

Circuit Court for Montgomery County
Criminal Case No.: 127024

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2343

September Term, 2019

WARREN MATTHEW GIDDINGS

v.

STATE OF MARYLAND

Berger,
Friedman,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: November 23, 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.

On December 18, 2015, Warren Matthew Giddings, appellant, pled guilty to one count of third-degree sexual offense in the Circuit Court for Montgomery County. The court sentenced appellant to ten years of imprisonment, with all but 18 months suspended, to be followed by a five-year period of supervised probation.

While on probation, appellant received a conviction in another jurisdiction. At the violation of probation hearing on May 16, 2018, the court determined that appellant had violated his probation and sentenced him to “104 days [of imprisonment] with credit for 104 days [of] time served, probation continued.”

On November 1, 2018, the Division of Parole & Probation (“Parole & Probation”) filed a supervision summary and request for a warrant. Appellant filed a motion to dismiss the violation of probation, arguing that he was no longer on probation following the court’s sentence of 104 days. The circuit court denied appellant’s motion to dismiss and sentenced appellant to eight-and-a-half years of imprisonment.

Appellant filed an Application for Leave to Appeal, which this Court granted as to the following question:

Whether the circuit court err by denying [a]ppellant’s motion to dismiss the period of probation.

For the following reasons we shall affirm the order of the circuit court.

FACTS AND PROCEEDINGS

Because the facts of the underlying offense are of little relevance to our analysis, a detailed recitation of the facts is unnecessary for purposes of our review. As stated above, appellant pled guilty to one count of third-degree sexual offense and was sentenced to ten

years of imprisonment, with all but 18 months suspended, to be followed by a five-year period of supervised probation.

On October 19, 2017, Parole & Probation filed a petition alleging that appellant had violated his probation based on an arrest in Charles County for assault, reckless endangerment, and malicious destruction of property. On January 10, 2018, Parole & Probation filed a supplemental report alleging that appellant had further violated his probation based on an arrest in Frederick County for burglary and trespass.

At the May 16, 2018 hearing on appellant's violation of probation, appellant admitted a probation violation based on his conviction for trespass in Frederick County. Defense counsel requested that the court reinstate appellant's probation. The court sentenced appellant as follows:

THE COURT: Okay. All right. Well, I will continue [appellant] on probation. That was not my initial inclination because it doesn't sound like you're a real suitable candidate for probation. But since the State and the Probation Agent feel that, you know, essentially they want to work with you and give you another opportunity, so that's fine, I'm happy to do that. But I also agree with the tenor of what they're saying which is this is kind of like a last shot, and if it doesn't work out and you're back here for some other violation of probation, you know, my inclination is going to be to, you know, close the case, impose some period of incarceration, and that'll be that because it's just, you know, it's just kind of you know a waste of everybody's time to have somebody on probation that you know they either don't they don't want to be on probation, they don't accept the probation, whatever, right? All right. So does he need to get some sentence and credit for time served? Is that how you want to do it, [defense counsel]?

[DEFENSE COUNSEL]: Yeah. So he gets credit from February 2 through today.

THE COURT: All right. So how many days is that? February 2 through today?

[DEFENSE COUNSEL]: Let me see here.

THE COURT: Somebody has some computer program that has this?

THE CLERK: It's from February 2nd?

THE COURT: Yes, through today.

THE CLERK: 103 days.

THE COURT: 103?

[DEFENSE COUNSEL]: Yes, I agree.

THE COURT: All right. So –

[PROSECUTOR]: It's actually 104 because he gets credit for the 2nd, but, yes.

THE COURT: All right. 104 days. So the sentence for the violation of probation will be 104 days with credit for 104 days' time served. The probation will be continued so you'll still be on the same period of probation. So it looks like that is scheduled to expire on June 13th of 2021. Does that sound right? That's the date that I'm looking at.

[DEFENSE COUNSEL]: That's what I'm looking at.

[PROSECUTOR]: Yes.

On November 1, 2018 Parole & Probation filed a supervision summary and request for warrant, alleging that appellant had violated multiple conditions of probation, specifically: (1) failing to report to his probation agent, (2) making contact with the victim in the case, and (3) failing to complete sex offender treatment.

Appellant filed a motion to dismiss the violation of probation, arguing that he was not on probation. Appellant argued that because the court had imposed a straight sentence with no suspended time, any probationary period imposed by the court was a nullity.

On January 30, 2019, the circuit court heard argument on appellant’s motion to dismiss. The following colloquy ensued regarding the court’s order of May 16, 2018:

THE COURT: The disposition of the violation of probation was to continue him on probation, and he had served whatever it was, 104 days or whatever it was at the time, so in order to give him, I guess the way I looked at it was to give him credit for the 104 days’ time served if eventually he needed credit on the 10 years. He’d get credit for, I think, 18 months plus the 104 days towards the 10 years, but he was continued on probation. I mean, the case law, I mean I looked at the cases and, of course, Greco¹ is probably one of the main ones, and I understand that in order to put somebody on probation, you have to suspend part of the sentence, right, but that’s just kind of basic law.

* * *

... [T]here’s kind of a two-part process, so when you have a violation of probation hearing, the first issue is, is the person in violation of probation, but there’s a second question even if someone is in violation of probation. Then, the question there is, well, what do we do about it? You can do nothing. You could revoke probation. You could impose all or part of the suspended sentence. You can do lots of things.

[DEFENSE COUNSEL]: I agree.

THE COURT: So here, his probation wasn’t revoked. His probation, I think, whatever I did, I added a term or whatever we did.

[DEFENSE COUNSEL]: Correct.

¹ *Greco v. State*, 427 Md. 477 (2012).

THE COURT: All I did was give him credit for the time he had served, so.

[DEFENSE COUNSEL]: Well, and the thing is, that, well, what the [c]ourt did was impose a jail sentence.

THE COURT: For the violation of probation.

[DEFENSE COUNSEL]: Yes.

THE COURT: Right.

[DEFENSE COUNSEL]: You imposed a jail sentence with time served.

THE COURT: Right, for the violation, not for -- the crime that he's on probation for is third-degree sex offense. The punishment that he got way back whenever it was, in May of 2018, he wasn't being sentenced for a third-degree sex offense. His disposition was for the violation of probation.

[DEFENSE COUNSEL]: He was being sentenced for third-degree sex offense, for violating his conditions. For committing an offense, the [c]ourt determined that his sentence should then be time served, probation to continue on the conditions stated in the report. The problem simply is this; without re-imposing the backup time on the record and stating it, I think that's what Costello and Lory tell us. The [c]ourt has to say on the record. The clerk didn't pick it up. It's not in the probation contract. That's not what was given to [appellant] when he walked out. If someone came in and looked at the file, they would say, well, that's his sentence. That's the sentence he was given on March 16th, 2018.

So without saying it on the record, even if the [c]ourt thought that was the case or that it was implied, it's insufficient under the case law, so that's why, you know, I moved to dismiss on this case. So I understand where the [c]ourt's coming from, but violation of probation isn't a crime. It's a proceeding to determine whether the person should receive all or some, or none, of the backup time for the original crime, and the [c]ourt, this one the [c]ourt determined that the appropriate disposition was to find the violation --

THE COURT: Continue on probation.

Following argument by the parties, the court denied appellant’s motion to dismiss. The court continued the violation of probation hearing to April 15, 2019, and found, at that time, that appellant had violated his probation by failing to report to his probation officer and failing to complete sex offender treatment.² The court imposed a sentence of eight-and-a-half years’ incarceration with credit for time served. Appellant then filed an Application for Leave to Appeal, which this Court granted.

DISCUSSION

Appellant argues that the court’s sentence of 104 days’ incarceration with credit for 104 days’ time served for his first violation of probation was a new sentence that replaced the terms of his original sentence. He contends that, because the circuit court did not suspend any portion of that sentence, the court’s probation order was a nullity. Because he asserts that he was no longer on probation at the time of the alleged violations, the court did not have the authority to resentence him at the April 15, 2019 hearing.

The State responds that the circuit court properly sentenced appellant to serve a portion of his suspended sentence for his first violation of probation. The State maintains that the circuit court was not required to reimpose the suspended portion of appellant’s original sentence at the violation of probation hearing in order to continue appellant’s probation. The State asserts that, because appellant remained on probation as of the request

² Though appellant’s violations were technical violations of his probation, the circuit court determined that adhering to the limits on the period of incarceration for technical violations under § 6-223(e), would create a risk to public safety, and imposed a period of incarceration longer than provided in § 6-223(d).

for the issuance of the warrant on November 1, 2018, the circuit court properly denied appellant’s motion to dismiss his second violation of probation.

Section 6-221 of the Criminal Procedure Article of the Maryland Code, (2001, 2018 Repl. Vol.) permits a trial court to suspend the execution of a sentence and order that a defendant be placed on probation. This is commonly referred to as a split sentence. *Moats v. Scott*, 358 Md. 593, 595 (2000). A split sentence “allows a court to impose a sentence for a specified period and provide that a lesser period be served in confinement, suspend the remainder of the sentence and grant probation for a period longer than the sentence but not in excess of 5 years.” *Id.* (internal quotation marks and citation omitted). Any plea agreement that provides for a suspended sentence must include a period of probation. *State v. Crawley*, 455 Md. 52, 63-64 (2017) (citing *Rankin v. State*, 174 Md. App. 404, 411-12 (2007)).

Upon a finding of a violation of probation, a court may: “(1) impose a sentence for a specified time and provide that a lesser time be served in confinement; (2) suspend the remainder of the sentence; and (3)(i) order probation” § 6-222(a). A trial court has broad discretion in determining the sentence to be imposed for a violation under § 6-222(a). *State v. Brown*, 464 Md. 237, 264, n.13 (2019).

Appellant contends that the trial court’s sentence of 104 days’ incarceration with credit for 104 days served, was a straight sentence, which effectively replaced his original suspended sentence and probation order. Appellant relies heavily on *Cathcart v. State*, 397 Md. 320 (2007), to argue that the circuit court’s failure to restate a suspended sentence at his violation of probation disposition nullified the court’s order that he remain on

probation. In *Cathcart*, the Court of Appeals held that a sentence that suspended a portion of the time served, but failed to impose a period of probation, was not an illegal sentence, though it could not be a split sentence under § 6-222. *Id.* at 330. The Court explained that when a trial court fails to impose a period of probation, the period of incarceration is limited to the unsuspended portion of the sentence. *Id.*

Cathcart is readily distinguishable from the present case. Indeed, *Cathcart* addressed the court’s failure to impose probation as part of the defendant’s original sentence. We disagree with appellant’s argument that the holding of *Cathcart* mandates that unless a court “reimposes” a split sentence in a violation order, an order of probation is of no effect. To the contrary, the original sentence, once properly imposed, is not eliminated and replaced with a new sentence upon a finding of a violation of probation.

As the Court of Appeals has explained:

[W]hen a court imposes a sentence and then, . . . suspends execution of all or part of that sentence in favor of probation, and later strikes the probation and directs execution of all or part of the previously suspended part of the sentence, the court does *not*, at that time reimpose all or any part of the sentence. The full sentence has already been imposed and does not need any reimposition. The effect of the court’s action is simply to lift the previously ordered suspension and direct execution of the now unsuspended part.

Moats, 358 Md. at 596-97 (emphasis in original).³ *Accord Benedict v. State*, 377 Md. 1, 8 (2003):

³ In *Moats*, the Court applied Md. Code, Art. 27, §641A. That section was recodified in §§ 6-219 through 6-224 of the Criminal Procedure Article as part of the general code revision process in 2001. *Benedict v. State*, 377 Md. 1, 7 (2003).

If [a] defendant violates . . . probation, the court may revoke it and, at that time, direct execution of all or any part of the sentence. The court does not, at that time, either impose or reimpose the sentence. The sentence has already been imposed. All that is at issue is how much of the sentence previously imposed the defendant must now serve in prison by reason of the violation of probation.

We have noted that “[e]ven when revocation is both permissible and appropriate, the court is not bound to reinstitute the entire suspended sentence, or the maximum sentence authorized by law, if imposition (rather than execution) of sentence was suspended originally.” *Christian v. State*, 62 Md. App. 296, 309 (1985). A court may order the probationer to serve any period of the suspended sentence and order additional probation, within the five-year maximum. *Id.* These statutory provisions are intended to “provide ample flexibility to tailor the disposition of revocation to the ends of justice.” *Id.*

Appellant’s argument that he was no longer on probation following the court’s disposition of his first violation of probation is without merit. At the time of appellant’s first violation of probation, the circuit court imposed only 104 days of the remaining eight-and-one-half years of his original sentence. The balance of appellant’s suspended sentence remained in effect, as did the order of probation. Because appellant’s order of probation had not expired at the time of his second violation, we discern no error in the court’s order of April 15, 2019, imposing the remainder of his sentence, with credit for time served.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**