

Circuit Court for Baltimore City
Case No. 118130033

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2048

September Term, 2019

TAVON BRAND

v.

STATE OF MARYLAND

Beachley,
Gould,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 15, 2020

*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, Tavon Brand, appellant, was convicted of two counts of first-degree murder, two counts of use of a firearm in the commission of a crime of violence, possession of a regulated firearm after having been convicted of a disqualifying crime, and wearing, carrying, or transporting a handgun on his person. On appeal, he contends that the court erred in failing to find that he was not criminally responsible (NCR) for those offenses. For the reasons that follow, we shall affirm.

BACKGROUND

Mr. Brand entered a plea of not guilty and NCR and elected to have a bifurcated bench trial. At the trial on the merits, the State presented evidence that on April 16, 2018, Mr. Brand shot and killed his aunt and uncle, Rona Brand and Clyde Burrell. Mr. Brand had been living in their basement at the time of the murders. After the court found him guilty of the charged offenses, it then heard evidence to determine whether Mr. Brand was criminally responsible for the charged offenses. At that hearing, Mr. Brand and the State both called experts in the field of forensic psychiatry, each of whom examined Mr. Brand and offered different opinions as to whether he was responsible for his criminal conduct. Both experts agreed that Mr. Brand had been psychotic at the time of the shooting and that his psychosis had been the result of his having used some type of intoxicating substance, likely marijuana. However, they disagreed as to whether that psychosis was caused by acute intoxication or whether it was the result of “settled insanity” stemming from prior drug use. In the first instance, the experts agreed that Mr. Brand would be criminally responsible, whereas in the second instance he would not.

In resolving this question, both experts focused their testimony on two issues: (1) whether Mr. Brand was still using intoxicating substances at the time of the murders, and (2) how long it took for his symptoms to resolve following the murders. Mr. Brand's expert witness, Dr. Solomon Meltzer, concluded that Mr. Brand did not ingest any drugs on the day of the shooting based, primarily, on Mr. Brand having self-reported to Dr. Meltzer and others that he had stopped using drugs several weeks prior to that time. Dr. Meltzer also reviewed Mr. Brand's medical records from the jail and, based on several notations contained therein, he concluded that Mr. Brand had remained psychotic until at least April 30, 2018, approximately two weeks after his arrest. These findings ultimately led Dr. Meltzer to opine that Mr. Brand's psychosis was the result of settled insanity.

On the other hand, the State's expert, Dr. Travis Klein, concluded that Mr. Brand was likely using drugs on the day the murders occurred based on the fact that (1) on the day of the murders, Mr. Brand's cousin had reported smelling marijuana in the basement where Mr. Brand was living,¹ (2) Mr. Brand's post-arrest claims that he had stopped using drugs appeared to be inconsistent with what he had told other people prior to the crimes; and (3) in his expert opinion, a two to three week break from using drugs was inconsistent with a sudden increase in symptoms followed by a rapid decline in symptoms. Dr. Klein also disagreed with Dr. Meltzer's conclusion that Mr. Brand's symptoms had continued for a significant length of time following his arrest, noting that his medical records specifically indicated that his mental status exams were normal on

¹ His cousin acknowledged that she did not see Mr. Brand smoking marijuana and that there were other people in the basement besides Mr. Brand.

each of the two days after the murders occurred. Therefore, Dr. Klein opined that Mr. Brand's psychosis was temporary and had been caused by acute intoxication.

At the close of all the evidence the court determined that the question to be answered was whether Mr. Brand's psychosis was "essentially [] enduring, or what they call settled mental condition" or a "temporary or transient condition . . . [which] was the direct result of intoxication which [was] voluntarily sought[.]" The court noted that the parties "agreed that there are really two things [the court] needs to look at . . . the front end being how long after the ingestion of a potentially triggering intoxicant did [the murder] take place, and the back end being how long did it take for the symptoms to resolve." Answering the second question first, the court stated that "from a factual standpoint" it found, based on Mr. Brand's medical records that, "whatever the cause of the psychosis, it had resolved within a day or two after the arrest[.]" The court then noted that the issue of whether the psychosis was "the direct result of ingesting an intoxicant, or was it a remote consequence from prior drug abuse" was a "tougher question." After reviewing the evidence in support of each expert opinion, the court determined it was "not persuaded by a preponderance of the evidence that [Mr. Brand] hadn't consumed anything for weeks prior to this episode" and that it was "more likely . . . that he had in fact consumed something shortly before this happened . . . and this ingestion pushed his sort of weakening grip on sanity to a breaking point on this particular day." Based on these findings, the court found that the psychotic episode was temporary and thus, did "not meet the Maryland definition for not criminally responsible[.]"

DISCUSSION

Mr. Brand’s sole contention on appeal is that the “the trial court erred in failing to find that [he] was not criminally responsible for his conduct in this case.” We disagree. “A defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder ..., lacks substantial capacity to: (1) appreciate the criminality of that conduct; or (2) conform that conduct to the requirements of law.” Crim. Pro. Art. § 3-109(a). Although mental disorders do not include an abnormality caused by a defendant’s voluntary consumption of intoxicants, such as alcohol or illegal drugs, Maryland courts have recognized what has become known as the “settled insanity” doctrine, which excuses criminal responsibility for a defendant whose actions stem from a permanent or chronic mental disorder caused by the habitual and long-term abuse of drugs or alcohol. *See Parker v. State*, 7 Md. App. 167, 174–75 (1969).

In support of his claim that the circuit court erred in not finding him NCR, Mr. Brand cites our opinion in *Porreca v. State*, 49 Md. App. 522 (1981). In *Porreca*, we applied the settled insanity doctrine in a case decided when Maryland still had the plea of “insanity.” In that case, Porreca stabbed the victim with a knife during a psychotic episode. *Id.* at 523-24. There was evidence that Porreca had a long history of drug use and had taken PCP and cocaine the day before the attack. *Id.* at 524-25. Porreca pleaded not guilty by reason of insanity.

At that time, Maryland law provided that if a criminal defendant presented sufficient evidence to call into question his sanity, then the burden of production and

persuasion shifted to the State to prove, beyond a reasonable doubt, that he was not insane. *Id.* at 523 n.1. To satisfy his initial burden of production, Porreca presented testimony from a forensic psychiatrist who explained that PCP commonly triggers a psychosis that may return weeks or months after its use, that the drug is capable of causing four or five different categories of serious mental disorders, and that it could cause an organic brain syndrome that is irreversible. *Id.* at 525. According to the doctor, Porreca's psychosis manifested itself at least a month before the assault and it continued, intermittently, for three to six months. *Id.* During this period, Porreca's periods of psychosis decreased as the effects of his drug use abated. *Id.* at 525. In the psychiatrist's opinion, therefore, Porreca's psychosis at the time of the attack was caused by his prior use of intoxicants. *Id.* at 525-26. The trial court ruled that, because Porreca had ingested the drugs voluntarily and was sane, both before taking the PCP and after it wore off, he did not present sufficient evidence to shift the burden to the State to prove his sanity beyond a reasonable doubt. *Id.* at 525-26. We reversed, holding that Porreca had satisfied his burden of production by presenting the psychiatrist's testimony that his psychosis stemmed from the use of PCP, which could cause a "settled insanity" in the sense that it "was not the result of the ingestion of PCP on any particular occasion." *Id.* at 530.

Mr. Brand asserts that, as in *Porreca*, he adduced sufficient evidence to place his sanity at issue under a theory of settled insanity. This is true as far as it goes. However, Mr. Brand conflates his burden of production with his burden of persuasion. In *Porreca*, we held that the defendant had satisfied his burden of *production*, by presenting testimony that called into question whether his psychosis was the result of a "settled

insanity,” so that the State was required to prove *beyond a reasonable doubt* that Porreca was sane. *Porreca*, 49 Md. App. at 528-29. However, Maryland law has changed since *Porreca* so that now the burden of production and persuasion is at all times on the criminal defendant, who must prove—but only by a preponderance of the evidence—that his or her inability to control or understand the criminality of his conduct stems from a “mental disorder.” *See* Crim. Pro. Art. § 3-110(b). Thus, under the current statutory scheme, Mr. Brand also had the burden of persuasion to establish, by a preponderance of the evidence, that he was not criminally responsible by reason of a mental disorder that prevented him from conforming his conduct to the requirements of the law or appreciating the criminality of that conduct. Therefore, *Porreca* is inapposite.

To be sure, the evidence cited by Mr. Brand on appeal, if fully credited by the circuit court, would have been sufficient to support a finding that his psychosis was the product of settled insanity, for the reasons articulated by Dr. Meltzer. The trial court did not find otherwise. However, having met his burden of production, he was also required to *persuade* the court that, in light of *all* of the evidence, and not simply his evidence, that it should find him not criminally responsible. And the court ultimately did not find his evidence sufficiently persuasive. As we have repeatedly noted, it very difficult for a party who bears the burden of persuasion on an issue—as Mr. Brand did in this case—to convince an appellate court that the trier of fact erred by not being persuaded. In fact, in *Byers v. State*, 184 Md. App. 499, 531 (2009), this Court noted that “it is nearly impossible for a verdict to be . . . legally in error when it is based not on a fact finder’s being persuaded of something but only on the fact finder’s being unpersuaded.” (Citing

Starke v. Starke, 134 Md. App. 663, 680–81 (2000)). Consequently, we hold that the fact that the trial court was unconvinced by Mr. Brand’s evidence bearing on his criminal responsibility is not a basis for appellate relief under the circumstances.

Mr. Brand does not otherwise contend that the court failed to apply the correct legal standard in determining whether he was NCR or that it committed clear error in making any of its factual findings. Therefore, those issues are not properly before this Court on appeal. *See Diallo v. State*, 413 Md. 678, 692 (2010) (“[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.” (citation omitted)).² Consequently, we shall affirm the judgments of the circuit court.

**JUDGMENTS OF THE CIRCUIT
COURT FOR BALTIMORE CITY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**

² In any event, the record demonstrates that the court applied the correct legal standard for determining Mr. Brand’s criminal responsibility. Moreover, all its factual findings were supported by evidence in the record, specifically the testimony and report of Dr. Klein and the testimony of Mr. Brand’s cousin.