Circuit Court for Washington County
Case No. 21-K-14-050701

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2792

September Term, 2018

ANDRE WALTER WILLIAMS

v.

STATE OF MARYLAND

Berger,
Reed,
Raker, Irma, S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.
Dissenting opinion by Raker, J., with whom
Berger, J., concurs as to Part II.

Concurring opinion by Berger, J.

Filed: January 25, 2021

Andre Walter Williams ("Appellant") was arrested for and charged with armed robbery, second-degree burglary, false imprisonment, kidnapping, and six related offenses. Dissatisfied with the representation of the assistant public defender assigned to his case, Appellant requested that the court permit him to discharge his attorney so that he could obtain substitute representation. Finding no merit in support of Appellant's motion, the court denied his request. Rather than retaining the services of his assistant public defender, Appellant elected to proceed *pro se*.

On June 29, 2015, Appellant was tried by a jury empaneled in the Circuit Court for Washington County. With the exception of kidnapping, which the State had *nolle prossed*, that jury convicted Appellant of each of the counts with which he had been charged. The court sentenced Appellant to 20 years' incarceration for armed robbery, a consecutive term of 15 years for second-degree burglary, and another consecutive sentence of 10 years for false imprisonment. For sentencing purposes, the court merged Appellant's remaining convictions.

The post-conviction court permitted Appellant to file a belated appeal, after which he noted this appeal. He presents the following three issues for our review, which we have reworded slightly:

1. Did the circuit court fail to properly comply with Maryland Rule 4–215, thereby committing reversible error in denying Appellant's right to counsel at trial?

2. Should Appellant's sentence for false imprisonment have merged into his conviction for robbery with a dangerous or deadly weapon?

3. Did the circuit court abuse its discretion when it denied Appellant's request for a continuance of the hearing on his criminal responsibility?

We answer Appellant's first question in the affirmative, and shall, therefore, reverse the judgments of the circuit court. Given that our resolution of the first issue is dispositive of this appeal, we shall not address the merits of Appellant's remaining contentions.

FACTUAL AND PROCEDURAL BACKGROUND

The resolution of this appeal does not depend on the facts underlying the crimes of which Appellant was convicted. We shall, therefore, forgo a recitation of those facts, and proceed directly to the procedural history on which our holding is based. *See Kennedy v. State*, 436 Md. 686, 688 (2014); *Teixeira v. State*, 213 Md. App. 664, 666–67 (2013).

At a pre-trial hearing held on April 6, 2015, Appellant requested permission to discharge the assistant public defender who had been assigned to his case so that he could be assigned substitute representation. Appellant cited several reasons for his request. Those reasons included: (i) the purported failure of his attorney to investigate records pertaining to the schizoaffective disorder with which Appellant had been diagnosed; (ii) his attorney's not having filed motions to suppress or dismiss; (iii) Appellant's not yet having been provided the evidence that had been produced during discovery; (iv) his attorney's alleged failure to "properly investigate the leads" that Appellant had given him; (v) his general distrust of counsel; and (vi) disagreements regarding trial strategy. The court permitted defense counsel to respond to Appellant's accusations. In so doing, counsel averred that the Office of the Public Defender had (i) sought Appellant's psychiatric records; (ii) retained a psychologist to whom it had sent Appellant medical records, and with whom Appellant had met; (iii) thoroughly investigated the merits of Appellant's alternative perpetrator

theory; and (iv) provided Appellant with all of the discovery materials, save for the Bank's surveillance footage. When the court offered Appellant an opportunity to reply, he claimed that a representative of the Social Security Administration ("SSA") had advised him that the SSA had not received a request for his psychiatric records. The court denied Appellant's request, ruling:

> Based upon your complaints regarding [defense counsel's] performance in this matter, Mr. Williams, and my understanding of the facts of the case and my recognition that [defense counsel] is an experienced attorney admitted to the practice of law before the Court of Appeals of Maryland, I do not find that your reasons for discharging [defense counsel] are meritorious.
>
> Now you have the opportunity to … keep [defense counsel] as your attorney. I believe this matter is scheduled for April the 16th. [I]f you wish to do that, that's fine. If you decide that you wish to discharge him, I will permit that, but trial will proceed as scheduled on April the 16th. Do you understand that?

The following colloquy ensued:

> DEFENDANT WILLIAMS: So, you are forcing me to go to trial without representation?
>
> THE COURT: I'm not forcing you to do anything. I'm forcing you to make a decision whether or not you wish to discharge [defense counsel] or you do not wish to discharge [defense counsel]. I do not find a meritorious reason for your request to discharge [defense counsel].
>
> DEFENDANT WILLIAMS: But if I'm saying that I'm having --
>
> THE COURT: Mr. Williams.
>
> DEFENDANT WILLIAMS: Yes, sir.
>
> THE COURT: My decision is that your reasons for discharging him do not have merit. Now you may discharge him. You will then be required to represent yourself. Is that what you wish to do?

DEFENDANT WILLIAMS: No, that's not what I wish to do. I wish for an attorney.

THE COURT: Well, you have [defense counsel], that's who's been assigned. This court does not have the power to reassign an attorney to you. So, your decision is whether or not you wish to discharge [defense counsel.]

DEFENDANT WILLIAMS: So, how do I work out the things that I have issues with?

THE COURT: You can always hire a lawyer of your own choosing but we're going to proceed with trial on April the 16th.

DEFENDANT WILLIAMS: I going [sic] to be in by myself.

THE COURT: You wish to represent yourself?

DEFENDANT WILLIAMS: No I don't but I think that's the Court's decision.

THE COURT: It's your decision, Mr. Williams.

DEFENDANT WILLIAMS: Well, the Court pretty much --

THE COURT: It is not my decision.

DEFENDANT WILLIAMS: You done [sic] made a decision already, Your Honor.

The court then apprised Appellant of the charges that had been filed against him, as well as the penalties for each. Thereafter, the State interjected:

Your Honor, it's incumbent upon the Court to notify the defendant that if he is convicted as a subsequent offender of the crimes of violence, uh, armed robbery, robbery, or kidnapping, uh, that if it is a second offense, [he] faces a mandatory minimum penalty of 10 years. Or if it is a third offense for a crime of violence, which we do believe this defendant is -- has been convicted two times previously and served the requisite period of time in prison, qualifies as a, uh, third time offender, that the mandatory minimum

> is 25 years without the possibility of parole. I would put that on the record, your Honor.

Addressing Appellant, the court asked, "Did you hear that, Mr. Williams?" Appellant answered, "Uh, yes."

After reiterating the terms of the State's plea offer, the court struck defense counsel's appearance. The court then advised Appellant as follows:

> Mr. Williams, you do have the right to be represented by a lawyer at every stage of these proceedings. A lawyer can render important assistance to you in determining whether there may be defenses to the charges or circumstances in mitigation of the charges. A lawyer can prepare for and represent you at trial. Even if you would intend to plead guilty, a lawyer may be of substantial assistance to you in obtaining [and] developing information which could affect the sentence or other disposition. And you may certainly hire an attorney of your choosing. You would have to do that promptly since this matter has been scheduled for trial on April the 16th. Since you have discharged the public defender from your representation in this matter, uh, the public defender, I do not believe, will appoint another attorney to represent you in this matter, having found there is no meritorious reasons for your discharge of [defense counsel].

Trial was set for April 16, 2015 before the Honorable Kenneth M. Long Jr. However, on that date, the trial court continued the case to allow Appellant to enter a written plea of not criminally responsible and obtain an evaluation from a mental health provider. The case was reset to June 29, 2015.

Appellant pled both not guilty and not criminally responsible. On June 29, 2015[1], he appeared, without counsel, for trial before the Circuit Court for Washington County,

[1] Trial was set for April 16, 2015 before the Honorable Kenneth M. Long Jr. However, on that date, the trial court continued the case to allow Appellant to enter a written plea of not criminally responsible and obtain an evaluation from a mental health provider. The case was reset to June 29, 2015.

Judge Daniel P. Dwyer presiding. Outside the presence of the jury, the State moved to bifurcate the guilt and criminal responsibility phases of trial. Over Appellant's objection, the court granted the State's motion. Appellant elected to be tried by a jury, after which the case proceeded to trial.

At trial, the State elicited testimony corroborating the facts provided above. After the close of the State's case-in-chief, Appellant elected to testify in his own defense. In so doing, he averred that, on the night the crimes at issue were committed, he had witnessed an individual matching the perpetrator's description as the culprit fled the crime scene. According to Appellant's testimony, that individual discarded a bag containing cash, which Appellant then retrieved and secreted in his pants. Thereafter, Appellant testified, he was "tackled" by police officers and summarily arrested. Apparently unpersuaded by Appellant's testimony, the jury convicted him of the crimes with which he had been charged (with the aforementioned exception of kidnapping).

After having been convicted, Appellant secured a public defender to represent him at his criminal responsibility hearing. There were several postponements and continuances between trial on June 29, 2015 and the criminal responsibility hearing on December 12, 2016 for several reasons. Primarily, delays occurred from attempts to obtain mental health evaluations of Appellant and to address scheduling conflicts between the parties and expert witnesses.

That hearing was held before Judge Dwyer on December 12, 2016.[2] After finding Appellant criminally responsible for the crimes of which he had been convicted, the court sentenced him to an aggregate 45 years' incarceration.

DISCUSSION

Appellant contends that the circuit court violated several of the requirements of Maryland Rule 4–215, thereby denying him the right to counsel.

Standard of Review

Whether a trial court has complied with Maryland Rule 4–215 is a question of law, which we review *de novo*. *State v. Weddington*, 457 Md. 589, 598–99 (2018); *Weathers v. State*, 231 Md. App. 112, 131 (2016). Strict compliance with the Rule is mandatory, and any departure therefrom constitutes reversible error. *Williams v. State*, 435 Md. 474, 485 (2013). *See also State v. Camper*, 415 Md. 44, 55 (2010) ("Rule [4–215] exists as a 'checklist' that a judge must complete before a defendant's waiver can be considered valid; as such, it mandates strict compliance." (Citation omitted)); *Parren v. State*, 309 Md. 260, 280 (1987) (The Maryland Rules are "not guides to the practice of law but precise rubrics established to promote the orderly and efficient administration of justice and are to be read and followed." (Internal quotation marks and citation omitted)); *Webb v. State*, 144 Md. App. 729, 741 (2002) ("Maryland appellate courts demand strict, not substantial,

[2] There were several postponements and continuances between trial on June 29, 2015 and the criminal responsibility hearing on December 12, 2016 for different reasons. Primarily, delays occurred from attempts to obtain mental health evaluations of Appellant and to address scheduling conflicts between the parties and expert witnesses.

compliance with [Rule 4–215] in order to find waiver." (Citation omitted)). Should a trial court fail to strictly comply with the requirements of Rule 4–215, we shall reverse without inquiring as to whether that error was harmless. *Lopez v. State*, 420 Md. 18, 31 (2011) ("When applicable, [the] provisions [of Rule 4–215] are mandatory, must be strictly complied with, and are not subject to a harmless error analysis.").

Maryland Rule 4–215

Maryland Rule 4–215 was promulgated as a prophylactic measure to safeguard the rights of criminal defendants to adequate representation of counsel, as guaranteed by the Sixth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights. *See Snead v. State*, 286 Md. 122, 130 (1979) (Maryland Rule 4–215 "implements the constitutional mandates for waiver of counsel."); *Johnson v. State*, 67 Md. App. 347, 361 (1986). That Rule governs the discharge of counsel, and provides, in pertinent part:

> **(a) First Appearance in Court Without Counsel.** At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, *the court shall*:
>
> * * *
>
> (2) Inform the defendant of the right to counsel and of the importance of assistance of counsel.
>
> (3) Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any.
>
> (4) Conduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel.

> (5) If trial is to be conducted on a subsequent date, advise the defendant that if the defendant appears for trial without counsel, the court could determine that the defendant waived counsel and proceed to trial with the defendant unrepresented by counsel.
>
> * * *
>
> **(b) Express Waiver of Counsel.** If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel.

(Emphasis added).

Subsequent Offender Sentencing Enhancements

Appellant contends that the court failed to apprise him of sentencing enhancements with which he, as a subsequent offender, was faced, thereby violating Rule 4–215(a)(3).[3] The State counters that although the court did not advise Appellant of those sentencing enhancements, he was so advised by the prosecutor. After the prosecutor had done so, the State maintains, the court adopted his recitation thereof, and, in so doing, complied with Rule 4–215(a)(3). To embrace Appellant's position, the State argues, would be to "elevate the form of the [R]ule over its substance."

[3] **(a) First Appearance in Court Without Counsel.** At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, the court shall:

* * *

(3) Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any.

In urging us to exalt substance over form, the State would have us affirm a finding of waiver absent the court's having strictly complied with the requirements of Rule 4–215. This we cannot do. As the Court of Appeals has repeatedly stressed, the plain language of Rule 4–215 demands strict—and not substantial—compliance, and expressly requires that "*the court shall*" advise a defendant of the penalties with which he or she is faced. *Richardson v. State*, 381 Md. 348, 368 (2004); *Moten v. State*, 339 Md. 407, 411 (1995). *See also Webb*, *supra* 144 Md. App. at 748–49 (Hollander, J. concurring) ("[E]ven if a prosecutor's accurate recitation of the charges and penalties satisfies the spirit of the [R]ule, it does not comport with the letter of the [R]ule. The particular text of Rule 4–215 does not authorize the trial court to delegate any portion of the advisement. When … principles of construction are coupled with the repeated pronouncements of the Court of Appeals, mandating strict compliance with Rule 4–215, I agree that a reversal is required."[4]

[4] In the *Webb* case, that we distinguish from the present case, we held that the circuit court had failed to strictly comply with Rule 4–215(a)(3). The court had expressly directed the prosecutor to advise the defendant of the charges against him and of the potential penalties corresponding thereto. After the prosecutor had done so, the court "summarily reiterated to [the defendant] 'you've just heard, you face serious charges. The maximum sentence for just one of the charges is up to 20 years in prison and a $25,000 fine.'" *Id*. at 742. In reversing the judgments of the trial court, we reasoned, "[t]he plain language of Rule 4–215(a) contemplates advisement 'by a judge' or 'the court.' The language of the [R]ule 'means what it says." *Id*. at 742–43 (quoting *Johnson*, 355 Md. at 464). We addressed the rationale for the Rule's strict requirement that *a court* bear the exclusive responsibility of apprising a defendant of the maximum sentence(s) with which he or she is faced. We explained:

> [T]he apparent rationale behind the requirement that the trial judge—not some other person or entity—perform the functions required by the Rule is that the judge is the impartial arbiter with ultimate authority over the

(Citations omitted)). Such a bright-line rule is necessary in order to prevent the gradual erosion of the fundamental right to counsel. *Johnson*, 355 Md. at 452 ("This Court has on several occasions resisted attempts to relax the strictures of Md. Rule 4–215. We believe that any erosion of the [R]ule's requirements would begin the dangerously slippery slope towards more exceptions.").

Although the court apprised Appellant of the charges against him and of the penalties corresponding thereto, it did not satisfy Rule 4–215(a)(3)'s requirement that it "[a]dvise the defendant of … the allowable penalties, *including mandatory penalties*, if any." (Emphasis added). The Court of Appeals addressed this issue in *Knox v. State*, 404 Md. 76 (2010). In that case, the Court expressly held that "'allowable penalties, including mandatory penalties, if any,' as stated in Rule 4–215, *includes notice of subsequent*

> courtroom. The law perceives that certain things should be done by a judge, *e.g.*, instructing the jury as to the law.

Id. at 746. By delegating responsibility to the State, the court failed to strictly comply with the requirements of Rule 4–215(a)(3). However, in the present case, Appellant does not argue that he was not advised of the subsequent offender penalties or that he received incorrect information. The judge in this case provided a lengthy recitation of the charges and penalties. Also, after the prosecutor stressed the sentence enhancement, the court affirmatively sought confirmation from Appellant that he understood the enhancement. The plain language of Rule 4–215 clearly evinces the intent of the Court of Appeals that *a court* advise a defendant of the allowable penalties that he or she faces. Had the Court deemed it permissible for the State to so apprise a defendant, it could have authorized it to do so. *Compare* Md. Rule 4–215(b) (prohibiting the court from accepting a defendant's waiver of counsel unless and until he or she has been examined "on the record … *by the court, the State's Attorney, or both*" (emphasis added)), *with* Md. Rule 4–215(a)(3) (requiring that "*the court* … [a]dvise the defendant of the nature of the charges … and the allowable penalties" (emphasis added)).

offender penalties." *Id*. at 88 (emphasis added). The Court reasoned that without having been informed of the subsequent offender penalties with which he or she is faced, "it could hardly be said that a defendant makes a knowing and voluntary decision to waive counsel with eyes open or with full knowledge of the ramifications of the choice." *Id.* (Citing *Broadwater v. State*, 401 Md. 175, 181 (2007)). Even if Appellant had been aware of the additional penalties with which he was faced, that would not alter our analysis. *See Camper*, 415 Md. at 57 (holding that the court was required to apprise the defendant of the enhanced penalties for subsequent offenses regardless of whether he had actual knowledge thereof).

Advisement as to the Importance of Assistance of Counsel

Appellant further contends that the court erred in striking defense counsel *prior* to apprising him of the importance of the assistance of counsel, and, in so doing, failed to strictly comply with the requirements of Maryland Rule 4–215(a)(2).[5] In his Motion to Accept Supplemental Authority, Appellant argues this constitutes plain error and warrants reversal of his convictions.[6]

[5] **(a) First Appearance in Court Without Counsel.** At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, the court shall:

* * *

(2) Inform the defendant of the right to counsel and of the importance of assistance of counsel.

[6] In Appellant's "Motion to Accept Supplemental Authority," filed December 7, 2020, he cites to *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), *cert. granted sub*

As discussed above, Rule 4–215(a) dictates a specific procedure which courts *must* follow, and any deviation therefrom *requires* reversal. "Before a court may find that a defendant has waived the right to counsel, [it] must be satisfied that the defendant is informed of the risks of self-representation[.]" *Knox*, 404 Md. at 87. Without a court's having so advised a defendant, he or she can hardly be deemed to have knowingly and intelligently waived his or her right to counsel.

nom. United States v. Gary, Michael A., No. 20-444, 2021 WL 77245 (U.S. Jan.8, 2021) urging this Court to find plain error as the basis for reversal of his convictions. We cannot consider this Motion. Appellant filed his Motion pursuant to Federal Rule of Appellate Procedure 28(j) which provides:

> **(j) Citation of Supplemental Authorities:** If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

This rule provides a mechanism for parties to supplement their arguments with new opinions after oral arguments. While Maryland does not have an identical counterpart to this rule, under Md. Rule 8-431 this Court may consider additional filings such as a Motion to Accept Supplemental Authority. However, the authority cited in Appellant's Motion fails to support any of the arguments presented in his brief or at oral arguments. To grant Appellant's Motion would allow consideration of a new argument outside the scope of the exact Federal Rule Appellant relies on. For this reason, we deny Appellant's Motion and decline consideration of the arguments presented within it. ("We do not countenance a litigants use of Rule 28(j) as a means to advance new arguments couched as supplemental authorities." *United States v. Ashford*, 718 F.3d 377, 381 (4th Cir. 2013)) ("Indeed, considering an argument advanced for the first time in a Rule 28(j) filing is not only unfair to the appellee, it also creates the risk of an improvident or ill-advised opinion being issued on an unbriefed issue." *United States v. Leeson,* 453 F.3d 631, 638 n. 4 (4th Cir. 2006)).

Here, the court struck defense counsel's appearance *prior to* apprising Appellant of either the benefits of legal representation or the perils of proceeding *pro se*. In so doing, the court failed to strictly comply with the requirements of Rule 4–215(a). Given that the court neither addressed the advantages of representation by counsel, nor explained the perils of self-representation, we cannot deem Appellant's waiver of the right to counsel to as having been knowingly and intelligently made.

The State claims that, though the court struck defense counsel's appearance prior to explaining the advantages of having an attorney, "there was no indication that the additional information changed Williams's mind." As discussed *supra*, *any departure* from the requirements of Rule 4–215(a) constitutes reversible error, *Williams*, 435 Md. at 485 (2013), regardless of whether that error was harmless. *Broadwater*, 401 Md. at 182 (holding that Rule 4–215 must be followed "irrespective of … the lack of an affirmative showing of prejudice to the accused."); *Lopez*, 420 Md. at 31. Even if we were to conclude, beyond a reasonable doubt, that the court's error did not affect Appellant's decision (we do not), reversal would be required.

Mental Health Inquiry

Appellant's third sub-contention is that the court violated Rule 4–215 by failing to inquire about a mental disorder with which he had been diagnosed and of which he had apprised the court. In the absence of such an inquiry, he argues, the court was incapable of

assessing whether his decision to discharge counsel was knowingly and intelligently made.[7]

Rule 4–215(b) requires that a trial court conduct an examination of a criminal defendant sufficient to determine that "'defendant is competent to waive the right to counsel, and that he [or she] knowingly and intelligently has done so[.]'" *Gregg v. State*, 377 Md. 515, 535 (2003) (citation omitted). Though such an examination is mandatory, "[t]he trial judge need not follow a 'specific ritual or fixed litany' in determining the voluntariness of the defendant's election to waive his jury right." *Martinez v. State*, 309 Md. 124, 134 n.11 (1987). *See also Abeokuto v. State*, 391 Md. 289, 320 (2006) ("[T]he trial court is not required to engage in a fixed litany or boilerplate colloquy with a defendant."). An examination of a defendant's competence is adequate where that examination is sufficient to ascertain whether a defendant possesses the ability to

[7] **(a) First Appearance in Court Without Counsel.** At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, *the court shall*:

* * *

(4) Conduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel.

* * *

(b) Express Waiver of Counsel. If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel.

"understand what is going on in the courtroom." *Muhammad v. State*, 177 Md. App. 188, 259 (2007). The determination of whether a defendant's waiver was knowing and intelligent, in turn, depends on whether, at the time of said waiver, that defendant understood the nature of the right at issue, the importance of that right, and the potential consequences of waiver. *See Fowlkes v. State*, 311 Md. 586, 609–10 (1988).

In support of his contention, Appellant relies on *Abeokuto v. State*. He cites that case in support of the proposition that "[a] defendant's waiver of his [or her] right to a jury trial [is] deficient when the trial court [is] aware of the accused's mental challenges, [but] [does] not inquire into [his or her] mental health statu[s] before accepting the waiver." Although *Abeokuto* is, indeed, instructive in this case, Appellant has misconstrued the Court of Appeals's holding.

The defendant in *Abeokuto* appeared before a court for a competency hearing during which his attorney elicited testimony from multiple medical experts pertaining to a psychiatric condition with which the defendant had been diagnosed and the medications he had been prescribed to treat that condition. Based upon that testimony, as well as "reports submitted regarding [the defendant's] medical diagnoses, screening, and medication prescribed," the court found the defendant competent to stand trial. *Id*. at 323. The court then initiated a jury trial waiver inquiry. During that inquiry, the court did not ask whether the defendant's psychiatric condition prevented him from knowingly and intelligently waiving his right to a jury trial.

The Court of Appeals held that such further inquiry by the court was unnecessary, reasoning that "[w]hile the trial court was aware that [the defendant] may have been taking a prescription medication and that [the defendant's] mental health had been an issue earlier in the proceedings, the court's failure to ask anew about these particular facts during the colloquy was not error at that point in the proceedings." *Id*. at 321. Rather, the Court held, the evidence adduced earlier in the proceedings—coupled with the court's opportunity to observe the defendant's demeanor and behavior—afforded the court an adequate basis from which to determine whether his psychiatric condition precluded him from knowingly and intelligently waiving his right to a jury trial.

As in *Abeokuto*, in this case, the court was apprised of Appellant's psychiatric diagnosis prior to its ruling on the defendant's waiver request. During the hearing on his request, Appellant informed the court that: (i) the SSA had diagnosed him with schizoaffective disorder; (ii) he had sought treatment for his condition; and (iii) among the bases for Appellant's request to discharge his attorney was his belief that defense counsel had inadequately investigated the history of his diagnosis. Finally, in addition the trial court's having the opportunity to observe Appellant's behavior and demeanor, Appellant addressed the court at length, explaining the various reasons for his request to discharge counsel. In so doing, Appellant afforded the court ample opportunity to assess his understanding of the proceedings against him, as well as the nature and importance of the right he chose to waive. No further inquiry by the court was necessary in order for it to

determine that Appellant's waiver of his right to counsel was made competently, knowingly, and intelligently.

The Decision to Waive Counsel

Finally, Appellant contends that the court violated Rule 4–215(b) by striking the appearance of defense counsel without Appellant's having first affirmatively agreed to proceed *pro se* or his having knowingly, intelligently, and voluntarily waived his right to counsel.[8]

While the Sixth Amendment to the United States Constitution, Article 21 of the Maryland Declaration of Rights, and Rule 4–215 guarantee a criminal defendant the right to counsel, that guarantee "does not translate into an absolute right to counsel of the defendant's choosing." *Moore v. State*, 390 Md. 343, 377 (2005). *See also Fowlkes*, 311 Md. at 605 ("[F]or indigent defendants ... the right to counsel is but a right to effective legal representation; it is not a right to representation by any particular attorney." (Citations omitted)). Where, as here, a defendant is unable to proffer meritorious reasons for his or her request to discharge counsel, the trial court "may … require [that] defendant to choose between proceeding with current counsel and proceeding *pro se*." *Id*. at 606.

As the colloquy recounted *supra* clearly reflects, in this case, the court made indelibly clear that, having found Appellant's reasons for requesting counsel's discharge

[8] **(b) Express Waiver of Counsel.** If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel.

unmeritorious, it was Appellant's decision whether to: (i) retain his public defender; (ii) procure private representation; or (iii) proceed *pro se*. In finding that Appellant's reasons for requesting counsel's discharge were without merit, the court merely foreclosed a fourth possibility, to wit, his being provided substitute representation. Even if Appellant did not explicitly agree to go to trial without counsel, he did so by implication when he declined to retain the assistant public defender who had been assigned to his case. *See id*. ("[W]e do not believe that the constitutional right to counsel precludes [a] degree of flexibility when the defendant, in an apparent effort to delay the trial, makes an unjustified demand for the discharge of his lawyer without electing self-representation, and when the defendant is fully advised in accordance with Rule 4–215 and the constitutional standards for waiver."). Having rejected that option, Appellant was left with two possibilities: to obtain private counsel or to represent himself. Either unwilling or unable to do the former, he chose the latter.

Isolation of Error

The State asserts that if we hold that the trial court's failure to act in strict compliance with Md. Rule 4–215 constitutes reversible error, that such reversal only applies to the bifurcated trial held on Appellant's guilt/innocence where such error occurred and not to the criminal responsibility proceeding where Appellant was represented by counsel. A defendant who pleads not guilty and not criminally responsible may move for a bifurcated trial to determine the issue of guilt separate from that of criminal responsibility. Md. Rule 4–314(a)(1). "For purposes of this [r]ule, a bifurcated trial is a

single continuous trial in two stages," Md. Rule 4–314(b)(1), where only after the issue of guilt is tried and a verdict of guilty is returned on any charge by a jury shall the issue of criminal responsibility be tried. Md. Rule 4–314(b)(2). We agree that the trial court's error did not prejudice the outcome of the bifurcated criminal responsibility trial and, as such, we shall not disturb the trial court's decision regarding that matter.

Conclusion

In this case, the court failed to strictly comply with two of the mandates of Rule 4–215: (i) the requirement that *the court* advise Appellant of the permissible penalties with which he was faced—inclusive of mandatory sentencing enhancements—and (ii) the requirement that it advise him of the benefits of the assistance of counsel prior to striking the appearance of defense counsel. Given that any departure from the requirements of that Rule constitutes reversible error, we shall reverse Appellant's convictions. *Williams*, 435 Md. at 485.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY REVERSED; CASE REMANDED FOR FUTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WASHINGTON COUNTY.

Circuit Court for Washington County
Case No. 21-K-14-050701

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2792

September Term, 2018

ANDRE WALTER WILLIAMS

v.

STATE OF MARYLAND

Reed,
Berger,
Raker, Irma, S.,
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Raker, J., with whom
Berger, J., joins as to Part II.

Filed: January 25, 2021

Raker, J., with whom Berger, J., joins as to Part II, dissenting:

> Appellant presents three questions for our review:
>
> "1. Did the lower court fail to properly comply with Md. Rule 4-215 [discharge of counsel] thereby committing reversible error in denying Appellant his right to counsel at trial?
>
> 2. Should Appellant's sentence for false imprisonment have merged into his conviction for robbery with a dangerous or deadly weapon?
>
> 3. Did the lower court abuse its discretion when it denied Appellant's request for a continuance of the hearing on his criminal responsibility?"

The majority reverses, holding that the trial court failed to comply with Rule 4-215. I most respectfully dissent. I would affirm the judgment of convictions, holding that the trial court did not err or abuse its discretion as to each of the issues appellant raises in this appeal. First, I would hold that appellant was not denied his right to counsel and that the trial court complied with the strictures of Rule 4-215. Second, I would hold that the trial court did not err in declining to merge the armed robbery conviction with false imprisonment. Third, I would hold that the trial court did not abuse its discretion in denying appellant's postponement request of the hearing on his criminal responsibility. Finally, in Part II of this dissent, I would most respectfully suggest that the Court of Appeals take a fresh look at the interpretation of Rule 4-215, in light of the treatment by our sister jurisdictions and the dissent of Judge Lawrence Rodowsky in *Parren v. State*, 309 Md. 260 (1987).

I.

A. Discharge of Counsel

Appellant was represented initially by assigned counsel in the Office of the Public Defender. On April 6, 2015, ten days before the scheduled trial, at a pre-trial hearing, appellant told the court he no longer wanted the public defender to represent him. The court engaged in a lengthy discussion about why appellant wanted to discharge counsel, and then the court conducted a Rule 4-215(e) hearing.

Appellant contended that the circuit court violated the requirements of Rule 4–215 in three ways, thereby denying him the right to counsel: (1) that the judge failed to inform appellant of the allowable penalties as a subsequent offender; (2) that in determining that appellant's waiver of his right to counsel was knowing and voluntary, the judge was bound to make a determination that appellant's decision was unaffected by his mental health challenges; and (3) that the judge never determined and announced that appellant had waived his right to counsel and that the colloquy between the court and appellant reveals that appellant always wanted to be represented by counsel.

Whether a trial court complied with Rule 4–215 is a question of law, which we review *de novo*. *State v. Weddington*, 457 Md. 589, 598–99 (2018); *Weathers v. State*, 231 Md. App. 112, 131 (2016). I agree that Maryland jurisprudence requires strict compliance with Rule 4-215, and departure ordinarily constitutes reversible error. *Williams v. State*, 435 Md. 474, 485 (2013); *Moten v. State*, 339 Md. 407, 411 (1995); *Parren*, 309 Md. at 280 (1987) (stating that the Maryland Rules are "not guides to the

practice of law but precise rubrics established to promote the orderly and efficient administration of justice and are to be read and followed" (internal marks and citation omitted)); *Webb v. State*, 144 Md. App. 729, 741 (2002) (noting that strict compliance, not substantial compliance, is required to find waiver). Harmless error analysis is inapplicable and cannot satisfy Rule 4–215. *Lopez v. State*, 420 Md. 18, 31 (2011) (noting that when applicable, the provisions of Rule 4–215 are not subject to a harmless error analysis).

I would hold that the trial court complied with the requirements of Rule 4-215. This particular fact pattern arising under Rule 4-215 appears to be one of first impression. To be sure, the Rule requires that the *court* advise the defendant of the nature of the charges and the applicable penalties. Although here the prosecutor, after the court advised appellant of the apparent applicable penalties, stated on the record in open court the penalties applicable to a second and third offender, the court inquired explicitly of appellant whether he heard those (correctly stated) penalties. Appellant responded "yes." A common sense interpretation leads to the conclusion that the judge, who had advised appellant painstakingly of the penalties moments earlier, adopted the penalties recitation by the prosecutor and he carefully ensured that appellant heard those penalties.[9] In my

[9] It is likely that the court did not advise appellant initially of the subsequent offender penalties because the State had not yet given notice to appellant of its intention to seek subsequent offender status and penalties. At the end of the day, the court did not impose enhanced penalties based on subsequent offender status.

view, and that of the State, the *court* did advise appellant of the penalties as required by the Rule.[10]

The majority further holds that the court erred because the court did not explain the importance of counsel to appellant until *after* the court had stricken his attorney's appearance, in violation of the requirements of Rule 4–215(a)(2). Immediately following the court's grant of appellant's request to discharge his attorney, the court explained to appellant in a lengthy discussion about the benefits of counsel. Rather than change his mind, appellant inquired as to the process of self-representation. I would hold that this minor deviation, in context of the lengthy court colloquy with appellant, did not constitute error. Appellant adamantly wanted to discharge counsel because he no longer trusted him and no longer had faith in him. The trial court found no meritorious reason to discharge counsel, but permitted appellant to do so. Appellant heard (and knew) the benefits of counsel. I would find no error.

[10] Appellant relies upon *Webb v. State*, 144 Md. App. 729 (2002), and *State v. Camper*, 415 Md. 44 (2010), to support his argument that the trial court erred and reversal is required. He concludes that those two cases, along with others, stand for the proposition that an advisement by the prosecutor is insufficient to satisfy the mandatory requirement by the Rule that the advisement come from the court. Those cases are distinguishable. In *Webb*, the prosecutor *alone* advised the defendant of the charges and the maximum penalties. *Id.* at 734. The trial judge merely told the defendant that "as you've just heard, you face serious charges. The maximum sentence for just one charge is up to 20 years in prison and a $25,000 fine." *Id.* In the case at bar, the court gave a lengthy explanation to appellant as to the charges and penalties, and had appellant affirm that he had heard the subsequent offender penalties. *Camper* is distinguishable as well. In that case, there was no indication on the record that anyone had advised the defendant of the mandatory sentencing requirements.

As the colloquy clearly reflects, the court made indelibly clear that, having found appellant's reasons for requesting counsel's discharge non-meritorious, it was appellant's decision whether to: (i) retain his public defender; (ii) procure private representation; or (iii) proceed *pro se*. In finding that appellant's reasons for requesting counsel's discharge were without merit, the court merely foreclosed a fourth possibility, to wit, the court appointing new counsel. Even if appellant did not agree explicitly to go to trial without counsel, he did so when he declined to keep the assistant public defender who had been assigned to his case. Having rejected that option, appellant was left with two choices: to obtain private counsel or to represent himself. Either unwilling or unable to do the former, he was left with the latter option, to proceed *pro se*.

Although the Sixth Amendment to the United States Constitution, Article 21 of the Maryland Declaration of Rights, and Rule 4–215 guarantee a criminal defendant the right to counsel, that guarantee "does not translate into an absolute right to counsel of the defendant's choosing." *Moore v. State*, 390 Md. 343, 377 (2005); *Fowlkes v. State*, 311 Md. 586, 605 (1988) (noting that the right to counsel is for effective legal representation, not a right to representation by any particular attorney). Where, as here, the court finds the reasons for discharge of the public defender non-meritorious, the trial court may require that the defendant choose between current counsel and proceeding *pro se*. *Id*. at 606.

B. Denial of Postponement Request

Appellant contends that the court violated Rule 4–215 by failing to inquire about appellant's diagnosed mental disorder. In the absence of such an inquiry, he argues, the

court was incapable of assessing whether his decision to discharge counsel was knowingly and intelligently made.

The majority holds that the court had ample opportunity to assess appellant's understanding of the proceedings against him, as well as the nature and importance of the right to choose to waive counsel, and that no further inquiry was necessary. I agree with that holding. *See* Maj. Op. at ____ .

C. Merger of Convictions for Sentencing Purposes

Appellant argues that his convictions for false imprisonment and robbery should merge. I would hold that the convictions do not merge, and that the trial court did not err.

The doctrine of merger of offenses for sentencing purposes is premised in part on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *Abeokuto v. State*, 391 Md. 289, 352–53 (2006). The traditional test to determine whether the doctrine applies in a particular case is the "required evidence test," also known as the *Blockburger* test.[11] Appellant's argument here is that merger is required where a defendant is convicted of multiple offenses based on the same act or acts or the same conduct and, as reflected here, the false imprisonment should merge into the robbery "when the false imprisonment lasts no longer than necessary to effect the robbery." Appellant Br. at 18.

[11] The test for merger of convictions in Maryland is the *Blockburger* test, stated as follows: "If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited." *Twigg v. State*, 447 Md. 1, 13 (2016).

Appellant was convicted of false imprisonment[12] and robbery with a dangerous weapon.[13] In the instant case, the circuit court declined to merge the sentences for appellant's convictions of false imprisonment and robbery. Appellant argues that these convictions should have been merged for purposes of sentencing because the false imprisonment lasted no longer than was necessary to effectuate the robbery. He argues that Ms. Iman was detained only as long as the robbery lasted, that she was not tied up or restrained and she was free to leave when the robbery was over, *i.e*, when appellant left the bank. Whether merger is required depends upon the facts and circumstances of the case.

I would hold that the trial court did not err in declining to merge robbery and false imprisonment for sentencing purposes. The facts indicate that appellant confined or detained Ms. Iman longer than was necessary to effectuate the robbery, that is, longer than to simply take the money from her by force. After he took money from the bank, appellant attempted to leave the bank, but he returned after he heard the sound of the police dogs.

[12] False imprisonment is a common law offense and is defined as the unlawful detention of another person against her will. *Marquardt v. State*, 164 Md. App. 95, 129 (2005). To prove the offense of false imprisonment, the State must prove: (1) that appellant confined or detained Ms. Iman; (2) that Ms. Iman was confined or detained against her will; and (3) that the confinement or detention was accomplished by force, threat of force, or deception.

[13] The offense of robbery with a dangerous weapon, proscribed by Crim. Law § 3-403(a)(1), is not a separate substantive offense, but if the State proves that a defendant used a deadly weapon during the commission of a robbery then the defendant is subject to harsher penalties. *Conyers v. State*, 345 Md. 525, 558 (1997). Robbery is defined as "the felonious taking and carrying away of the personal property of another from his [or her] person by the use of violence of by putting in fear." *Metheny v. State*, 359 Md. 576, 605 (2000). To prove the offense of robbery, the State must prove: (1) that appellant took the property from the victim or the victim's presence and control; (2) that appellant took the property by force or threat of force; and (3) that appellant intended to deprive the victim of the property.

He ordered Ms. Iman to stay where she was, on the ground, while he disappeared into the bank. She was not free to leave and appellant prolonged her detention beyond that necessary to rob her.

D. Denial of Request to Continue Criminal Responsibility Hearing

Finally, appellant argues that the circuit court abused its discretion in denying his request, on December 12, 2016, to continue his criminal responsibility proceeding to enable his counsel and Dr. Neil Blumberg, a psychiatrist engaged by defense counsel, to review 1500 pages from Eastern Regional where his client had been incarcerated previously. In denying the continuance request, the court noted several important points: that a continuance had been granted previously to allow Dr. Blumberg to perform an evaluation; that the court-appointed psychologist told defense counsel that the additional records would not change her opinion or have bearing on her opinion; that a year and a half had passed between appellant's trial and the responsibility proceeding, and in that time appellant had not secured an opinion favorable to his position.

I would hold that the trial court did not abuse its discretion in denying appellant's motion to continue. Appellant had more than a reasonable amount of time to secure the documents he now wished to have his expert review. Dr. Blumberg, according to defense counsel, had reviewed materials, and concluded that there was no basis for an opinion that appellant was not criminally responsible. The State's mental health expert held the opinion that appellant "was not 'not criminally responsible.'" The State represented that the materials from Eastern Regional had no bearing on the issue of appellant's criminal

responsibility. And, significantly, the responsibility proceeding had been continued many times before.

II.

Strict Compliance vs. Substantial Compliance

Were this panel writing on a clean slate, I think it would have no difficulty affirming the trial court under the circumstances of this case and finding substantial compliance with Rule 4-215. Appellant was advised of his right to discharge counsel and the potential for enhanced penalties, albeit by the prosecutor. When asked by the Court, he affirmatively stated on the record that he understood his right to discharge his counsel, and understood he could be subject to enhanced penalties. Any misstep by the judge was cured by the court's follow-up questions. Since *Parren* v. *State*, 309 Md. 260 (1987), Maryland has required strict compliance with Rule 4-215, for the purpose of protecting the fundamental right to the assistance of counsel. Maryland has not joined the majority of our sister states that have adopted a substantial compliance standard.

I most respectfully suggest that, if the occasion arises, and the suggestion resonates, the Court of Appeals revisit the strict compliance requirement, the basis therefor, and at least consider adopting, as have the majority if not all of our sister states, a standard of "substantial compliance." *See Parren,* 309 Md. 260, 283–301 (Rodowsky, J., dissenting).

The purpose of Rule 4-215 is to ensure that a defendant's waiver of counsel is knowingly and voluntarily made. *See id.,* 309 Md. 260, 281–82 (noting that "[i]t is perfectly clear that the purpose of Rule 4-215 is to protect that most important fundamental

right to the effective assistance of counsel, which is basic to our adversary system of criminal justice, and which is guaranteed by the federal and Maryland constitutions to every defendant in all criminal prosecutions"). The test is whether the defendant has been made aware of the dangers and disadvantages of self-representation and whether the record establishes that he or she "knows what he [or she] is doing and his [or her] choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). *See also Parren*, 309 Md. at 283 (Rodowsky, J., dissenting).

The Rule is designed also to protect a defendant's right to self-representation. *See Faretta v. California*, 422 U.S. 806, 835 (1975). In 1987, Judge Charles Orth, writing for the Court of Appeals, announced that the right to counsel was so fundamental a right that *strict compliance*, and not substantial compliance, with Rule 4-215 is required. *Parren*, 309 Md. at 280. The Court did not distinguish why this particular fundamental right is different from the myriad of other fundamental rights that are subject to substantial compliance and harmless error or lack of prejudice analysis. Many other fundamental rights in Maryland are subject to harmless error analysis and substantial compliance. In requiring strict compliance, the Court explained as follows:

> "In the light of all of this we would be reluctant indeed to conclude that noncompliance with such an essential part of our Waiver Rule be determined on an ad hoc basis. We think that to do so would erode Rule 4-215 and seriously encroach upon its purpose to protect the constitutional right to counsel. We believe that such a holding would enhance complexity rather than secure simplicity in procedure, tend to unfairness rather than fairness in administration, and, in the long run, promote rather than eliminate unjustifiable expense and delay."

Id. at 282. Notwithstanding this broad statement, courts and judges competently consider the totality of the circumstances and the facts of each particular case in making decisions on fundamental rights. Reversals on very minor variations from the strictures of the rules, especially where it is apparent that the omission has absolutely no bearing on a defendant's understanding of a waiver of rights, promote unfairness, unjustifiable expense and delay in requiring new trials.[14]

It appears that most, if not all, of our sister states, like the federal courts, apply a substantial compliance standard in implementing the rule protecting right to counsel and in evaluating whether a defendant has knowingly and intelligently waived the right. *See* John S. Herbrand, Annotation, *Accused's Right to Represent Himself in State Criminal Proceedings*, 98 A.L.R.3d 13 (1980). Those courts seem to have no difficulty protecting the important right to counsel. *See, e.g.*, *United States v. Evans*, 559 F. App'x 475 (6th Cir. 2014); *People v. Haynes*, 673 N.E.2d 318, 355 (Ill. 1996); *State v. Martin*, 816 N.E.2d 287 (Oh. 2004); *In re Martinez*, 345 P.2d 449, 452 (Cal. 1959) (Traynor, J.); *In re Fresquez*, 432 P.2d 959 (Cal. 1967); *State v. Domian*, 668 A.2d 1333 (Conn. 1996); *People v. Russell*, 684 N.W.2d 745 (Mich. 2004); *State v. Finney*, 834 N.W.2d 46, 60 (Ia. 2013). I am unable to find another jurisdiction applying our standard to protect this federal constitutional right.

[14] This case is just one of a string of cases reversing trial courts based upon failure to strictly satisfy Rule 4-215. As an example, recently, in an unreported opinion, *Latimer v. State*, 2020 Md. App. LEXIS 783 (2020), this Court reversed because the trial court misstated the maximum amount of a permissible fine, where the trial court didn't even impose a fine.

The Supreme Court of Michigan, in *People v. Russell*, 684 N.W.2d 745, 751 (2004) (quoting *People v. Adkins*, 551 N.W.2d 108, 118), explained well the application of the substantial compliance requirement:

> "The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach. Further, we believe this standard protects the 'vital constitutional rights involved while avoiding the unjustified manipulation which can otherwise throw a real but unnecessary burden on the criminal justice system.'"

There is no question that the requirements of Rule 4-215 are mandatory. There is no question that the right to counsel and the twin right to self-representation are fundamental. And there is no question that a defendant's waiver of those rights needs to be knowingly and intelligently made. If the experience of our sister states shows that those fundamental rights may be protected well by looking to the facts of the case and determining whether the waiver was knowing and intelligent, then strict compliance serves no purpose.

Circuit Court for Washington County
Case No. 21-K-14-050701

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2792

September Term, 2018

ANDRE WALTER WILLIAMS

v.

STATE OF MARYLAND

Reed,
Berger,
Raker, Irma, S.,
(Senior Judge, Specially Assigned),

JJ.

Concurring Opinion by Berger, J.

Filed: January 25, 2021

I join the opinion of the majority for the reasons stated in the majority opinion in this case. I write separately to express my agreement with the views expressed in Part II of the dissenting opinion authored by Judge Raker.