Circuit Court for Baltimore City
Case No. 117248025

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2884

September Term, 2018

BRANDON BOOTH

v.

STATE OF MARYLAND

Berger,
Gould,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 5, 2020

Appellant, Brandon Booth, presents us with a facially curious question, asking whether "the trial court err[ed] in trying and convicting [him] on charges that did not exist[.]" We shall explain and affirm his convictions of first-degree murder and related firearms offenses.

PROCEDURAL BACKGROUND

Booth raises neither evidentiary nor sufficiency questions, so we need only report that he was charged with first-degree murder and related firearms violations arising from a fatal shooting in Baltimore City on July 12, 2017. *Washington v. State*, 180 Md. App. 458, 461 n. 2 (2008) (reiterating that, absent an evidentiary challenge, it is unnecessary to recite the trial evidence to address the issues raised on appeal); *Whitney v. State*, 158 Md. App. 519, 524 (2004). After at least one postponement, the case was set for trial on August 16, 2018, before Hon. Althea Handy.[1]

At that time, the State moved, over Booth's objection, for a postponement because its prime witness, a juvenile, had absconded from court-ordered Department of Juvenile Services' supervision and had not been served with a witness subpoena.[2] The court,

[1] The record suggests that there had been two previous postponements, both charged, at least in part, to the defense.

[2] At an earlier postponement hearing that morning, the parties reiterated a previously denied advance joint request for postponement to allow defense counsel time to obtain copies of the witness' juvenile criminal record. At that point it was unknown by the State that the witness had absconded. Judge Peters denied the joint postponement request but, during a brief recess, arranged for a judge in the Juvenile Justice Center to grant defense counsel's request to view the juvenile's record, while holding the case over until the afternoon docket with Judge Handy to resolve any additional pretrial matters once the records had been reviewed. Also, during that recess, the State was informed that the juvenile witness had potentially absconded, but the police were actively searching for him.

frustrated that the State had not served the juvenile in over a year, even while he was in the custody of the Department of Juvenile Services, effectively denied the State's request and set the matter for trial on the following day to allow the State an opportunity to locate the juvenile overnight.

On the following day, after a discussion about Booth's tardiness (because his civilian clothing was late in arriving), the court observed that the State's missing witness was still not present, which the prosecutor acknowledged.

> THE COURT: Well, that's unfortunate. What are you going to do?
>
> [PROSECUTOR]: Your Honor, the State will be entering a nol pros for that reason. We don't have -- it's a juvenile. And we have not served him. He was in custody the last time and --
>
> THE COURT: Why wouldn't you take the precaution of serving a witness? …
>
> * * *
>
> [PROSECUTOR]: Your Honor, we -- we had the subpoenas, however, he was not served.
>
> THE COURT: That was not my question. My Question was, why wouldn't you have served him?
>
> [PROSECUTOR]: That was ideal, that we wanted to get him served, yes.
>
> THE COURT: I mean, how long have you been missing your witness?
>
> [PROSECUTOR]: Your Honor, he was under juvenile custody. And then --
>
> THE COURT: And so he would have been easy to serve.
>
> [PROSECUTOR]: Yes, your Honor.

The State informed the court and defense counsel of that situation, and intimated a potential request for postponement might be necessary if the witness could not be located by the afternoon docket.

> THE COURT: Well, I think this is a disservice to the citizens of Baltimore that this case -- how many times has it been postponed?
>
> * * *
>
> THE COURT: All right. So, you were not going to ask Judge Peters[3] for a postponement?
>
> [PROSECUTOR]: We -- we did ask for a postponement, and we -- we -- we reiterated --
>
> THE COURT: What did you do to find your witness last night?
>
> [PROSECUTOR]: Your Honor, that's why Detective Voderick is here. And he canvassed the area. He went to all of the locations that the witness's GPS indicated that the witness goes to.
>
> He spoke to the mother, the father, and the grandmother. Am I correct?
>
> [DETECTIVE VODERICK]: Yes, your Honor.
>
> [PROSECUTOR]: And this was an all night effort. We -- but to be clear, we would first ask for a postponement to have time to still serve this juvenile.

At that point, defense counsel objected to the State's request for a further postponement. Without responding to the State's request, Judge Handy placed a telephone call to Judge Peters. After speaking with Judge Peters, Judge Handy returned to the record to engage both parties in a discussion about why the case had twice been postponed, resulting in the decision to send the case back to Judge Peters for consideration of a recommended third postponement:

[3] Referring to Hon. Charles Peters who, at that time, was the designee of the Administrative Judge of the Circuit Court for Baltimore City, among whose responsibility was to consider requests for postponement of criminal cases. In the lexicon of that court, the designated judge presides in "reception court." *See* Md. Rule 4-271(a).

> THE COURT: (apparently addressing defense counsel) … So [the State is] ready for trial twice when you requested a postponement. So, I think it only fair that they get a postponement today. So, go back [to] Judge Peters and get a new trial date.
>
> * * *
>
> [DEFENSE COUNSEL]: Your Honor, so the record is clear, are you saying that the case is postponed or are you --
>
> THE COURT: I'm sending it to Judge Peters, and Judge -- and I'm recommending a postponement, but it's ultimately up to Judge Peters.

Counsel were excused to appear before Judge Peters who, after hearing counsel, ruled:

> THE COURT: All right. For the record, I have spoken briefly with Judge Handy. And she did recounted [sic], at least, summarized to me what was proffered by the State. And she was recommending, although I'm the one, obviously, that has to make the decision, was recommending that the matter could be postponed.

Judge Peters granted the State's request for postponement, over defense counsel's objection. The transcript of the brief proceedings before Judge Peters is devoid of any mention of, or reference to, *nol pros*.

Subsequently, Booth filed a motion to dismiss, asserting that the State had entered a *nol pros* to the charges in the hearing before Judge Handy. The motion was argued, with other pre-trial motions, before Hon. Christopher Panos, on the day of trial. Booth took the position that the State had, during the August 17 hearing before Judge Handy, entered an unequivocal *nol pros* of the charges. The State's response to the motion was that "there[ ] needs to be … [an] unambiguous *nol pro*, … [a]nd that it needs to be clear by all accounts…. And in the case in front of Judge Handy it's clearly not clear…."

In his consideration of the motion and arguments of counsel, Judge Panos also twice listened to the audio/video recording of the proceedings before Judge Handy, as well as the recordings of two prior and unrelated criminal proceedings that were *nol prossed* by the same prosecutor, for examples of the language used. In ruling on the motion, Judge Panos carefully and extensively reviewed the proceedings before Judge Handy and the language used in the prosecutor's other cases, and concluded:

> It is against this Court's findings as just articulated on the record, that the totality of … circumstances indicates, at least to [this] Court, that the case was not nol prossed. That the case was then subsequently reset for trial ….[4]

DISCUSSION

Standard of Review

We review Booth's claims under a clearly erroneous standard because Judge Panos' finding was one of fact, that is, did the State, in the hearing before Judge Handy, unequivocally enter a *nol pros* to the charges?[5] *See* Rule 8-131(c). A finding of fact will not be disturbed on appeal unless clearly erroneous. *Himelstein v. Arrow Cab*, 113 Md.

[4] Trial proceeded, resulting in Booth's convictions on all counts, with the two handgun charges merging for sentencing purposes. He was sentenced to a term of life in prison on the first-degree murder count and a concurrent ten-year term on the felony firearm count, the first five years of which were to be served without parole eligibility. His counsel continued to press his *nol pros* argument, both at a hearing on his motion to dismiss and in his motion for new trial.

[5] Contrary to the requirements of Rule 8-504(a)(5), it appears that only the State has provided us with a suggestion that the appropriate review is under the clearly erroneous standard. Because we view Judge Panos' decision as one of fact resulting in a legal conclusion, we have adopted the clearly erroneous standard for our review. In any event, were the standard otherwise, we would not find that Judge Panos abused his discretion in concluding that a *nol pros* had not been entered.

App. 530, 536 (1997) (citing *Dorf v. Skolnik*, 280 Md. 101, 117–18 (1977)). It has been said that the appellate court will uphold the trial court's ruling unless the Court is left with the firm conviction that an error has been committed. *See MAS Associates, LLC v. Korotki*, 465 Md. 457, 474 (2019) (quoting *Clearly-Erroneous Standard*, Black's Law Dictionary (11th ed. 2019)); *Kusi v. State*, 438 Md. 362, 383 (2014) (quoting *Goodwin v. Lumbermens Mut. Cas. Co.*, 199 Md. 121, 130 (1952)); *Miller v. Rosewick Rd. Dev., LLC*, 214 Md. App. 275, 308–09 (2013) (observing that "'[a] finding is 'clearly erroneous' when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948))).

As we have stated, Judge Panos reviewed the video recording of the proceedings before Judge Handy, the only evidence available on the subject, before ruling. Because we are not left with a firm conviction that error has occurred, we cannot say that his ruling that a *nol pros* had not been entered is clearly erroneous.

On appeal, Booth cites us to unquestionable authority supporting the State's right to enter a *nol pros* of criminal charges, and of the finality of such action.[6] That argument, of course, is valid if a *nol pros* has been entered. The question before us, however, is not the effect of a *nol pros*; rather, the question is whether, on this record, a *nol pros* was entered.

[6] Booth refers us to *Ward v. State*, 290 Md. 76, 82–84 (1981), wherein Judge Eldridge wrote of the history and development of the concept of *nolle prosequi*, the prosecutor's right to utilize the procedure, and the sanctity of it once entered on the record.

Booth argues principally that *Williams v. State*, 140 Md. App. 463 (2001), "controls" our review. In *Williams*, the prosecutor advised the court, on the day of trial, that because the State's expert witness was unavailable, "the State would not request a postponement, but *nol pros* Count 1[.]" 140 Md. App. at 471. The court then engaged the State in a discussion of alternatives to a *nol pros* and, prompted by a comment from defense counsel that the State had just entered a *nol pros*, the court inquired whether the prosecutor had intended to finally *nol pros* the count or whether it was conditional. *Id*. at 471–73. To that question, the prosecutor said, "I withdraw it." *Id*. at 473. The trial court ruled that the entry of the *nol pros* was conditional and subject to withdrawal. *Id*.

In reversing, we said:

> The trial judge "authorized" or "suggested" withdrawal of the nolle prosequi on the theory that it was conditional. He was wrong. There was nothing conditional about the nolle prosequi; that the prosecuting attorney might not have nol prossed Count 1 if she had thought of presenting the witness' testimony by deposition did not make the nolle prosequi conditional. It was final, absolute, complete; there were no conditions attached. The court erred in subjecting appellant to trial and conviction on a charge that no longer existed.

140 Md. App. at 474.

The State responds to Booth's reliance on *Williams* by offering a comparison of the words used by the respective prosecutor. Referring to the *Williams* prosecutor's statement that she had a "preliminary" matter, the State posits, that "signaled that the State was undertaking the formal step of nol prossing a charging document." The State contrasts that statement with the response by the prosecutor in the instant case to Judge Handy's question—"What are you going to do?" To that question, the prosecutor said, "the State

will be entering a nol pros …." (Emphasis in the State's brief). As to that, the State now argues that the prosecutor indicated only an intent to do a future act which was not carried to fruition.

We find *Williams* distinguishable. In *Williams*, after the prosecutor suggested a *nol pros* there was continuing discussion about *nol pros* by counsel and the court. 140 Md. App. at 471–73. Indeed, defense counsel brought the issue to light, thereby compelling the court to raise the question. *Id*. at 473. Ultimately, the prosecutor said "I withdraw it[,]" indicating a belief that a *nol pros* had, in fact, been entered on the record. *Id*. In the instant case, in contrast, there was no further discussion of *nol pros* before Judge Handy—the court and counsel moved immediately to a discussion of postponement and *nol pros* was not again mentioned. There is no indication that any of the participants believed that the State, at that point, had entered a *nol pros*. Judge Handy did not, as did the court in *Williams*, engage counsel in any discussion of the effect of a *nol pros*, or of alternatives beneficial to the State. Rather, she recommended a postponement. Significantly, neither the docket entries nor the courtroom clerk's notes contain any reference to the entry of a *nol pros*.

At the sentencing hearing, in his "preliminary remarks," Judge Panos provided, what he characterized as a "brief procedural backdrop," explaining Booth's two arguments from his motion for new trial[7]—the issue of the prior *nol pros* and an implicit bias in the court's handling of defense counsel's objection—and further outlining the procedural

[7] Throughout Judge Panos' preliminary remarks, he refers to Booth's September 28 "Motion for New Trial" interchangeably with a "Motion to Dismiss."

sequence of events pertaining to both issues. Judge Panos explained the reason for his preliminary remarks was that, while the Rules permit the grant or denial of a motion for new trial "without the need of any explanation[,] [t]he order that I issued (denying Booth's motion for new trial) didn't have that explanation." He elaborated on his earlier ruling:

> Judge Handy did not indicate that the case was nol prossed by the State, and instead questioned[] the State as Judge Handy did, and then sent counsel back to reception court.
>
> The reception court judge didn't nol pros the case, and I'm not sure why that -- or didn't note that the case was nol prossed, let me correct myself. The reception court judge did not note that case was nol prossed by the State.

Booth asserts Judge Panos' remarks to be further consideration of his argument and nothing more than a retrospective disavowal of responsibility of his pre-trial ruling amounting, he concludes, to an abuse of discretion. We view Judge Panos' further discussion as an affirmance and an explanation of his earlier order denying Booth's motion for new trial and not as a reconsideration of the motion to dismiss. His additional discussion reinforced the fact that, in the proceedings before Judge Handy, after the State uttered the fateful phrase "*nol pros*" the entire discussion moved to why the State had not served the juvenile witness and then to the possibility of a postponement, and that *nol pros* was not again mentioned by either the prosecutor or defense counsel.

Finding no error, we shall affirm.[8]

[8] In our review of this record, we have developed a curiosity as to why the State did not, in fact, enter a *nol pros* and later reindict Booth. Because he was charged with murder, there existed no statute of limitations bar. Nor, as Booth points out in his brief, was there, at that time, a *Hicks* concern.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS ASSESSED TO APPELLANT.