution of controlled dangerous substances." He argues that this was an inadmissible legal conclusion.

The testimony at issue occurred after Mr. Delauter testified that he had been convicted of "[c]onspiracy to sell CDS" with a confidential informant. The following then occurred:

> [PROSECUTOR]: Okay. Was there anybody else that you were involved with **in this distribution**?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled. You may answer.
>
> [WITNESS]: I made a phone call.
>
> [PROSECUTOR]: Okay. So you talked to somebody else about this as well, correct?
>
> [WITNESS]: Yeah.

(emphasis added). Mr. Delauter then pointed to appellant as the person that he talked to in this regard.

Maryland Rule 5-701 provides that a lay witness may testify "in the form of opinions or inferences . . . which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Rule 5-704(a) further provides that, except where the opinion is based on mental state or condition, "testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact." *Accord Zachair, Ltd. v. Driggs*, 135 Md. App. 403, 438 (2000) (A lay witness may testify on "an ultimate issue of fact . . . if the opinion is rationally based on the perception of the witness and helpful to the determination of the trier of fact."), *cert. denied*, 363 Md. 206 (2001).

The decision to admit lay witness testimony, like all evidentiary rulings, rests within the sound discretion of the trial court and will not be overturned on appeal unless it is shown that the trial court abused its discretion. *Moreland v. State*, 207 Md. App. 563, 568-69 (2012). An abuse of discretion occurs when the trial court's decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id*. at 569 (citations and quotation omitted).

Appellant argues, correctly, that a witness may not, "in the guise of opinion upon a matter of fact include in it a matter of law," and a witness should not be permitted to give his or her "opinion directly that a person is guilty" of a crime. *Franceschina v. Hope*, 267 Md. 632, 643 (1973). That is not, however, what occurred in this case.

Mr. Delauter testified regarding his involvement in the events that resulted in his conviction for conspiracy to distribute CDS. Although the prosecutor used the term "distribution," Mr. Delauter's version of the events, from his perspective, was that a woman told him she wanted drugs, he called appellant, who met him and gave him "almost a gram of [crack cocaine]" in exchange for money. This testimony involved matters of fact, as opposed to an improper conclusion of law. *United States v. Levine*, 180 F.3d 869, 871 (7th Cir. 1999) ("Matters of fact often overlap matters of law . . . that the answer to a question may lead to a particular legal conclusion does not put the subject off limits."). The circuit court did not abuse its discretion in permitting Mr. Delauter's testimony.

II.

FORFEITURE ORDER

Appellant contends that the sentencing court erred in ordering that "any monies seized" be "forfeited to the State." In that regard, he asserts that "no application for forfeiture had been made and the criminal court lacked jurisdiction over a civil matter." The State agrees, and so do we.

"[F]orfeiture is a civil proceeding completely separate and apart from the criminal proceeding." *Dir. of Fin. of Prince George's Cnty. v. Cole*, 296 Md. 607, 619 (1983). "To apply for the forfeiture of money [seized in connection with a violation of the CDS law], the appropriate local financial authority or the Attorney General shall file a complaint and affidavit in the District Court or the circuit court for the county in which the money was seized." Md. Code (2014 Supp.) § 12-302(a) of the Criminal Procedure Article.

Here, the State acknowledges that the record does not reflect that civil proceedings were instituted or that appellant consented to place such proceedings before the sentencing court in his criminal case. Under these circumstances, the State concedes, and we agree, that the sentencing court in this criminal case was without jurisdiction to order the forfeiture. *See Gatewood v. State*, 264 Md. 301, 305 (1972). Accordingly, the order that "any monies seized [are] forfeited to the State" must be vacated.

III.

ENHANCED SENTENCES ON SEPARATE COUNTS

Appellant's final contention involves his sentence. As indicated, appellant was sentenced, as a subsequent offender, to the mandatory minimum of 25 years' imprisonment, without parole, on each of the two counts of possession of CDS with intent to distribute. Appellant argues that the court erred in imposing this sentence because "only one enhanced penalty can be imposed in a single case." The State agrees.

Pursuant to Md. Code (2014 Supp.) § 5-608(c)(1)-(4) of the Criminal Law Article, appellant, who previously had been convicted of two qualifying offenses of distribution of narcotics, was subject to an enhanced penalty as a third-time offender. This Court has held, however, that "[u]nder the rule of lenity, only one enhanced penalty may be imposed under [the statute] when there are multiple convictions arising from a single indictment or case." *Veney v. State*, 130 Md. App. 135, 149, *cert. denied*, 358 Md. 610 (2000).

Here, because appellant's convictions for possession with intent to distribute arise from the same underlying transaction and the same trial, he was subject to an enhanced penalty on only one of the convictions, not both. We agree with the parties that the proper

remedy is to vacate the two sentences for possession with the intent to distribute and remand for resentencing.

ORDER FORFEITING MONEY VACATED. SENTENCES FOR POSSESSION WITH INTENT TO DISTRIBUTE VACATED AND CASE REMANDED FOR RESENTENCING. JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID 33% BY APPELLANT AND 67% BY WASHINGTON COUNTY.