Circuit Court for Washington County
Case Nos: 21-K-04-33511
21-K-07-38787

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2640

September Term, 2018

ROBERT ANTHONY CROSBY, JR.

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Wells,
JJ.

Opinion by Wells, J.

Filed: July 22, 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.

Robert Anthony Crosby, Jr., appeals the Circuit Court for Washington County's denial of his motion to correct an illegal sentence, which he filed in Case Nos. 21-K-07-38787 and 21-K-04-33511. Because Mr. Crosby's sentences are legal, we shall affirm.

BACKGROUND

In 2007, a jury convicted Mr. Crosby of possession with intent to distribute cocaine and conspiracy to distribute cocaine in Case Nos. 21-K-07-38787.[1] Given that this was his third conviction for distribution of cocaine, the court sentenced him, as a subsequent offender, to 40 years' imprisonment for the distribution offense, with the first 25 years of that sentence to be served without the possibility of parole. *See* § § 5-608(c) and 5-905 of the Criminal Law Article (2002 Repl. Vol., 2007 Supp.).[2] The court also sentenced him to 20 years' imprisonment for conspiracy, to run concurrently with the distribution sentence. Finally, the court ordered that the sentences in this case were to run "concurrent with any

[1] Mr. Crosby appealed and raised a single issue regarding an evidentiary matter. This Court affirmed the judgments. *Crosby v. State,* No. 1206, September Term, 2007 (Md. App. July 23, 2009).

[2] At the time of Mr. Crosby's conviction in 2007, Crim. Law § 5-608(a) provided that a person convicted of distribution of CDS was "subject to imprisonment not exceeding 20 years." Section 5-608(c), however, provided that a third-time offender "shall be sentenced to imprisonment for not less than 25 years" and "the person is not eligible for parole during the mandatory minimum sentence." In addition, Crim. Law § 5-905 authorized double penalties for "repeat offenders." Specifically, the statute provided that "[a] person convicted of a subsequent crime under [the controlled dangerous substances] title is subject to . . . a term of imprisonment twice that otherwise authorized[.]" In 2017, the legislature amended Crim. Law § 5-608 to eliminate mandatory minimum sentences for subsequent offenders and restricted the double sentencing enhancement in Crim. Law § 5-608, in some instances, to repeat offenders who also have a prior conviction for a crime of violence. *See* Criminal Law Article (2012 Repl. Vol., 2018 Supp.).

other outstanding or unserved sentence," with a start date of November 16, 2006. We shall refer to this as the "2007 sentence."

Mr. Crosby committed the crimes in the 2007 case while on probation for a conviction incurred in 2004 for possession with intent to distribute a large volume of crack cocaine (Case No. 21-K-04-3351) for which he was sentenced to 20 years' imprisonment, with all but 15 years suspended. A week after he was sentenced in the 2007 case, the circuit court revoked his probation in the 2004 case and ordered him to serve eight years of his previously suspended time, to run consecutively to the 2007 sentence. We shall refer to this as the "VOP sentence."

Motion for Modification of Sentence

In 2017, Mr. Crosby filed a motion for modification of sentence in both cases pursuant to Crim. Law § 5-609.1 (2012 Repl. Vol., 2018 Supp.). That provision, adopted pursuant to the Justice Reinvestment Act ("JRA") and effective October 1, 2017, authorized a limited timeframe in which a person who was "serving a time of confinement that includes a mandatory minimum sentence imposed on or before September 30, 2017" for a violation of certain controlled dangerous substances ("CDS") laws to "apply to the court to modify or reduce the mandatory minimum sentence as provided in 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."

The JRA also eliminated the mandatory minimum sentences set forth in Crim. Law § 5-608 for certain subsequent CDS offenders. Thus, for a third-time offender, the penalty was amended from a *minimum* of 25 years' incarceration, without the possibility of parole

for the first 25 years, to a *maximum* term of 25 years of imprisonment, with parole eligibility. The repeat offender penalty set forth in Crim. Law § 5-905 was also amended to allow a term of imprisonment twice that otherwise authorized for subsequent offenders of certain CDS laws only if the defendant "was also previously convicted of a crime of violence." *See* Crim. Law §§ 5-608(c) & 5-905 (2012 Repl. Vol., 2018 Supp.).

On June 4, 2018, the court convened a hearing on Mr. Crosby's motion for sentencing modification. His counsel acknowledged that he had filed the motion in both cases, but as to the VOP sentence informed the court that there was "no mandatory minimum" associated with the VOP sentence. He, therefore, withdrew the motion as to the VOP sentence and, instead, requested that the court consider authorizing drug treatment for Mr. Crosby pursuant to §§ 8-505 & 8-507 of the Health General Article "at some point" in the future. Counsel claimed that Mr. Crosby had not been eligible for treatment to date "in part due to the length" of his overall sentence.

Counsel noted that Mr. Crosby had "received the maximum sentence" he could have received for the 2007 distribution offense, "which was 40 years, and with 25 years of that was mandatory." Counsel further related that, with the VOP sentence running consecutively, Mr. Crosby was serving a total term of 48 years' imprisonment, "25 years of that mandatory minimum." Counsel requested that the court consider "eliminating the mandatory minimum." He related that both he and the prosecutor interpreted Crim. Law § 5-609.1 as authorizing the court to "modify or reduce the mandatory minimum." He further related that he had recently read a newspaper article where another judge in the same circuit had "actually reduced the sentence after removing the mandatory," and stated

that "maybe" the appellate courts "will make a ruling on that." He then reiterated that he read the statute as giving the court "the power just to reduce the mandatory," and asked that if the court's "not going to reduce the sentence because it's unclear that maybe [the court] would consider an 8-505[.]" Counsel further noted that it was "unclear in this process" how the Division of Corrections would "calculate" Mr. Crosby's sentence if the court were to "remove the mandatory[.]" Counsel queried: "are they going to send it back, recalculate his sentence with the 12 years [already served], give him the good days [credit]?" Counsel continued:

> Potentially, as we were talking, additional good days because of the new law, and then are they going to say – okay well you served 12 years plus good days, you're probably 16, 17 years but we're only going to calculate towards that - - towards the first [2007] sentence. And never give him -- never move any of that time over to the VOP. Or are they going to say – oh, you did 15 years with good time, we'll take 10 of that towards this sentence because you would have been paroled, and move the rest over the VOP [sentence] and then he'd be paroled? I don't think they're going to do that. I think they'll credit it all towards the first [2007] sentence and he – then he's still going to be doing an eight year sentence [the VOP sentence] that will begin once paroled on the first sentence. So in light of that, we'd ask you consider, you know, potentially an 8-505 down the road or sooner or later because as I said, he's done 12 years and he – at this point, he's just sitting."

The prosecutor confirmed that the State believed the court's "authority is to reduce the mandatory portion of the sentence" and stated that the "State's not opposed to removing the mandatory portion of the 25 years, just doing that today and, and handing the matter to DOC for calculation. I'm not sure what they will do. And then of course Mr. Crosby can file his 8-505."

After hearing from the parties, the court announced that it would "grant the relief requested" and "eliminate the mandatory portion of [the] sentence" in the 2007 case. The court told Mr. Crosby that it was "not sure how [the DOC will] recalculate that . . . how that plays into the sentence in the other case, but you have to recognize that you were on probation when you picked up that next charge [the 2007 case] and that's why that eight years [the VOP sentence] is consecutive there." The court further stated that it would "consider an 8-505 disposition at some point" and reiterated that it would grant the relief requested in the 2007 case and "strike the mandatory minimum portion of that sentence." The court was silent as to any reduction to the 40-year term of the sentence.

New Commitment Record

A commitment record, dated the same day as the modification hearing, was then issued. The sentence differed only in that parole ineligibility for the first 25 years of the sentence was struck. Otherwise, the sentence was a carbon copy of the original sentence imposed in 2007, that is, 40 years' imprisonment for the distribution offense and a concurrent 20 years for conspiracy, with a start date of November 16, 2006, "to run concurrent with any other outstanding or unserved sentence." We shall refer to this as the "modified 2007 sentence."

Motion to Correct an Illegal Sentence

Three months later, represented by new counsel, Mr. Crosby filed a Rule 4-345(a) motion to correct an illegal sentence in both cases. As to the modified 2007 sentence, he asserted that the court erred in not reducing the sentence from 40 years' imprisonment to 25 years' imprisonment. He pointed out that the original 40-year term was permitted

pursuant to Crim. Law § 5-905, which allowed "a term of imprisonment twice that otherwise authorized" for repeat offenders, but that the JRA had amended that provision to apply only when the repeat offender had also been previously convicted of a crime of violence. In short, he maintained that "the mandatory minimum of 25 years and the double penalty of 40 years should both have been vacated and reduced" to a term of 25 years' imprisonment, the maximum sentence now permitted for a third-time offender pursuant to Crim. Law § 5-608(c).

The State responded that the court had granted relief by "striking the mandatory portion of [Mr. Crosby's] 40-year sentence in accordance with the relief afforded under Crim. Law § 5-609.1" and noted that Mr. Crosby had not cited any "authority to support further modification of the 40-year repeat offender sentence imposed pursuant to Crim. Law § 5-905." As such, the State maintained that the modified 2007 sentence was legal.

Mr. Crosby also asserted that the VOP sentence was illegal. He noted that the VOP sentence was ordered to run consecutively to the 2007 sentence, but when the 2007 sentence was modified in 2018, the court "was silent" as to whether the 8-year VOP sentence "was to run consecutive or concurrent to the 40 years." Mr. Crosby requested that the "VOP sentence of 8 years be made concurrent to the new 25-year sentence."

The State responded that the VOP sentence was "not at issue" at the modification hearing, it was not modified, and it is lawful. The State further asserted that, at the modification hearing, the court "simply point[ed] out on the record why the 8-year sentence in [the VOP] case was consecutive."

The circuit court denied Mr. Crosby's request for a hearing and summarily denied his motion to correct his sentences. Mr. Crosby appeals that decision.[3]

DISCUSSION

The Modified 2007 Sentence

Mr. Crosby maintains that the 2007 sentence, as modified in 2018, is illegal because he never should have been sentenced both as a third-time offender under Crim. Law § 5-608(c) and as a repeat offender under Crim. Law § 5-905. Moreover, "in line with" the JRA, he contends that, upon the court's granting of his motion for modification pursuant to Crim. Law § 5-609.1, his sentence should have been modified to 25 years of imprisonment, the maximum now permitted for a third-time offender. (He also argues in favor of a 20-year sentence.) He claims that he is not subject to the double enhancement under Crim. Law § 5-905, as amended in 2017, because he has never been convicted of a crime of violence.

The State does not address Mr. Crosby's specific contentions, but merely responds that "the only benefit" to Mr. Crosby under the JRA "was the opportunity to file a motion to modify his sentence" and that upon doing so "he received the benefit of the striking of the 'no parole' component of his 25-year sentence." The State maintains that the modified sentence, 40 years with parole eligibility, "is permissible, and not inherently illegal."

We begin with Mr. Crosby's contention that the trial court erred in 2007 by sentencing him both as a third-time offender under Crim. Law § 5-608(c) and as a repeat

[3] Counsel represented Mr. Crosby in his motions in the circuit court. On appeal, he is self-represented.

offender under Crim. Law § 5-905. He relies on *Gardner v. State,* 344 Md. 642 (1997) and *Scott v. State,* 351 Md. 667 (1998) to support his position. In *Gardner* and *Scott,* the Court of Appeals held that, whether the legislature intended to allow a sentencing enhancement on a single count pursuant to Article 27, § 286 (now codified as Crim. Law § 5-608) and Article 27, § 293 (now codified as Crim. Law § 5-905) was ambiguous and, therefore, in those cases applied the rule of lenity to permit a single enhancement. But in *Price v. State,* 405 Md. 10, 31-32 (2008), the Court of Appeals noted that, in response to *Gardner* and *Scott,* the legislature in 2000 enacted Senate Bill 345 (now codified as Crim. Law § 5-905(d)) to clarify that a term of imprisonment twice that otherwise authorized "may be imposed in conjunction with other sentences under this title." Moreover, when Mr. Crosby was sentenced in 2007, Crim. Law § 5-608(c) provided for a mandatory *minimum* term of 25 years' imprisonment but was silent as to a *maximum* term. Crim. Law § 5-905(a), however, can be read in conjunction with Crim. Law § 5-608(c) to establish the maximum as "twice that otherwise authorized." In sum, we find no merit to Mr. Crosby's contention that the court in 2007 illegally sentenced him to 40 years' imprisonment, the first 25 years to be served without parole.

We also reject his contention that the double enhancement (40 years' imprisonment) is now illegal because under Crim. Law § 5-905, as amended in 2017, he would not qualify for that enhancement because, he claims, he has no prior conviction for a crime of violence. The short answer is that the 2017 amendment to Crim. Law § 5-905 was not retroactive.

We turn now to the legality of Mr. Crosby's sentence, as modified in 2018. Our first task is to determine the nature of that modification. The State maintains that the court merely struck the restriction on parole eligibility for the first 25 years of the 40-year sentence, which is consistent with the commitment record. In our view, that position is also consistent with the transcript of the sentencing modification hearing. At that hearing, the parties acknowledged that the "mandatory minimum" portion of the 40-year sentence was 25 years imprisonment, to be served without parole eligibility. Mr. Crosby's counsel specifically requested that the court "consider . . . eliminating the mandatory minimum, especially with the amount of years that he's served." The prosecutor informed the court that the "State's not opposed to removing the mandatory portion of the 25 years, just doing that today[.]" When read in context with other comments by defense counsel, including the remarks about the DOC's recalculation of Mr. Crosby's sentence if the court granted the relief requested, it is apparent that the parties were focused on the 25 years of parole ineligibility, and not the term of years. Noticeably absent from the hearing is any mention of a reduction in the sentencing term itself, that is, a reduction of the 40-year term of imprisonment. In fact, in pointing out that another judge in another case had "actually reduced the sentence after removing the mandatory[,]" defense counsel appeared to question the court's authority to take that action.

The court did not address the scope of its authority to modify Mr. Crosby's sentence under Crim. Law § 5-609.1, but after hearing from the parties simply announced that it would "grant the relief requested" and "eliminate the mandatory portion" of the sentence. The court explained to Mr. Crosby that the VOP sentence was consecutive to the 2007

sentence, and further stated it would consider "an 8-505 disposition at some point," after "things shake out at DOC and how they [re]calulate your sentence[.]"[4] The court then reiterated that it would "grant your relief" and "strike the mandatory portion of that [2007] sentence."

Although the relief requested and granted could have been articulated more clearly, we do not believe that the sentencing modification was ambiguous in this instance. We are persuaded that, when the court announced it would grant relief and strike the "mandatory portion of that sentence," the court struck the parole restriction on the first 25 years of the 40-year sentence. That is the modification Mr. Crosby's attorney requested at the hearing and that was the modification agreed to by the State. In short, there was no request to reduce the term of years. Accordingly, the circuit court did not err in denying Mr. Crosby's motion to correct the modified 2007 sentence because that sentence is legal.[5]

The VOP Sentence

Mr. Crosby maintains that the modified 2007 sentence "should now be construed as running concurrently to the 8 years violation of probation sentence." He acknowledges that, at the 2018 modification hearing, the court mentioned that the VOP sentence was

[4] With the striking of the parole ineligibility for the first 25 years of the 40-year sentence, Mr. Crosby presumably would be eligible for parole much sooner than otherwise.

[5] Crim. Law § 5-609.1 authorized a person to apply for a modification or reduction of mandatory minimum sentence for certain CDS offenses but did not mandate that a court grant relief nor dictate, if relief were granted, that the modified sentenced reflect the current penalty for the offense. Thus, we reject Mr. Crosby's contention that, upon modification, the court was required to reduce his 40-year sentence to a 25-year term of imprisonment.

originally to run consecutively to the 40-year sentence imposed in 2007 sentence, but he asserts that the court "never considered its relation as a now intervening sentence to the newly modified sentence" imposed in 2018. He also points out that the commitment record issued upon the 2018 modification reflects that "the total time to be served is 40 years, to begin on 11/16/2006, *to run concurrent with any other outstanding or unserved sentence*." (Emphasis added.) His argument appears to be that, upon the 2018 modification of the 2007 sentence, the VOP sentence was then outstanding and, therefore, the modified 2007 sentence is to be served concurrently with the VOP sentence. In the alternative, he maintains that the order in which his sentences are to run is ambiguous because the court "never concretely or definitively stated that the modified [40-year sentence] was to run consecutively or concurrently to the violation of probation." Therefore, under the rule of lenity, he maintains that the ambiguity is to be resolved in his favor.

The State responds that, at the 2018 modification hearing, the court noted that Mr. Crosby was on probation when he committed the offenses that lead to the 2007 sentence "and that's why that eight years is consecutive there." The State interprets the court's statement as maintaining the original order in which the sentences are to run. We agree.

In 2018, the court did not modify the VOP sentence which, when imposed in 2007, was ordered to run consecutively to the 40-year sentence. In fact, defense counsel withdrew the motion to modify the VOP sentence upon correctly acknowledging that it was not eligible for modification under Crim. Law § 5-609.1.

We see no ambiguity here. The record reflects that the court modified the 2007 sentence only to the extent of striking the parole restriction – the only relief defense counsel

requested. Because the VOP sentence was imposed after the 2007 sentence, the VOP sentence remains consecutive to the modified 2007 sentence.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.