Circuit Court for Baltimore City
Case No. 118109016

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2196

September Term, 2018

DONALD MARCH

v.

STATE OF MARYLAND

Leahy,
Gould,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: October 15, 2019

Appellant, Donald March, was charged with multiple counts of first- and second-degree assault, reckless endangerment, use of a firearm in the commission of a crime of violence, discharging a firearm in violation of Baltimore City ordinance, possession of a firearm, possession of ammunition, and using, wearing, carrying, or transporting a handgun. He was acquitted by the jury of all the charges except the possession of the firearm and ammunition discovered on him during the incident.

On appeal, appellant asks:

I) Did the trial court fail to comply with Rule 4-215?

II) Could the trial court's statements at sentencing lead a reasonable person to infer that the court may have impermissibly considered Mr. March's decision not to plead guilty when it sentenced him?

For the following reasons, we reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On Saturday, March 31, 2018, appellant's confrontation with his mother, Ida March, and Troy Smothers escalated, according to their testimony, to the point of appellant pointing a gun at both of them. Mr. March testified that, in March of 2018, he was living with his mother and Mr. Smothers. On or about Thursday, March 29, appellant's children, Dakari and Donald, came to Ms. March's house for the weekend. On Saturday morning, Ms. March and Mr. Smothers decided to purchase tags for appellant's car and woke him to tell him that they were leaving. When they returned, appellant was in the shower. Ms. March knocked on the bathroom door and told appellant that the children's mother wanted money for the children's Easter clothes.

Appellant oddly responded, "Donald's not here." Ms. March then went to the dining room. According to Ms. March, appellant, shortly thereafter, entered the room with "an attitude." Through a series of confusing statements, he accused Mr. Smothers of giving his son beer. Ms. March told him that Mr. Smother's had not given his son beer and asked him to leave, which he did. But he returned about ten minutes later and approached Ms. March and Mr. Smothers. He "pulled out a gun" and it "went off." Pointing the gun at Mr. Smother's head, appellant asked, "Mr. Troy, why did you give my son beer?" Mr. Smother's responded that he had not given appellant's son beer. Appellant then pointed the gun at Ms. March and said, "and you," and then abruptly walked away. Ms. March and Mr. Smother got in their car and called the police.

At trial, appellant admitted confronting his mother and telling her that Mr. Smothers had given his son a beer, which she denied. He testified that he then went outside, approached Mr. Smothers, and asked if he had given his son a beer. When Mr. Smothers denied doing so, appellant went inside and continued to argue with his mother. She asked him to leave, and he gave her his keys and left. He walked to the store and later returned to wait for a ride. He did not say anything more to Ms. March and Mr. Smothers. Although he admitted that he had the gun on him and that he was not supposed to have it, he denied discharging it or pointing it at either Ms. March or Mr. Smothers.

Officer Kenneth Matthews responded to the scene. Officer Matthews testified that he went to the back alley and saw appellant sitting on top of a car. He asked appellant if

he had a weapon. Appellant did not "really answer" that question but said "I have my ID" and "kept reaching in his back." Officer Matthews again asked if he had a gun, and appellant did not reply. Officer Matthews "held him, patted him down, and then pulled out a gun on the left of his side." It was a revolver. Officer Matthews stated that the revolver held six bullets, and that when he took the bullets out, there was one spent shell casing and five live rounds.

Appellant was later charged with two counts of first-degree assault; two counts of second-degree assault; two counts of reckless endangerment; one count of use of a firearm in the commission of a crime of violence; one count of possession of a firearm in violation of Md. Code (2002, 2012 Repl. Vol.), § 5-622 of the Criminal Law Article ("CL"); one count of possession of a regulated firearm in violation of Md. Code (2003, 2018 Repl. Vol.), § 5-133(c) of the Public Safety Article ("PS"); one count of possession of a regulated firearm in violation of PS § 5-133(b), one count of possession of ammunition after being disqualified from possessing a regulated firearm; one count of wearing, carrying or transporting a handgun; and one count of discharging a firearm in violation of Baltimore City ordinance. Appellant was acquitted of the assault charges, reckless endangerment, use of a firearm, and discharging a firearm counts. He was convicted of the counts relating to possession of the firearm and ammunition.

Request to Discharge Counsel

Before the trial had commenced and during jury selection, appellant, through his attorney, requested new representation:

[DEFENDANT'S COUNSEL]: Mr. March has informed me that he would like to hire another attorney, I told him that if he fires the Office of the Public Defender, that he fires the whole office.

THE COURT: Mr. March, please stand. Mr. March …

* * *

THE COURT: All right. So stop fiddling with those papers and pay attention to me, Mr. March. Mr. March, you understand that you are now represented by legal counsel.

THE DEFENDANT: Yes.

THE COURT: And your attorney is a member of the Office of the Public Defenders[sic].

THE DEFENDANT: Yes.

THE COURT: *And understand that if I strike her appearance, I strike not only her appearance but the Office of the Public Defenders[sic] and you will not be allowed to get another one. The second thing is I will not send you back to Reception Court nor will I give you a postponement in this case. If you fire [defense counsel], you will represent yourself.* Understanding, sir, that we went extensively over yesterday, the number of years that you could face if you are found guilty of any one of those 13 charges and any combination thereof, you will be bound by the same Rules of Evidence that the State's Attorney is bound by. [Defense counsel] has gone to law school, you have not. *I will not allow the delay. If you—I will make an inquiry under the Maryland Rules that is necessary to strike [defense counsel's] appearance and when she walks out that door, the next faces you will see is [sic] the jury walking in.* You will have to conduct jury selection, you will have to do so under legal parameters set by the Maryland Rules of which you are not aware of. You will have to conduct your examination of witnesses based on the Rules of Evidence of which you are not aware of. You have every right to represent yourself. You have every right to have [defense counsel] represent you, but I will not allow it to be used as a delay.

So let me be clear, *I will go through the analysis that is necessary under the Maryland Rule to strike [defense counsel's] appearance, I will also strike the Office of the Public Defender, and you will pick your jury*

> knowing that you could face up to 92 years of incarceration. You will pick your jury, you will try this case by yourself. Talk to your attorney.
> (Brief pause in the proceedings.)
>
> [DEFENDANT'S COUNSEL]: Your Honor? Mr. March has decided he would like me to represent him.
>
> THE COURT: All right, Mr. March. We're not going through that again. All right? The time has come. Mr. March, we are either going to hear this motion and we're going to pick a jury or you're going to take the plea. What's your election, sir?

(Emphasis added.) Appellant ultimately elected to be tried by a jury.

A little later, just before the trial was to begin, defense counsel informed the court that appellant wanted to "call his son as a witness." Defense counsel stated that this was the first time appellant had mentioned this to her. The court, finding that this was simply another delay tactic, denied a continuance to secure appellant's son as a witness:

> THE COURT: All right. And Madam Defense Attorney, this Court makes the finding that you in fact provided him with, as it pertains to effectiveness, that you could not possibly subpoena a witness that you were never made aware of. Being made aware of it two seconds ago is not going to be—will be prejudicial to the State at this point. This Court will not allow for a continuance and based on Mr. March's behavior so far, it appears that Mr. March seems to want to hold up the proceedings in this Court and will not—I believe you've done everything that you could do. I believe that Mr. March is holding up the proceedings in this Court and I will no longer allow him to make a mockery of my Court and the way we are proceeding today. And so we will proceed with the motion, we will proceed with the trial, and I will no longer entertain what I characterize as Mr. March attempting to delay this Court proceeding.

The State was then asked to call its first witness.

Plea Negotiation and the Sentencing Hearing

The day before the trial began, appellant was informed that if he pleaded guilty to one count of first-degree assault and one count of use of a handgun in the commission of a crime of violence, he would be sentenced to fifteen years, the first five years to be served without the possibility of parole. After appellant was given time to consider the offer, defense counsel made a counter offer of a twenty-year sentence, all but ten years suspended, with the first five to be served without the possibility of parole. After a brief discussion, another offer was relayed to appellant, but defense counsel informed the court that appellant was "not going to do anything."

The next morning, defense counsel placed on the record the State's plea offer of twelve years, the first five without parole, if appellant pleaded guilty to first-degree assault and the use of a handgun charge. She asked whether a ten-year sentence was possible, or whether the State would "just call the handgun charge because appellant has difficulty taking [the assault] charge." The State and court declined both. The trial court then outlined the history of the plea negotiations on the record and stated that the offers from the previous night were back "on the table" but that it had "no intention on spending the next two to three hours figuring [it] out."

After conferring with appellant, defense counsel informed the court that he was willing to accept the previous plea offer. But after appellant was sworn, and the guilty plea colloquy began, defense counsel informed the court that appellant had changed his

mind and that they were going to trial. The trial court responded: "Call your first witness. All offers are off the table[.]"

After the trial and during the sentencing proceedings, the prosecutor made the following statement:

> Your Honor, the State is inclined to ask for the maximum penalty in this case which would be 29 years on the combined counts with a 5-year mandatory minimum sentence without the possibility of parole.
>
> This is the defendant's third gun charge, third gun case. He is on active probation for a handgun and for a violent assault.
>
> And at this point in time, the State does believe that he is a danger to the community and needs to be incarcerated for a significant period of time.
>
> *The State did, in fact, offer as recently as today an offer of 25 years with a mandatory minimum of 10, but Mr. March had the opportunity to take that offer, he did not take that offer nor did he take any lesser offers. And at this point, we've been through—this is our third day reporting to your honor. There were multiple witnesses and victims that have been here. And after having gone through the tribulations of a trial, the State would be asking for the maximum penalty.*

(Emphasis added.)

Defense counsel responded:

> Your Honor, the interesting thing is when someone starts plea negotiations, you're left with counts, we don't get to choose the counts, the State gets to choose the counts.
>
> Clearly what Mr. Mar[ch] wanted to plead to and what we asked for throughout this case is to plead guilty to the gun, the gun offenses.
>
> That's what he was guilty of. The original plea offer from the State or what the State offered us was the assault or the victim-related crimes, to put it—you know, there's numerous of them. And he was found not guilty of that.

> *He has an absolute right to go to a trial. And I think that's something that's integral to the justice system. He maintained his innocence as far as all the assault charges and the jury found for what—the argument, him not guilty of all those charges. So I think we're penalizing him for going to trial if we give him a sentence of 29 years, first 5 without.*
>
> So I would ask the Court to go back to the offer of 12 years, first 5 without. I think the Court has to—is aware of the fact that he is still facing time before the Honorable Judge Peters of just short of ten years.
>
> *So I don't think people under justice system should be penalized for going to trial and asserting that they are innocent of certain crimes. Because that flies in the face of why we do our jobs.*

(Emphasis added.)

Appellant then added:

> First of all, like [defense counsel] said, I was willing and I respected the—appreciated the offer that was granted upon me, but I did not appreciate the counts was bestowed upon me.
>
> So I took my time to fight my innocence for the handgun charges. Pretty much, I'm just asking, basically, for a—you know, some type of leniency and opportunity just to make it an opportunity to even—being with my family again.

After ensuring that appellant did not wish to make any further statements, the trial court stated:

> So you have been before me for a couple of days. I sat here and listened to the testimony. I saw your mother, painstakingly, come before this Court and come before 12 strangers to explain to them what happened, still grappling with it, trying to understand it and make sense.
>
> And the jury's verdict is the jury's verdict and I'm not going to look behind that in any way. I found your mother to be credible. I found Mr. Smothers to be credible. But it was not my decision, it was the decision of the Jury. But I watched her and I listened to the testimony and I listened to your testimony, *and I have observed you, all these past couple of days, not seeming to take responsibility for anything. And not having any day and*

> *thought of reckoning that no one put you there but yourself. But I never heard that.*
>
> *Seems to be that you lack the ability to just take responsibility. But as [defense counsel] has indicated, you were willing to take the gun charge, but the way you wanted to.*
>
> I don't know how your mother can move on from having allegedly had a handgun pointed at her, but I believe that the sentence of this Court is appropriate.

(Emphasis added.) Appellant was then sentenced to five years for possession of a firearm in violation of CL § 6-222; to a consecutive ten years, the first five years without parole, for possession of a regulated firearm in violation of PS § 5-133(c); to a consecutive five years for possession of a regulated firearm in violation of PS § 5-133(b); to a consecutive three years for wearing, carrying or transporting a handgun; and to a consecutive one year for possession of ammunition, for a total sentence of twenty-four years.

Just over a week later, on August 24, 2018, the court exercised its revisory power to merge several of the sentences. The sentences for possession of a firearm, under CL § 6-222 and PS § 5-133(b) and (c), were merged into one ten-year sentence. The sentences relating to the wearing, carrying or transporting of a handgun, and the possession of ammunition remained the same. The total amended sentence was fourteen years, the first five without parole.

DISCUSSION

Contentions

Appellant contends that the trial court failed to comply with Maryland Rule 4-215(e) after his attorney informed the court that he "would like to hire another attorney."

He argues that the rule requires that the trial court inquire into the reasons for discharging counsel when apprised of a defendant's desire to discharge his or her attorney, and that the trial court did not do so. For that reason, he maintains that we "must reverse [his] convictions and remand for a new trial."

Appellant also contends that some of the statements made by the trial judge at sentencing might lead a reasonable person to infer that the court was motivated by an impermissible consideration when it sentenced him. He acknowledges that a sentencing court has discretion in fashioning a sentence, but he argues that it is prohibited from considering a defendant's decision not to plead guilty in determining the sentence. And, even if we do not reverse appellant's convictions on the basis of Rule 4-215, he asserts that we "must reverse appellant's sentences and remand for a new sentencing hearing."

Standards of Review

Rule 4-215(e)

An interpretation of the Maryland Rules is "a question of law," which we review "*de novo*." *State v. Weddington*, 457 Md. 589, 598–99 (2018); *Williams v. State*, 435 Md. 474, 483 (2013); *State v. Graves*, 447 Md. 230, 240 (2016). In interpreting a rule, we employ the same "canons and principles of construction" as we do with legislation:

> We look to the plain meaning of the language employed in the[ ] rules and construe that language without forced or subtle interpretations designed to limit or extend its scope. We avoid a construction of a rule or statute that is unreasonable, illogical, or inconsistent with common sense. We construe statutes and rules as a whole so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory.

Williams, 435 Md. at 483–84 (internal citations and quotation marks omitted) (alteration in *Black*) (quoting *Black v. State*, 426 Md. 328, 338–39 (2012)).

Sentencing

We review a trial court's fashioning of a sentence for "abuse of discretion[.]" *Sharp v. State*, 446 Md. 669, 685 (2016) (citing *State v. Wilkins*, 393 Md. 269, 279–80 (2006)).

Analysis

I) Maryland Rule 4-215(e)

Because Maryland Rules demand "strict compliance," we conclude that, in this case, the trial court failed to comply with Rule 4-215(e). When a defendant indicates a desire to discharge his or her counsel, subsection (e) of Rule 4-215 provides the procedure that the trial court is to follow:

> **(e) Discharge of Counsel—Waiver.** If a defendant requests permission to discharge an attorney whose appearance has been entered, *the court shall permit the defendant to explain the reasons for the request.* If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

Md. Rule 4-215(e) (emphasis added).

The rule's primary goal is "to protect that most fundamental right to the effective assistance of counsel[.]" *Weddington*, 457 Md. at 600 (internal quotation marks omitted) (quoting *Williams*, 435 Md. at 485). But that right is not an "unfettered right to discharge current counsel[.]" *State v. Taylor*, 431 Md. 615, 645 (2013). For that reason, the rule prevents "defendants from unmeritoriously discharging their attorneys in an effort to delay their trial." *Gonzales v. State*, 408 Md. 515, 532 (2009); *Fowlkes v. State*, 311 Md. 586, 603, 605 (1988) ("Rule 4-215(e) embodies the principle . . . that an unmeritorious discharge of counsel and request for new counsel, in an apparent effort to delay the trial, may constitute a waiver of the right to counsel.").

The Court of Appeals has "held consistently" that the rules are "'precise rubrics . . . to be read and followed[.]'" *Pinkney v. State*, 427 Md. 77, 87 (2012) (quoting *Parren v. State*, 309 Md. 260, 280 (1987)). And in the case of Rule 4-215, "strict compliance" is required. *Weddington*, 457 Md. at 600; *see also Johnson v. State*, 355 Md. 420, 452 (1999) ("Md. Rule 4-215 is a bright line rule that requires strict compliance in order for there to be a 'knowing and intelligent' waiver of counsel by a defendant."). A departure from its procedure "constitutes reversible error." *Weddington*, 457 Md. at 601; *Williams*, 435 Md. at 486; *see also Snead v. State*, 286 Md. 122, 130 (1979); *Williams v. State*, 321 Md. 266, 272 (1990); *Hawkins v. State*, 130 Md. App. 679, 686 (2000).

The rule is triggered any time, before a trial commences,[1] when the "court is alerted to the defendant's desire to discharge his [or her] counsel." *Joseph v. State*, 190 Md. App. 275, 285 (2010); *State v. Davis*, 415 Md. 22, 32 (2010); *State v. Brown*, 342 Md. 404, 414–15, 428 (1996). A defendant need not "utter any particular magical incantation or 'talismanic phrase[,]'" so long as the "'court could *reasonably conclude*' that the defendant desire[d] to discharge his or her attorney." *Taylor*, 431 Md. at 632; *State v. Campbell*, 385 Md. 616, 629–30, 632 (2005) (emphasis added); *see also State v. Northam*, 421 Md. 195, 206–07 (2011) (finding a "vague request" for a discharge of counsel, "buried in the final sentence of the final paragraph" of a "change of venue motion[,]" to not reasonably alert the court to the request). "A declaration of dissatisfaction with counsel[,]" as opposed to "an explicit request to discharge[,]" may be sufficient. *State v. Hardy*, 415 Md. 612, 623 (2010) (finding the defendant's "declaration that he was 'thinking about changing the attorney or something'" should have triggered a Md. Rule 4-215(e) inquiry). And notification of the defendant's thoughts towards discharging counsel may come from the defendant, defendant's counsel, or even the State. *Taylor*, 431 Md. at 634; *Davis*, 415 Md. at 32, 36. Once aware of the defendant's

[1] The timing of a request, however, is rather important in the appellate analysis of the circuit court's eventual decision as to whether the request should be granted. In *Hardy*, it was made clear that the timing of the request determined whether "the trial judge's consideration of that request is governed purely by its discretion, or whether it should be circumscribed by the procedural demands of Rule 4-215(e)."

Bey v. State, 228 Md. App. 521, 530 (2016) (quoting *State v. Hardy*, 415 Md. 612, 624 (2010)).

desire to discharge counsel, the "court should *first* ask the defendant why he [or she] wishes to discharge counsel, give *careful* consideration to the defendant's explanation, *and then* rule whether the explanation offered is meritorious." *Hawkins*, 130 Md. App. at 687 (emphasis added).

The defendant's reasons for discharging counsel are "pivotal" for the trial court "to give 'practical effect' to the defendant's constitutional choices[.]" *Gambrill v. State*, 437 Md. 292, 301 (2014). In other words, the process "'*begins* with a trial judge inquiring about the reasons underlying a defendant's request to discharge the services of his [or her] trial counsel and providing the defendant an opportunity to explain those reasons.'" *Graves*, 447 Md. at 242 (emphasis added) (quoting *Pinkney*, 427 Md. at 93); *see also Taylor*, 431 Md. at 631. The rule "does not contemplate that a criminal defendant is trained in the law," and, therefore, it imposes "an affirmative duty" on the trial court "to provide a 'forum'" in which the defendant's reasons are heard and to solicit them. *Graves*, 447 Md. at 242, 253 (citing *Taylor*, 431 Md. at 631); *see Williams*, 435 Md. at 492. This duty extends beyond mechanically going through the motions. Rather, "the record must 'be sufficient to reflect that the court *actually considered* th[e] reasons' given by the defendant" and, if necessary, made a further inquiry into "whether those reasons [were] meritorious." *Pinkney*, 427 Md. at 93–94 (emphasis added) (quoting *Moore*, 331 Md. at 186); *Graves*, 447 Md. at 243; *see also Taylor*, 431 Md. at 638 (suggesting that a trial court may not ignore a defendant's request by "refuting the defendant's declarations that he was dissatisfied with his [or her] attorney" or by giving

the defendant's "explanation a 'cursory consideration'"). In short, the trial court may not predetermine that the defendant's reasons are not meritorious. And, as with other detours from the outlined procedure, a "failure to inquire into a defendant's reasons for seeking new counsel when the proper request has been made to the court is a reversible error." *Davis*, 415 Md. at 31.

When a trial judge determines a defendant's request to discharge counsel is unmeritorious, it may proceed in three ways:

> (1) deny the request and, if the defendant rejects the right to represent himself and instead elects to keep the attorney he has, continue the proceedings; (2) permit the discharge in accordance with the Rule, but require counsel to remain available on a standby basis; (3) grant the request in accordance with the Rule and relieve counsel of any further obligation.

Williams, 321 Md. at 273 (citing *Fowlkes*, 311 Md. at 604–05); *see* Md. Rule 4-215(e).

But when a defendant has a meritorious reason, the court "*must* grant the request and, if necessary, give the defendant an opportunity to retain counsel." *Id.* (emphasis added). For an indigent defendant who desires representation, the court should refer the defendant to the Office of the Public Defender ("OPD") "explicitly for the assignment of a new assistant public defender or panel attorney, or, if it believe[s] that to be fruitless, act[] on its own authority to offer to appoint counsel for [the defendant] under its inherent authority." *See Dykes v. State*, 444 Md. 642, 668–69 (2015); *see also State v. Westray*, 444 Md. 672, 687 (2015) ("[A] trial court has inherent authority to appoint counsel as necessary to carry out its constitutional function—authority that may be necessary to

invoke when the OPD is unavailable to represent an indigent defendant who has a constitutional right to the appointment of counsel furnished by the State.").

Here, defense counsel informed the court that appellant "would like to hire another attorney[.]" If mere expressions of dissatisfaction with counsel are sufficient, the court could "reasonably conclude," from this statement, that appellant wanted to discharge his attorney and engage new counsel. In fact, the trial judge appeared to recognize that Rule 4-215(e) had been triggered.

Therefore, inquiring into appellant's reasons for requesting the discharge of his attorney was the required first step. *See Graves*, 447 Md. at 242 (quoting *Pinkney*, 427 Md. at 93). But the trial judge at no point—directly or indirectly—solicited any reasons from appellant. To be sure, the court twice stated that it *would* perform the necessary analysis under Rule 4-215(e), which would have included soliciting his reasons. But merely offering to follow the required procedure is hardly strict compliance with the rule.

The trial court could not assume that appellant understood what the offered analysis would entail, because the rule assumes that a defendant is not "trained in the law." *Graves*, 447 Md. at 253. It was incumbent on the trial court—not appellant, or even his counsel—to ensure that he was heard and to apply the rule properly. *See id.* at 242, 253. Without determining whether appellant had meritorious reasons to discharge counsel, the trial court proceeded to inform him that he would not be permitted to acquire new counsel and that he would have to represent himself. But had he presented a meritorious reason for discharging his attorney, the trial court would have been required

to allow him to obtain new counsel, and, if necessary, used its "inherent authority to appoint counsel." *See Williams*, 321 Md. at 273; *Dykes*, 444 Md. at 668–69.

The State responds that the trial court appreciated that appellant's request for new counsel was a manipulative tactic to delay the trial, and that Rule 4-215(e) has an "important limitation" that a """defendant may not manipulate the right to counsel so as to frustrate the orderly administration of criminal justice,""" quoting *Taylor*, 431 Md. at 645 (quoting *Fowlkes* 311 Md. at 605 (1998)). It further asserts as "plain" that appellant did not have a "*present intent* to discharge his counsel[.]"[2] (Emphasis added.)

We agree that a defendant may not employ the rule as a tactic to delay the trial, but that possibility is addressed within the rule by the "meritorious reasons" inquiry. *See Gonzales v. State*, 408 Md. at 532; *Taylor*, 431 Md. at 645; *Fowlkes*, 311 Md. at 605. The court is not permitted to predetermine that the defendant's reasons for the request are not meritorious. *See Pinkney*, 427 Md. at 93-94; *Graves*, 447 Md. at 243; *Taylor*, 431 Md. at 638. It must "'*actually consider[]* th[e] reasons' given by the defendant." *Pinkney*, 427 Md. at 93 (emphasis added) (quoting *Moore v. State*, 331 Md. 179, 186 (1993)).

In regard to "*present intent*," a trial court may not consider its perceived motives behind defendant's request in determining whether the rule has been triggered. *See*

[2] The State suggests that his desire to discharge counsel arose after appellant viewed a video from a body camera on one of the officers when the police discovered the gun in his possession.

Davis, 415 Md. at 33; *Williams*, 435 Md. at 491. Rather, it is an awareness of a *past* desire to discharge counsel that does not trigger the rule. *Williams*, 435 Md. at 491. And, even then, the trial court is still "required to inquire further so it [can] determine whether [the defendant] still maintain[s] that intent." *Davis*, 415 Md. at 33; *see Williams*, 435 Md. at 491. Here, appellant's request was expressed in the present tense.

In sum, Maryland Rule 4-215(e) requires "strict compliance." Appellant, through his attorney, clearly indicated that he wanted to discharge counsel. It was reversible error for the trial court not to solicit appellant's reasons for the request.

II) Sentencing Hearing

A) Is the Issue Moot?

Because we have reversed the convictions, whether the trial court, during sentencing, impermissibly considered appellant's deciding to go to trial is moot. The State argues that it was moot because the trial court revised appellant's sentence from a total of twenty-four years to fourteen years, the first five years without parole, with no reference to the plea offers or appellant's attitude at trial during the Revised Sentencing Hearing.

We agree with appellant that the resentencing in this case was based on a merger of sentences that was required as a matter of law, rather than a reconsideration of what was appropriate and fair. And an isolated comment that "fundamental fairness" required the merger does not demonstrate reconsideration of the appropriateness of the sentence as a whole.

Impermissible Considerations in Constructing the Sentence

Although the sentencing issue is moot, there is a likelihood of resentencing in this case, and therefore, it is appropriate to address this issue. A sentencing court has wide, "virtually boundless discretion in imposing a sentence." *Reiger v. State*, 170 Md. App. 693, 697 (2006) (internal quotation marks omitted) (citing *State v. Dopkowski*, 325 Md. 671, 679 (1992)); *see Sharp*, 446 Md. at 685. In fashioning a sentence, a trial court should consider, among other things, "'the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background.'" *Abdul-Maleek v. State*, 426 Md. 59, 71 (2012) (quoting *Jackson v. State*, 364 Md. 192, 199 (2001)); *see also Jennings*, 339 Md. at 684–85 (emphasis added) (citing *Johnson*, 274 Md. 536, 540 (1975)) (stating that a trial court is permitted "to base its sentence on 'perceptions . . . derived from the evidence presented at trial, the *demeanor and veracity* of the defendant gleaned from his various court appearances'"). It does not prevent considering a defendant's "lack of remorse exhibited at the sentencing hearing."[3] *Saenz*, 95 Md. App. at 243; *Jennings*, 339 Md. at 685 ("[A] lack of remorse is an appropriate

[3] [P]ermitting the trial court to base its sentence on "perceptions … derived from the evidence presented at the trial, the demeanor and veracity of the defendant gleaned from his various court appearances, as well as the data acquired from such other sources as the presentence investigation or any personal knowledge the judge may have gained from living in the same community as the offender" is perfectly acceptable.

Jennings, 339 Md. at 684–85 (quoting *Johnson v. State*, 274 Md. 536, 540 (1975)).

sentencing consideration inasmuch as acceptance of responsibility is the first step in rehabilitation.").

A sentencing court's discretion is subject to "only three" general limitations to the sentencing court's discretion:

> "(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the trial court was motivated by ill-will, prejudice, or other impermissible considerations;[4] and (3) whether the sentence is within statutory limits."

Sharp, 446 Md. at 685–86 (quoting *Jones v. State*, 414 Md. 686, 693 (2010)).

But it is impermissible for a sentencing court to "punish a defendant for invoking his right to plead not guilty and putting the State to its burden of proof for protesting his [or her] innocence," *Jennings v. State*, 339 Md. 675, 684 (1995), which includes holding a defendant's "*trial* attitude based upon [that] right" against the defendant at sentencing, *Saenz v. State*, 95 Md. App. 238, 243 (1993) (emphasis in original).

When a "trial court's statements, 'in the context of the entire sentencing proceeding' . . . 'could lead a reasonable person to infer that the [trial] court might have been motivated by an impermissible consideration[,]'" an appellate court must remand the case for resentencing. *Sharp*, 446 Md. at 689 (quoting *Abdul-Maleek*, 426 Md. at 73–74). "'Any doubt in this regard must be resolved in favor of the defendant.'" *Abdul-Maleek*, 426 Md. at 72 (quoting *Johnson v. State*, 274 Md. 536, 539 (1975)).

[4] This case concerns the second restriction—namely, whether the trial court impermissibly considered appellant's decision to exercise his right to a jury trial.

The Court of Appeals has considered this issue on four occasions, twice concluding that the trial court may have impermissibly considered the defendant's decision not to plead guilty and twice finding that there was no discernable error. *See generally Johnson*, 274 Md. 536; *Jennings*, 339 Md. 675; *Abdul-Maleek*, 426 Md. 59; *Sharp*, 446 Md. 669.

In *Johnson*, the trial court stated that "the jury didn't accept it [defendant's wild story] and I didn't accept it." 274 Md. at 539. Just prior to the imposition of the sentence, the court asked the defendant what he had "learned" from not telling the truth. *Id.* And when the defendant insisted that he had been truthful, the court responded:

> And when you sit up here and lie about it, and you're not telling the truth. You think you're trying to get away with it. That attitude is not consistent with any consideration for leniency. *If you had come in here after this happened, before the other trouble you got into-if you had come in here with a plea of guilty and been honest about (it) and said, 'Of course I did it,' which you did, you would probably have gotten a modest sentence,* concurrent with the one in the District of Columbia, and you would have gotten out of it. But with this attitude that you have you can't receive that kind of treatment.

Id. at 539–40 (emphasis added). The court then sentenced the defendant to "twelve years, to run concurrent with the sentence that [he was] serving in the District of Columbia." *Id.* at 540. Noting that these "remarks in full [did] not necessarily demonstrate that a more severe sentence was imposed," the Court of Appeals concluded that the *explicit* reference to the defendant's determination not to plead guilty "manifest[ed] that an impermissible consideration may well have been employed." *Id.* at 543. The sentence was vacated. *Id.* at 545.

In *Abdul-Maleek*, the Court of Appeals again concluded that the sentencing court may have impermissibly considered the defendant deciding to exercise his de novo appeal rights not to plead guilty. 426 Md. at 74. There, the State requested "executed incarceration[,]" remarking that the defendant had the opportunity to "take responsibility for his actions" but had not done so. *Id.* at 66. After hearing from the defendant, the trial court imposed its sentence, explaining:

> Mr. Abdul-Maleek, you may indeed be a kind, caring, and conscientious individual, but none of those adjectives or descriptions apply to what you did to this young lady on this day. Nothing kind about it, nothing caring about it, nothing conscientious about it, quite the contrary, and I just, I'm at a loss for words.
>
> An individual who has a job, has a family, to do something like this and the total disregard that you had for this young lady, I'm really at a loss. I mean, if you had a drug addiction and you did it to get the money to support your drug addiction, that doesn't make it right but at least there's some explanation.
>
> * * *
>
> **You have every right to go to trial in this case, which you did—not once, but twice. Ms. Monroy was victimized, and then she had to come back and testify in District Court; then she had to come back again and testify in the Circuit Court, and she had to do that because you have every right to have all of those opportunities to put forth your position.** I am at a total loss.

Id. at 66–67 (emphasis in original). The court then imposed a sentence of eighteen months in the county detention center, suspending all but eight months, plus eighteen months of supervised probation upon his release. *Id.* at 67.

Noting that the trial court had "considered several permissible factors[,]" the Court of Appeals stated that it was "confident" that the court understood the law and applied it

correctly. *Id.* at 73–74. But, observing that the trial court made an "explicit reference" to the defendant exercising his "de novo appeal right[,]" the Court concluded that "a 'reasonable person [could] infer that [the court] *might* have been motivated' by an impermissible consideration." *Id.* at 74 (emphasis in original; some alterations added) (quoting *Jackson v. State*, 364 Md. 192, 207 (2001)). The sentence was vacated.

In *Jennings*, after being convicted of three counts of armed robbery and one count of use a handgun in the commission of a felony, the defendant, during sentencing, requested leniency from the circuit court. 339 Md. at 678–80. The court responded:

> This court doesn't treat lightly the use of handguns in the commission of crimes and more, especially, the type of handgun that was used in this crime.
>
> I cautioned you just before you spoke, Mr. Jennings, that what you had to say to the court was very important because, according to the PSI, according to the statement from your attorney, the jury found the wrong guy guilty. *And until you can face up to your problem of your implication in this little event you haven't learned a thing. For me to give you a minimum sentence just doesn't fit my role*.
>
> * * *
>
> Nothing is going to be suspended because this gentleman does not have any remorse, none whatsoever.

Id. at 678–79 (emphasis added). The Court of Appeals, distinguishing *Johnson*, based on "the explicit reference to the defendant's failure to plead guilty" being pivotal, *id.* at 687–88, and *Jennings*, based on the "sentencing court's remarks reflect[ing] a refusal to grant the [defendant] the benefit of a lesser sentence, as the parties requested, rather than the intentional imposition of a greater one in punishment for [the defendant's] refusal to

plead guilty or his continuing protestations of innocence," *id.* at 688, affirmed the sentence.

In *Sharp*, after the State had requested a sentence exceeding the guidelines, defense counsel suggested that the sentence should be no different than had the defendant pleaded guilty:

> [SHARP'S COUNSEL]: . . . I'm going to ask Your Honor to consider not incarcerating [ ] Sharp outside the guidelines[,] and, in fact, Your Honor offered, if [ ] Sharp wanted to take a plea, to sentence him to twenty years [of imprisonment], suspend all but a cap of eight [years].
>
> [CIRCUIT COURT]: Um hm.
>
> [SHARP'S COUNSEL]: So that Your Honor would have heard the same facts from the State in that plea. You would have heard about the injuries, you would have theoretically seen [ ] Evianiak, you would, I mean, *nothing is anything different because we went to trial, other than [ ] Sharp wanted the opportunity to speak and to defend himself* in what he believed was a situation that was more than just himself and mutual as well.

Sharp, 446 Md. at 679 (emphasis added; alterations in original). Taking note of the phrase, "nothing is anything different because we went to trial," the court responded and the following dialogue resulted:

> [CIRCUIT COURT]: So you don't believe that putting [the] State's witnesses, the victim through, reliving that and testifying in Court is no different than if he would have admitted what he did and pled guilty in front of me? You're saying that that, that's all the same?
>
> [SHARP'S COUNSEL]: Your Honor, I'm not saying, I'm not saying [that] it's no different[,] but I also don't—
>
> [CIRCUIT COURT]: That's what you, you just, you just said [that] there's no difference.

> [SHARP'S COUNSEL]: No, I don't believe in punishing someone for wanting to go to trial. So,—
>
> [CIRCUIT COURT]: Well, but the whole idea of an offer of a plea is to give something in exchange for sparing the State and the witnesses and the victims the trauma, the risk of a trial.

Id. at 679–80 (alterations in original). Later during sentencing and in explaining the sentence, the circuit court detailed the brutality and heinousness of the attack, but with no reference to the defendant pleading not guilty. *Id.* at 680–81. The circuit court then issued a sentence of twenty-five years for the first-degree assault, exceeding the guidelines, which was to run concurrently with a three-year sentence for openly wearing and carrying a dangerous weapon with the intent to injure. *Id.*

Applying the "reasonable person" standard, the Court of Appeals had "no difficulty" in affirming the sentence. *Id.* at 691. It noted that it was defense counsel, not the court, who introduced the right-to-trial issue at sentencing. *Id.* at 691. Second, the court was correctly "rebutting [defense] counsel's allegation that the circuit court would be 'punishing' [the defendant] by not imposing the sentence that was part of the circuit court's plea offer." *Id.* at 692. And third, the court "did not make the statements at issue while announcing and giving the reasons for the . . . sentence," but rather, during an earlier exchange. *Id.*

In *this* case, similar to *Johnson* and *Abdul-Maleek*, it appears that the trial court considered and referenced the defendant's decision not to plead guilty. It said: "Seems to be that you lack the ability to just take responsibility. But as [defense counsel] has indicated, *you were willing to take the gun charge, but the way you wanted to.*"

(Emphasis added.) Moreover, when the court said, "I have observed you, *all these past couple of days*, not seeming to take responsibility for anything[,]" it seems reasonable to believe that it was alluding not just to appellant's apparent lack of remorse during his allocution at sentencing, which is appropriate, but also to his "trial attitude," which is inappropriate. (Emphasis added.); *see also Saenz*, 95 Md. App. at 243 (some emphasis added) ("[A] defendant's exercise of certain rights at *trial, and his trial attitude based upon those rights*, may not be considered at sentencing.").

The State emphasizes that the judge's comments followed the State's argument for a greater sentence because, in part, he put the State "through the tribulations of trial" and defense counsel's rebuttal. But that is where any similarities to *Sharp* end. It was the State, not defense counsel, that argued for an increased sentence because, in part, appellant had rejected the plea offer. And that is the departure. The court, when it commented that appellant was "willing to take the gun charge, but the way [he] wanted to," implied that appellant's rejection of the plea offer was a reflection of his refusal to accept responsibility for his actions. And the court's statements were part of its explanation for the sentence.

To be sure, the circuit court also considered several permissible factors in issuing the sentence, and it may not have "actually" imposed a greater sentence because of appellant exercising his right to a trial. But, because any doubt must be resolved "in favor of the defendant," we are persuaded that the court's statements could lead a

reasonable person to infer that the trial court might have been motivated, at least partially, by appellant pleading not guilty in fashioning the sentence. *See Sharp*, 446 Md. at 689.

CONCLUSION

Appellant maintains that the trial court failed to adhere to the strict requirements of Maryland Rule 4-215(e) when he requested to discharge his counsel before the trial, and that the trial court may have been, at least partially, motivated by his election to decline the plea offers of the State when it declared his sentence. We are persuaded on both counts.

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

The correction notice for this opinion can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/2196s18cn.pdf