Circuit Court for Harford County
Case No.: 12-K-13-001341

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2315

September Term, 2018

CHARLES L. HICKS, JR.

v.

STATE OF MARYLAND

Fader, C.J.,
Zic,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),
JJ.

PER CURIAM

Filed: April 2, 2021

*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.

On March 13, 2014, Charles L. Hicks, Jr., appellant, pleaded guilty to distribution of a controlled dangerous substance ("CDS") in the Circuit Court for Harford County pursuant to a three-party binding guilty plea agreement. The court sentenced appellant, as a subsequent offender, to twenty-five years' imprisonment to be served without the possibility of parole.

In 2016, the Maryland General Assembly enacted, and the Governor signed, the Justice Reinvestment Act ("JRA").[1] Among other things, the JRA eliminated certain mandatory minimum sentences for persons convicted as subsequent offenders of certain drug offenses. In addition, the JRA created Maryland Code, Criminal Law Article ("CR"), § 5-609.1, which provides that a defendant who had received a mandatory minimum sentence, prior to the elimination of such sentences, could seek modification of that sentence pursuant to Maryland Rule 4-345 regardless of whether the defendant filed a timely motion for reconsideration or a motion for reconsideration was denied by the court.[2] Section 5-609.1 also provided some criteria for the court to consider when deciding whether to modify such a sentence.[3]

[1] Chapter 515, Laws of Maryland 2016.

[2] Pursuant to CR § 5-609.1(c), except for good cause shown, a request for a hearing on any such motion needed to have been filed on or before September 30, 2018.

[3] CR § 5-609.1(b) provides:

> (b) The court may modify the sentence and depart from the mandatory minimum sentence unless the State shows that, giving due regard to the nature of the crime, the history and character of the defendant, and the defendant's chances of successful rehabilitation:

(continued)

In October 2017, appellant sought to have his sentence modified pursuant to the provisions of CR § 5-609.1. At the conclusion of a hearing held on the motion, the circuit court denied appellant's motion for modification of sentence for two alternative reasons. On the one hand, the court stated that it believed that it lacked the authority to modify the sentence without the acquiescence of the State because the original sentence was imposed pursuant to a three-party binding guilty plea agreement. On the other hand, the court found that retention of the mandatory minimum sentence was necessary to protect the public and would not result in a substantial injustice to appellant. In pertinent part, the court stated as follows:

> One of the things that I wanted to be sure of in looking back at my own notes was the fact that it had been made very clear to Mr. Hicks at the time of the plea agreement and at the time the Court went over Mr. Hicks's rights with him that this was a binding plea agreement. I do have in my record circled on my checklist a binding plea, which means that I went over that in some detail probably given the ramifications of this agreement with Mr. Hicks.
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> Let's begin at the beginning where [Defense Counsel] did, which was the incredible family support that Mr. Hicks has, the heart[-]breaking impact that his prolonged incarceration has had on his family. So many members of his family are here. I want you to know that in making the finding that I'm about to make I'm not unaware of the toll that prolonged incarceration takes on the people who love the person behind bars.
>
> I know from your perspective your [sic] completely convinced that Mr. Hicks has transformed himself while incarcerated. That may or may not be the case. One of the difficulties in fashioning a sentence or agreeing to accept a plea agreement or making a decision about modification of sentence for a judge is that it is so often the case that the person who has been incarcerated for a

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(1) retention of the mandatory minimum sentence would not result in substantial injustice to the defendant; and

(2) the mandatory minimum sentence is necessary for the protection of the public.

long time, a person who has been removed by the imposition of law as opposed to by the person's own choice, someone who has been removed from their prior associations and activities and temptations is often a very different person than the person they were when they were on the street.

The problem is that it is necessary for the law to be enforced because beyond this courtroom there are many, many families whose lives and whose loved ones have been [a]ffected forever by the continuing activity of those who are involved in the sale and distribution of drugs.

We have an illusion in our popular view, current view, present day view of the drug trade that it is without victims. The fact that you are here today is evidence of how many victims of the drug trade there are.

So, I thank you for being here. I want you to know that I listened to you. I read carefully all of your letters. I want you to know that what I'm about to say is not in any way a reflection of whether or not I believe you. I do believe you and I do very much respect your experience in all of this.

The reason that Mr. Hicks was able to come before the Court today was because of the enactment of the Justice Reinvestment Act which made a particular change to the mandatory penalty sections of the Criminal Law Article. I believe we are implementing today or must be guided today by the Maryland Criminal Law Article Section 5-609.1 which went into effect in October of last year.

The first portion of that section or of that statute says under Subsection (a) notwithstanding any other provision of law and subject to Subsection (c), a person who is serving a term of confinement that includes a mandatory minimum sentence for a violation of one of the felony drug distribution sections of the Criminal Law Article may apply to the Court to modify or reduce the mandatory minimum sentence.

So, basically in the Court's view this language means that the Court may take a second look at the fact that a sentence was mandatory in nature. What I do not see in this language is permission for the Court to set aside a binding plea agreement, and that is what this was. I was very clear with Mr. Hicks, as my notes reflect and which I have now had a chance to confirm, that this was a binding plea agreement. As [the State] has detailed in [its] recitation, it not only was a binding plea an agreement within the context of this particular case, but it is clear to the Court that the State made its calculation in how it handled multiple other cases in which Mr. Hicks was facing prolonged periods of incarceration, the State made its decisions about those cases not only as part of the plea agreement in this case where two were entered as *nol*

prossed at the time of the plea, but also for an additional subsequent violation of probation case the State did not seek any further penalty for Mr. Hicks because Mr. Hicks was serving twenty-five without parole in this case.

Now, that looks like and it is a substantial sentence. It is. However, when one looks at what Mr. Hicks actually is serving under the plea agreement and the sentence versus the global possibility at the time he made his decisions, it is a small fraction of what he was facing.

So, the Court looks at this under the conditions of Subsection (b) of Section 5-609.1 of the Criminal Law Article and I have to consider whether retention of the mandatory minimum sentence would result in substantial injustice to the Defendant.

In this case it was made clear to the Defendant what period of time he was going to have to serve in order to make all of these other cases and all of the other violations of probations in those cases go away. He knew what he was agreeing to and he got the benefit of his bargain.

The Court also under Subsection (2) of Subsection (b) has to look at whether the mandatory minimum sentence is necessary for the protection of the public. [The State] has detailed the number of convictions, the number of opportunities for Mr. Hicks to turn back from his course of conduct, which repeatedly brought deadly drugs into this county and he did that while he was on probation under court supervision while on probation and also while he was awaiting trial in multiple serious drug offenses. He continued to violate while he had a plea agreement which would have given him the benefit of a *nol pros* in the case that was at hand at that point.

So, in terms of the protection of the public, the Court must not simply look at what Mr. Hicks has told me today and what his family members have told me today, the Court must look at Mr. Hicks's track record; and that is one during which over a period of years, years and years, having gone to Division of Corrections [sic] twice and served three year sentences on two occasions, he continued and expanded the drug sale activity which brought him before the Court in the instant case.

So, when I look at whether it would be a substantial injustice to Mr. Hicks to leave the mandatory sentence in place, I find that it is not a substantial injustice to Mr. Hicks. I'm certain it is a disappointment to him, but he got the benefit of his bargain. Multiple serious felony drug cases were dropped. I believe it was two were dropped and a third one with violation of probation which would have carried significant time, the violation was not pursued because he was serving this time. And because it was a mandatory sentence

the State could have confidence that Mr. Hicks actually would serve a certain period of time, because I believe he gets twenty-five years but then he gets credit for whatever good time credits he is entitled to. So, it was because of the certainty of the sentence in the Court's view that the State was willing to take those other steps.

But a completely separate certain [sic] that the Court has is the protection of the public. Mr. Hicks has told me that he is forty-three years old now. I well understand having worked in this courthouse for thirty-five years at this point that individuals do reach a point where they are weary of being in and out of the system. I hope that Mr. Hicks has reached that point.

But at this stage given the number of times Mr. Hicks was given the opportunity in the past to turn away from this life and simply continued to live it, I cannot have confidence that he would not pose a threat to the public should the Court minimize or reduce or alter his sentence.

So, for alternative reasons, these are alternative findings and alternative bases for the holding. First of all, I find that this was a binding plea agreement and the Court does not have the authority to alter the plea agreement that was entered into without the permission of the State. The definition of binding plea agreement was clearly explained to Mr. Hicks at the time of his plea. He was aware of what he was signing on for.

Second, with regard to whether or not the retention of the mandatory aspect of the sentence would constitute a substantial injustice, the Defendant got the benefit of his bargain. The State has maintained its part of the plea agreement. The Defendant got the benefit of having those other two very serious cases *nol prossed* at the time of his sentencing. He got the benefit of not being pursued for violation of probation of the other case for which this case was a violation. So, it is not a substantial injustice for the Defendant to be held to his side of the bargain.

Finally, as an independent ground, the Court is concerned that if that full period of time is not imposed that Mr. Hicks will continue to once again be a threat to the public and the Court finds that it is necessary to uphold the sentence as imposed for that alternative reason.

So, for that reason, respectfully the motion for modification is denied.

Immediately thereafter, appellant asked the court if it would consider holding the matter *sub curia* for later consideration. After the court expressed some doubt that CR § 5-609.1 would permit such action, the court said the following:

> This is what I will do, [Defense Counsel]. I'm denying it at this point. I'm denying the motion for modification at this point. You may file a written request for reconsideration and what I will do is note that I am holding that decision *sub curia*. I'm reserving that decision *sub curia*. However, I will tell you now on the record that unless there is some alteration of the State's viewpoint on this, I don't believe that I have the authority to reconsider or to grant any modification.
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> So, my evaluation of the case could perhaps change, but that doesn't matter unless [the State's] does.

Appellant took an appeal from the denial of his motion for modification of sentence. That appeal was stayed pending the Court of Appeals' decision in *Brown v. State*, 470 Md. 503 (2020) in which this Court had certified four questions to the Court of Appeals dealing with CR § 5-609.1.

Among the questions *Brown* addressed was whether a circuit court can modify a mandatory sentence imposed pursuant to a binding guilty plea agreement. The Court of Appeals determined that the circuit court has the authority to modify such a sentence pursuant to CR § 5-609.1. *Id*. at 534-40.

After *Brown* had been decided, appellant filed a motion in this Court seeking to lift the stay, which we granted on December 14, 2020.

On appeal, appellant claims that the circuit court erred in finding (1) that it lacked the authority to modify the sentence without the State's acquiescence, (2) that the retention of the mandatory minimum sentence would not result in substantial injustice to appellant,

and (3) that the mandatory minimum sentence is necessary for the protection of the public. The State agrees with appellant that the circuit court erred in finding that it lacked the authority to modify the sentence.[4] However, the State contends that that error was harmless because the circuit court's alternative reasons for denying the appellant's motion for modification of sentence did not amount to an abuse of discretion.

In *Brown*, *supra*, the Court of Appeals explained that, even under the JRA, the question of whether to modify a sentence remains to be reviewed for an abuse of discretion, stating that the decision to modify a sentence:

> … is a decision committed to the discretion of the circuit court and, accordingly, to be reviewed under the deferential abuse-of-discretion standard. Such a standard generally applies in the review of a sentencing decision because of the broad discretion that a court usually has in fashioning an appropriate sentence. *See Sharp v. State*, 446 Md. 669, 687 (2016). As has frequently been repeated, an abuse of discretion occurs "when the court acts without reference to any guiding rules or principles," "where no reasonable person would take the view adopted by the court," or where the "ruling is clearly against the logic and effect of facts and inferences before the court." *Alexis v. State*, 437 Md. 457, 478 (2014).

Brown v. State, 470 Md. at 553.

In exercising its discretion under CR § 5-609.1 a court may "consider the terms of the binding plea agreement, what prompted the State and defendant to enter into that agreement involving a mandatory minimum sentence in the particular case, or what considerations caused the court to approve it in the circumstances of that case." *Brown*, 470 Md. at 539.

[4] The State filed its Brief of Appellee in this Court after *Brown* had been decided. Appellant filed his brief before *Brown* had been decided.

We agree with the State that, any error that the court made in believing that it lacked the authority to modify the sentence was rendered harmless when the court provided an entirely independent ground for denying the motion that is consistent with CR § 5-609.1 and *Brown*. Thus, on this record, we are not persuaded that the circuit court's decision to not modify appellant's sentence amounted to an abuse of discretion.

Consequently, we shall affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY HARFORD COUNTY.