Circuit Court for Worcester County
Case No. C-23-CR-17-000227

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2466

September Term, 2019

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STANLEY FAISON

v.

STATE OF MARYLAND

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Beachley,
Wells,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Beachley, J.

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Filed: December 21, 2020

Following a two-day trial in the Circuit Court for Worcester County, a jury convicted appellant Stanley Faison of causing the death of another as a result of negligently driving a motor vehicle while under the influence of alcohol, and related charges. The court sentenced appellant to ten years' imprisonment, with all but six years suspended. The remaining counts were merged for sentencing purposes. Appellant timely noted an appeal and presents the following three issues for our review:

1. Did the trial court err by prohibiting and striking key opinion testimony from the defense's expert?

2. Did defense counsel render ineffective assistance by failing to disclose key expert opinion evidence in violation of the discovery rules?

3. Was it illegal to enhance [appellant's] sentence to ten years, or twice the statutory maximum, when he had no prior conviction of homicide while driving under the influence or any other substantially similar offense?

We answer these questions in the negative and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Because of the limited focus of the issues on appeal, we shall limit our factual recitation. The parties stipulated that at 2:24 a.m. on May 21, 2017, appellant, while driving his vehicle, struck and killed J.R. Ednie. After detecting a strong odor of alcohol on appellant, an officer administered a breath test, which revealed that appellant had a Blood Alcohol Content of 0.12.[1]

In light of these stipulations, the jury was tasked with determining whether appellant was driving in a negligent manner. Because none of the eyewitnesses were able to testify

[1] Blood Alcohol Content is measured in grams of alcohol per 210 liters of breath.

concerning appellant's speed at the time of the accident, the parties relied upon expert testimony to address appellant's speed as it related to the negligent driving element of the offense.

To prove appellant's negligence, the State called Detective Michael Karsnitz, an expert in vehicle crash reconstruction. Detective Karsnitz was present shortly after the accident and documented important evidence at the accident scene, including the location of paint chips, the length of a skid mark, and the final resting positions of the vehicle and Mr. Ednie's body. Detective Karsnitz used three different types of formulas to calculate appellant's speed at the time of the accident: the "slide to stop" formula, which projected appellant's speed to be 59.9 miles per hour; "pedestrian wrap" formulas, which projected appellant's speed to be 54.6 miles per hour; and "forward projection throw" formulas, which projected appellant's speed to be 52.7 miles per hour. The speed limit at the location of the accident was only 35 miles per hour. Important factors for these calculations included the length of the skid mark, the coefficient of friction of the road surface, the braking efficiency of the vehicle, the distance the body traveled, and whether the body went over the vehicle or under it.

Appellant called Glen Reuschling as a vehicle crash reconstruction expert. Mr. Reuschling testified concerning various alleged inconsistencies and errors in Detective Karsnitz's data collection and interpretation. However, the trial court precluded Mr. Reuschling from testifying about the results of independent tests he performed and his

ultimate opinion about appellant's speed because appellant failed to provide this information to the State in discovery.

As stated above, the jury found appellant guilty of homicide by motor vehicle while under the influence of alcohol, and related charges. Noting that this was his third global conviction for an alcohol-related driving offense, the court sentenced appellant to ten years' imprisonment, suspending all but six. We shall provide additional facts as necessary.

## DISCUSSION

### I. THE COURT DID NOT ABUSE ITS DISCRETION IN LIMITING APPELLANT'S EXPERT'S TESTIMONY TO THE CONFINES OF HIS EXPERT REPORT

Appellant argues that the trial court abused its discretion in precluding his expert witness from testifying about matters related to his vehicle's speed that were admittedly not disclosed in the expert's written report. In appellant's view, the court's ruling, which limited Mr. Reuschling's testimony to the confines of the expert's report, constituted an improper sanction for appellant's violation of the discovery rules.

Our analysis begins with Rule 4-263(e)(2), which states in relevant part:

> (e) Without the necessity of a request, the defense shall provide to the State's Attorney:
>
> . . .
>
> (2) As to each defense witness the defense intends to call to testify as an expert witness:
>
> (A) the expert's name and address, the subject matter on which the expert is expected to testify, the substance of the findings and the opinions to which the expert is expected to testify, and a summary of the grounds for each opinion[.]

The trial court has discretion to fashion a sanction for a party's failure to comply with this Rule, including excluding evidence or granting a continuance. *Thomas v. State*, 397 Md. 557, 570–71 (2007). Rule 4-263(n) provides, in pertinent part, as follows:

> If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

Here, appellant initially provided the State a perfunctory list of Mr. Reuschling's anticipated testimony, which did not provide any conclusions. The State then contacted Mr. Reuschling to request a more detailed report, which Mr. Reuschling provided four days before trial.

As noted, the trial court ultimately limited Mr. Reuschling's testimony to the information disclosed in his written report. In the approximately two-page report, Mr. Reuschling indicated that he would be challenging Detective Karsnitz's methods of collecting and interpreting data from the crash scene. Specifically, Mr. Reuschling opined that:

- "The interpretation of on-scene evidence is questionable";
- "Proper protocol and or procedures were not followed";
- Detective Karsnitz misinterpreted data in arriving at his opinions;
- Detective Karsnitz "failed to follow proper/accepted testing protocols involving the 'on-scene' data," including the effect of that data on "vehicular capabilities/dynamics" and "pedestrian's dynamics" and,

- "If inaccurate variables were used" by Detective Karsnitz, then "his results and opinion are not accurate."

Mr. Reuschling's written report is significant for what it omitted. Most notably, the report does not identify any opinion concerning the speed of appellant's vehicle at the time of the collision. The report is also silent as to any independent testing Mr. Reuschling performed, and it failed to articulate how Detective Karsnitz erred in his accident reconstruction calculations. To be sure, Mr. Reuschling's written report evidences criticism of Detective Karsnitz's procedures and protocols, but the report contains no affirmative opinions of the variables and calculations that should have been used to determine the speed of appellant's vehicle.

The issue concerning the permissible scope of Mr. Reuschling's expert testimony became apparent at the outset of trial. During defense counsel's opening statement, he stated that Mr. Reuschling would testify that, based on Detective Karsnitz's measurements, appellant's vehicle could have been travelling "anywhere from below the speed limit, at 28 miles per hour, up to 59 miles per hour." The State objected based on the absence of an opinion about appellant's speed in Mr. Reuschling's report. Defense counsel replied:

> Your Honor, the basis for that opinion is based upon the fact that he reviewed Detective Karsnitz's work. He didn't prepare a report in and of itself, and he can explain that on direct. He's reviewing what the State provided in discovery and making an opinion as to such. He also has a basis for his opinion, and he has provided to the State the fact that he differs in his opinion as to the range of probability for the speed. He does not have to provide the exact amount. He just has to say it was different from what the State provided.

The State acknowledged that, through conversations with defense counsel, it learned that

defense counsel "expected [Mr. Reuschling] to find a range." However, no range of speed was provided in the written report. The court deferred ruling on the objection, stating, "Well, that's an issue for -- that I'm going to have to take up at a later time, as to whether or not that's been concluded in the report and whether that's something that your expert can testify to."

Immediately before Mr. Reuschling's direct examination was to begin, the State moved to limit his testimony to what had been disclosed in the written report. Defense counsel proffered that Mr. Reuschling would "testify to his opinions that are drawn as a result of Detective Karsnitz's formulas, data, measurements, everything that he did as an expert in this case." Defense counsel further stated: "And I would ask the [c]ourt to allow him . . . to formulate his opinion[.] . . . [H]e's going to be able to formulate an opinion *as to what Detective Karsnitz did*, and that's simply what we are asking the [c]ourt to consider." (Emphasis added). Notably, defense counsel did not request that Mr. Reuschling be permitted to give an opinion as to appellant's speed at the time of the collision. After the court ruled that it would allow Mr. Reuschling to "give his opinion as long as those opinions have been provided to the State in discovery[,]" defense counsel asked the court to review the report and "make a determination as to whether his opinion is inside of the scope of that report. That's all I'm asking."

During Mr. Reuschling's examination, appellant attempted to elicit opinions and findings that were not disclosed in the written report, including the results of independent tests Mr. Reuschling conducted. Aside from testimony that the vehicle's brakes did not

lock during an independent test, which the State did not object to, the court consistently precluded Mr. Reuschling from testifying about any matters that were not disclosed as required by Rule 4-263(e)(2).

Appellant does not dispute that he failed to comply with Rule 4-263's discovery requirement, but instead argues that the sanction chosen by the trial court was excessive. Specifically, appellant argues that the court abused its discretion by failing to consider the factors enumerated in *Thomas v. State*, 397 Md. 557 (2007). The Court of Appeals stated in *Thomas*, "In exercising its discretion regarding sanctions for discovery violations, a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Id.* at 570–71 (footnote omitted). Appellant alleges that the failure to disclose Mr. Reuschling's opinions was not in bad faith, that the prejudice to the State was "slight," that the court failed to consider the feasibility of curing the prejudice with a continuance, and that the court failed to consider the importance of an opinion concerning appellant's speed to his defense.

"The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Id.* at 571. "Exclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed. . . . Where remedial measures are warranted, a continuance is most often the appropriate remedy." *Id.* at 572–73. In *BEKA Indus., Inc. v. Worcester Cty. Bd. of Educ.*, 419 Md. 194, 232 (2011),

the Court of Appeals noted that "[w]e have not required that statements addressing each of these factors be part of the record."

We encountered a similar situation in *Breakfield v. State*, 195 Md. App. 377 (2010). There, Breakfield failed to disclose the names of three witnesses until the first day of trial, when their names were read during *voir dire*. *Id.* at 387, 390. The trial court excluded the testimony of all three witnesses. *Id.* at 387. Breakfield argued that the State was not prejudiced by the late disclosure because it learned the names of the witnesses at the beginning of a three-day trial, giving the State "sufficient time to investigate their background prior to their testimony." *Id.* Breakfield further argued that the failure to disclose was "not willful," but instead caused by a misunderstanding of the disclosure requirements. *Id.* at 387, 391. This Court held that, "[a]lthough preventing all witnesses from testifying was a harsh sanction for violation of the discovery rules, Rule 4-263 makes plain that defendants may not wait until trial to disclose their evidence, and if they do, the trial court has authority to exclude such evidence from the case." *Id.* at 391.

Against this backdrop, we review the *Thomas* factors. First, defense counsel failed to provide a more complete expert report because he misunderstood the discovery rules. Defense counsel believed that it was the State's obligation to request such a report and, after the State requested and received a written report from Mr. Reuschling, defense counsel did not supplement the report. Although we see no evidence that defense counsel acted in bad faith, the State bears no responsibility for appellant's discovery failures.

As to the second factor, the prejudice to the State was potentially significant. The

discovery violation came to light during defense counsel's opening statement, after the jury had been chosen. "When a discovery violation becomes apparent only after the trial has commenced, the potential for prejudice is greater than if the discovery violation had occurred prior to trial." *Storetrax.com, Inc. v. Gurland*, 168 Md. App. 50, 89 (2006). Without knowing Mr. Reuschling's testing results, methodology, and conclusions, the State was potentially prejudiced in its ability to respond to such testimony. Although the prejudice to the State may have been reduced by Detective Karsnitz's rebuttal testimony, Detective Karsnitz did not have the opportunity to verify Mr. Reuschling's independent tests. We also note that the court did not preclude Mr. Reuschling's testimony in its entirety. Mr. Reuschling was still able to testify extensively about perceived errors in Detective Karsnitz's data collection and interpretation. His testimony examined each one of the measurements Detective Karsnitz used in his various formulas, and he was permitted to challenge Detective Karsnitz's protocols and methodology.

Intertwined with the second factor is the third factor—the feasibility of curing the prejudice with a continuance. On appeal, appellant suggests that a short continuance immediately after Mr. Reuschling's direct examination would have sufficed for the State and Detective Karsnitz to devise a strategy for responding to the opinions elicited. Notably, appellant did not ask for a continuance when the State objected during opening statements, nor did he seek a postponement during the motion *in limine* hearing prior to Mr. Reuschling's testimony. Moreover, the trial judge had previously addressed whether a continuance was necessary, but both parties "agreed that there was no reason to postpone

this matter any further." Considering the nature of the discovery withheld from the State—not only the expert's conclusions, but the fact that the expert had conducted his own tests—a short continuance would likely have been insufficient to cure the prejudice caused by appellant's material omissions in the expert report.

The "other relevant circumstances" mentioned in *Thomas* include the factors listed in *Taliaferro v. State*, 295 Md. 376, 390–91 (1983). These factors include: "whether the disclosure violation was technical or substantial, [and] the timing of the ultimate disclosure." *Id.* These factors weigh heavily in favor of the State. The violation here was not simply a matter of late disclosure, but of total non-disclosure of what appellant contends on appeal are "critical[ly] importan[t]" facets of Mr. Reuschling's testimony—his ultimate opinion as to appellant's speed based in part on multiple independent tests he conducted. Not only was this testimony substantive, but its attempted disclosure occurred after the commencement of trial. We do not view the discovery violation here as merely "technical."

We discern another "relevant circumstance" in our evaluation of the trial court's exercise of discretion. After the court indicated that Mr. Reuschling's testimony would be limited to the scope of what was disclosed to the State, defense counsel stated, "[Y]ou are clearly within reason to make a determination as to whether [Mr. Reuschling's] opinion is inside of the scope of that report. That's all I'm asking." Thus, defense counsel seemingly understood—and acquiesced in—the court's ruling. Consistent with that understanding, defense counsel failed to advise the court of the significance of the excluded testimony, and failed to proffer Mr. Reuschling's anticipated testimony about the variables used to

calculate speed. Although appellant claims on appeal that the excluded testimony was of "critical importance," that contention was not proffered to the trial court. It would be inappropriate for us to conclude on this record that the trial court abused its discretion in limiting Mr. Reuschling's testimony where defense counsel failed to sufficiently advise the court of the importance of the excluded testimony.

Based on the totality of the circumstances, we hold that the trial court did not abuse its discretion in limiting Mr. Reuschling's testimony to those topics and opinions disclosed in his expert report.

## II. WE DECLINE TO CONSIDER APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Appellant next argues that his trial counsel provided ineffective assistance by failing to disclose the substance of Mr. Reuschling's opinions and independent tests prior to trial. The State responds that the record at trial is insufficient for this Court to review this issue. We agree with the State.

To prevail on a claim of ineffective assistance of counsel, appellant must prove both that (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "Judicial scrutiny of counsel's performance must be highly deferential . . . [and, for fairness, must] evaluate the conduct from counsel's perspective at the time [of the alleged deficient representation]." *Tetso v. State*, 205 Md. App. 334, 377 (2012) (alterations in original) (quoting *Strickland*, 566 U.S. at 689).

A post-conviction proceeding is "the most appropriate way to raise the claim of ineffective assistance of counsel." *Mosley v. State*, 378 Md. 548, 558–59 (2003). This is because there must often be testimony from trial counsel concerning "his or her reasons for acting or failing to act in the manner complained of[.]" *Tetso*, 205 Md. App. at 378 (quoting *Johnson v. State*, 292 Md. 405, 434 (1982), *overruled on other grounds by Hoey v. State*, 311 Md. 473 (1988)).

The record in this case evidences lengthy and complicated expert testimony involving accident reconstruction. Except for defense counsel's passing mention of appellant's speed during opening statement, there is no proffer in the record that Mr. Reuschling was able to reach a conclusion, to a reasonable degree of certainty, concerning appellant's speed at or near impact with Mr. Ednie. Nor are there specific proffers of Mr. Reuschling's determination of the multiple variables that are employed to determine speed in accident reconstruction analysis. In short, we decline to review appellant's ineffective assistance of counsel claim on this record.[2] That determination is more appropriately left to the post-conviction court.

[2] Mr. Reuschling testified about the length of the skid mark, which is relevant to only one of the three types of formulas used by Detective Karsnitz, but his testimony concerning the other variables in that formula was vague. Additionally, Mr. Reuschling did not testify about variables relevant to the other two types of formulas, other than to say that Mr. Ednie's body may have gone under the vehicle, making the "forward projection throw" formula inapplicable. On this record, we would not be able to make a determination as to *Strickland*'s prejudice factor—whether there is a reasonable possibility that the results of the proceeding would have been different.

## III. APPELLANT'S SENTENCE IS NOT ILLEGAL

Finally, appellant argues that his sentence is illegal. Specifically, appellant argues that the subsequent offender provision of Md. Code (2002, 2012 Repl. Vol., 2020 Supp.), § 2-503 of the Criminal Law Article ("CR") violates the prohibition against "cruel or unusual" punishment in Article 25 of the Maryland Declaration of Rights. To understand appellant's argument, we must first give context to the subsequent offender sentence enhancement provision at issue.

The statute at issue in this case, CR § 2-503, prohibits homicide by motor vehicle. In 2016, the General Assembly amended CR § 2-503 to allow enhanced sentences for subsequent offenders. The statute now provides, in relevant part:

> (c)(1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $5,000 or both.
>
> (2)(i) A person who violates this section, having previously been convicted under this section, § 2-209, § 2-210, § 2-504, § 2-505, § 2-506, or § 3-211 of this article, or § 21-902 of the Transportation Article, is guilty of a felony and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding $10,000 or both.
>
> (ii) For purposes of application of subsequent offender penalties under subparagraph (i) of this paragraph, a conviction for a crime committed in another state or federal jurisdiction that, if committed in this State would constitute a violation of this section, § 2-209, § 2-210, § 2-504, § 2-505, § 2-506, or § 3-211 of this article, or § 21-902 of the Transportation Article, shall be considered a violation of this section.

We note that CR § 2-209, § 2-210, § 2-504, § 2-505, § 2-506, and § 3-211 all prohibit causing death or serious bodily injury while operating a vehicle in a negligent manner, or

while under the influence of alcohol or drugs. Unlike these sections of the Criminal Law Article, Md. Code (1977, 2012 Repl. Vol., 2020 Supp.), § 21-902 of the Transportation Article ("TA"), simply prohibits driving under the influence or while impaired.

Here, the trial court found appellant to be a "subsequent offender." That finding was based on the fact that appellant was found guilty of driving while impaired or under the influence on two prior occasions: in North Carolina on January 18, 2011, and on April 22, 2017, in Minnesota. In other words, the court found that appellant committed conduct in other states that, had the events occurred in Maryland, would have constituted a violation of TA § 21-902. Based on this predicate for a "subsequent offender" finding, the court sentenced appellant pursuant to CR § 2-503(c)(2), which provides for "imprisonment not exceeding 10 years or a fine not exceeding $10,000 or both."

Unfortunately, appellant's argument cannot be captured in a single sentence. Appellant's argument is as follows. CR § 2-503 criminalizes homicide by motor vehicle while under the influence of alcohol. The subsequent offender portion of that statute allows an enhanced sentence for similar conduct—causing death or serious bodily injury either by negligently operating a vehicle or by operating the vehicle while under the influence of alcohol or drugs. But the statute also permits an enhanced sentence for conduct that, according to appellant, is not the same—CR § 2-503(c)(2) permits an enhanced sentence for anyone who has merely been previously convicted of driving while under the influence or impaired by alcohol or drugs under TA § 21-902. In essence, the statute permits subsequent offender enhancement even if the defendant has never previously killed or

seriously injured someone while negligently operating a vehicle while under the influence of or impaired by alcohol or drugs. According to appellant, this discrepancy violates Maryland Declaration of Rights Article 25's prohibition on cruel or unusual punishment.[3]

Appellant's argument may be rephrased as follows: in order for an enhanced sentencing statute to be constitutional,[4] the prior conviction must be for the same conduct. In making this argument, appellant principally relies on *Maguire v. State*, 47 Md. 485 (1878). There, Maguire was charged with unlawfully selling, disposing, and giving away liquor on a Sunday in October 1876. *Id*. at 486–87. The indictment also alleged that Maguire had committed the same crime in 1875, for which he was convicted in February 1876. *Id*. at 487. On appeal, Maguire argued that the trial court erred in allowing the prosecutor to read the indictment to the jury, and that the court should not have allowed the deputy clerk of the circuit court to produce the docket entries regarding his first conviction. *Id*. at 492. Notably, the statute at issue "impos[ed] a different and a severer punishment for a second offence against its provisions, from that imposed for the first." *Id*. at 493.

The Court of Appeals held that the trial court did not err in allowing the prosecutor

[3] Article 25 of the Maryland Declaration of Rights provides: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law."

[4] Although appellant makes several references to the "constitutionality" of CR § 2-503, his argument relies on the Maryland Declaration of Rights and not the United States Constitution.

to read Maguire's prior indictment and conviction to the jury. *Id*. at 495. The Court explained:

> It is a common thing in this State, as it is elsewhere, to find in statutes in regard to crimes and punishment, the second or third offense under the same statute, made subject to an increased punishment; and this for an obvious reason. The great object of the law is the prevention of crime; and the party charged with the commission of a second offense is supposed to have known all the penalties denounced against it. If, therefore, the punishment denounced against the first offense proves to be insufficient to restrain his vicious propensities, *it is but just and right* that an increased punishment should be inflicted for a second or third offence; and he has no reasonable cause of complaint that his former transgressions, *under the same law*, are brought up in judgment against him. No constitutional objection exists to such regulation of punishment; and provisions in statutes similar to that under which the present indictment was framed, have been uniformly sustained, whenever or wherever questioned.

*Id*. at 495–96 (emphasis added).

Appellant relies on the above-emphasized language to argue that "The principles outlined in *Maguire* are rooted in proportionality[,]" and that enhanced sentencing statutes are only lawful where the defendant is punished for the exact same legal infraction. We reject this interpretation of *Maguire*. The Court of Appeals did not resolve whether sentence enhancement statutes comport with the proportionality requirements of Article 25, nor did the Court address the scope of the offenses which allow such enhancements. *Maguire* does not support appellant's argument that CR § 2-503 violated his constitutional rights because of its sentence enhancement provision. *Maguire* simply stands for the proposition that the trial court did not err in allowing the prosecution to read the indictment, which contained Maguire's prior conviction, to the jury, and that evidence of that prior conviction was admissible. *Id*. at 497. Indeed, this Court is unaware of any Maryland

precedent standing for the proposition that a sentence enhancement statute only satisfies constitutional proportionality if the predicate conviction is for the same crime as the subsequent conviction. Instead, as appellant correctly notes in his brief, "Appellate courts 'should grant substantial deference to the broad authority' that legislatures and sentencing courts have in determining appropriate sentences." (Quoting *State v. Bolden*, 356 Md. 160, 166 (1999)). As we have not been directed to any law supporting appellant's claim that his enhanced sentence violates the cruel and unusual punishment provision of Article 25 of the Maryland Declaration of Rights, we reject appellant's contention that his sentence is illegal.[5] *See Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 202 (2008) (stating that an appellate court will not seek out the law to sustain a party's position).

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

[5] We reject appellant's reliance on two out-of-state cases that he claims support his proposition. First, it has been our policy not to consider out-of-state unreported opinions, such as *Graham v. Commonwealth*, 2013 WL 593881 (Ky. Ct. App. Feb. 15, 2013). Next, we find *State v. Phillips*, 380 A.2d 1197 (N.J. Super. Ct. Law Div. 1977) unpersuasive. Although the opinion discusses the nature and elements of the offense for purposes of subsequent offender sentence enhancements, the only reference to constitutionality in that opinion concerns *ex post facto* provisions. *Id*. at 1200–01. Appellant makes no *ex post facto* claim.