Circuit Court for Somerset County
Case No. C-19-CR-17-000263

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2889

September Term, 2018

RICHARD ALLEN THURSTON

v.

STATE OF MARYLAND

Meredith,
Wells,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: January 7, 2020

Appellant, Richard Allen Thurston, was charged with possession of a firearm after a disqualifying conviction, possession of ammunition after a disqualifying conviction, illegal possession of a regulated firearm, possession of a stolen regulated firearm, and possession of a handgun in a vehicle. Prior to his jury trial, appellant elected to discharge his attorney and proceed without counsel. The Circuit Court for Somerset County permitted the discharge, and appellant proceeded to trial *pro se*.

The State *nolle prossed* the charge of possession of a stolen regulated firearm, and the jury convicted appellant on all remaining counts. The trial court sentenced appellant to a total of ten years in prison, the first five years without the possibility of parole. Thereafter, appellant (with counsel) timely noted this appeal, asking us to consider the following questions:

1. Did the trial court violate Rule 4-215?
2. Did the trial court err by not determining whether or not Appellant was competent to stand trial?

We conclude that the trial court failed to comply strictly with the mandates of Maryland Rule 4-215 before it permitted appellant to discharge his attorney and proceed *pro se*, so we reverse the judgments of that court and remand for a new trial. In light of the reversal and remand on the first issue appellant presents, we do not address the second issue.

BACKGROUND

Because appellant does not challenge the sufficiency of the evidence against him, and because the factual background of the charged crimes is not pertinent to the procedural

issues he does raise, we only briefly set forth the facts presented at trial, to provide context for our discussion. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

Following the theft of a gun safe and several guns in Wicomico County on July 29, 2017, Wicomico County Sheriff's Office detectives developed appellant as a suspect and obtained a warrant for his arrest.

On August 18, 2017, the police observed appellant pull into the parking lot of a restaurant in Somerset County, the only occupant of a Dodge truck. Appellant was placed under arrest pursuant to the open warrant, and his truck was seized and towed to the Wicomico County Sheriff's Office.

After obtaining a search and seizure warrant, detectives searched the truck and recovered a loaded Smith and Wesson .38 caliber revolver, inside a FedEx envelope addressed to appellant, from behind the driver's seat of the vehicle.[1] A check of the revolver's serial number revealed that it had been reported stolen in Wicomico County on July 14, 2017. In addition, the detectives found .38 special ammunition, multiple tools, and jewelry in the truck. Appellant acknowledged to the court that he had a prior felony conviction that would disqualify him from possessing a firearm.

DISCUSSION

Appellant contends that the trial court erred in permitting him to discharge his attorney and defend himself during trial. Acknowledging that the court conducted the required colloquy under Maryland Rule 4-215(e) before permitting the discharge of

[1] The weapon was later determined to be operable.

counsel,[2] appellant nonetheless avers that the court violated the terms of the Rule by delegating the advisement of the potential penalties for the charged crimes to the prosecutor and by mis-advising him of the maximum potential sentence for one of the offenses.

On February 6, 2018, appellant appeared before the circuit court without an attorney. Because it appeared to the State that the circuit court may not have received the return of the indictment served upon appellant in the district court, the prosecutor suggested that "it might be best and prudent if [appellant] be given an initial appearance." The court agreed, explaining to appellant, "[W]e're going to give you your rights to an initial appearance, okay?"

The court made certain appellant had received a copy of the indictment. Regarding the charges against appellant, the court advised:

[2] Md. Rule 4-215(e) provides:

> If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

THE COURT:. . .All right. You're charged with—there are five counts, Mr. Thurston, one is firearm possession with a felony conviction and I want to make sure that I know what the penalties are.

So, Mr. [Prosecutor], if you'll look them up and I bet Mr. Thurston probably knows what they are better than we do.

[PROSECUTOR]: He may, he may. 15 years and carries a five year minimum mandatory.

THE COURT: Do you understand that, Mr. Thurston?

THE DEFENDANT: Yes, sir, I do.

THE COURT: You're also charged with a regulated firearm stolen.

[PROSECUTOR]: And that is five years.

THE COURT: Five years, no fine?

[PROSECUTOR]: No, Your Honor.

THE COURT: You're charged with illegal possession of ammo, which is one year?

[PROSECUTOR]: Yes, sir.

THE COURT: And no fine?

[PROSECUTOR]: No.

THE COURT: All right. And you're charged with illegal possession of a regulated firearm, I guess that's because of the felony conviction, is that why they charged with you with that [sic]?

THE DEFENDANT: More than yes, that's probably it. That's like murder for a convicted felon, you know? Sir—

THE COURT: Do you have that?

[PROSECUTOR]: It is five years and/or $10,000 fine.

THE COURT: Okay.

[PROSECUTOR]: And if I may correct myself on Count Two it's five years and/or $10,000 fine. And on Count One it's one year and/or $1,000 fine.

THE COURT: Count One?

[PROSECUTOR]: Count One was the 15.

THE COURT: Count Three is one year and $1,000 fine?

[PROSECUTOR]: Yes, sir.

THE COURT: Okay. Do you understand all that, Mr. Thurston?

THE DEFENDANT: Yes, I do, sir.

THE COURT: And then the last one is handgun in a vehicle and what's that three years and a $2,500 fine?

[PROSECUTOR]: Yes, sir.

THE COURT: Okay.

When the court stated, "I need to get you represented by an attorney in this county,"[3] appellant added that he had a "petition" to show the court. The court instructed appellant to show the petition to the prosecutor and then went on to advise appellant of his right to be represented by an attorney, the importance of same, and the likelihood that the case would proceed to trial if he did not retain counsel.[4]

[3] A related case against appellant was also pending in Wicomico County.

[4] Shortly thereafter, the court again advised appellant to "talk to an attorney" before filing his petition. The court then asked a public defender to get involved in the case and recessed the matter briefly to give the attorney time to travel to the courthouse. It appears that between appellant's initial appearance on February 6, 2018, and a pre-trial hearing on October 15, 2018, several public defenders and panel attorneys entered and then struck their appearances as counsel for appellant, for reasons not apparent from the record.

By the time of the next pretrial hearing on October 15, 2018, appellant was represented by an attorney, who explained to the court that he and appellant had a difference of opinion about the merits (or lack thereof) of a motion to suppress appellant sought to argue. When the court asked appellant if he wanted to discharge his attorney and represent himself in front of a jury the following week, when trial was scheduled to begin, appellant answered that he would be prepared to go to trial and represent himself, although he would "prefer a standby."

The court then conducted the required colloquy under Rule 4-215(e) regarding the reasons for, and merits of, discharging counsel. The court again asked appellant if he knew what the charges were:

> THE COURT: All right. Do you know what the charges are against you?
>
> THE DEFENDANT: It's possession of a handgun.
>
> THE COURT: It's firearm possession with a felony conviction, regulated firearm possession, illegal possession of ammo, regulated firearms illegal possession, and handgun in a vehicle.
>
> Do you understand what you're charged with? Do you know what the penalties are? I don't know off the top of my head.
>
> THE DEFENDANT: I understand that, but I have to object to that.
>
> THE COURT: No, no you understand that? Do you understand what you're charged with?
>
> THE DEFENDANT: Yes, I understand those charges.
>
> THE COURT: What are the penalties?

> [PROSECUTOR][5]: On Count One the penalties are—the maximum is 15 years the mandatory minimum is five; Count Two maximum penalty is five years and/or $10,000; Count Three, maximum penalty is one year and/or $1,000; Count Four, five years and/or $10,000; and on Count Five, maximum penalty is three years with a mandatory minimum of 30 days.

Appellant indicated his understanding of the charges and penalties. The court found no meritorious reason for discharge of counsel but stated it would permit the discharge. Appellant discharged his attorney.

At a motions hearing on October 22, 2018, the court again asked appellant, who appeared without counsel, if he wanted to be represented by an attorney, if he had received a copy of the indictment, and if he understood the potential penalties. Appellant answered that he was willing and prepared to proceed without an attorney, and the court explicitly found that "by inaction the Defendant has waived his right to counsel." Representing himself, appellant presented argument on several motions, all of which the court denied.[6] He went on to represent himself at trial and was convicted, as detailed above.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to counsel. *Lopez*

[5] A different prosecutor than the one appearing in court on February 6, 2018, stood in at this hearing.

[6] At the conclusion of the hearing, appellant submitted a memorandum for the court to consider but did not provide a copy to the State, so the court continued the matter until November 5, 2018, to permit the State time to respond. On November 5, 2018, the court issued its oral ruling dismissing appellant's challenges to the validity of the indictment, the search warrant for the truck, the jurisdiction of the court, and the propriety of venue in Somerset County, as well as his claims of violations of his right to speedy trial and the dictates of *Miranda*. After issuing its ruling, the court once again advised appellant to "get an attorney."

v. State, 420 Md. 18, 33 (2011) (quoting *Parren v. State*, 309 Md. 260, 262 (1987)). These constitutional guarantees encompass not only the right to assistance by an attorney but also the right of a defendant to reject counsel and represent himself. *Id*. But, a criminal defendant may exercise his right to self-representation only if "he knowingly, intelligently, and voluntarily waives his right to counsel." *Fowlkes v. State*, 311 Md. 586, 589 (1988).

As part of the implementation and protection of the fundamental right to counsel, the Court of Appeals adopted Md. Rule 4-215, which sets forth "the method by which the right to counsel may be waived by those defendants wishing to represent themselves, the modalities by which a trial judge may find that a criminal defendant waived implicitly his or her right to counsel, either by failure or refusal to obtain counsel, and the necessary litany of advisements that must be given to all criminal defendants before any finding of express or implied waiver of the right to be represented by counsel may be valid." *Broadwater v. State*, 401 Md. 175, 180 (2007). "Any decision to waive counsel (or to relinquish the right to counsel through inaction) and represent oneself must be accompanied by a waiver inquiry designed to ensure that [the decision] is made with eyes open and that the defendant has undertaken waiver in a knowing and intelligent fashion." *Id*. at 181 (quoting *State v. Brown*, 342 Md. 404, 414 (1996)) (internal quotation marks omitted; alteration in original).

The requirements of Rule 4-215 are considered mandatory so as "to protect the fundamental rights involved, to secure simplicity in procedure, and to promote fairness in administration." *Parren*, 309 Md. at 280. "[S]trict compliance" with the Rule is mandated, and "a trial court's departure from the requirements of Rule 4-215 constitutes reversible

error." *Pinkney v. State*, 427 Md. 77, 87-88 (2012). We examine a trial court's compliance with the requirements of Rule 4–215 *de novo*. *State v. Weddington*, 457 Md. 589, 598-99 (2018).

Pursuant to Md. Rule 4-215(a), upon a defendant's first appearance in court without counsel, "the court shall:"

> (1) Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel.
>
> (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.
>
> (6) If the defendant is charged with an offense that carries a penalty of incarceration, determine whether the defendant had appeared before a judicial officer for an initial appearance pursuant to Rule 4-213 or a hearing pursuant to Rule 4-216 and, if so, that the record of such proceeding shows that the defendant was advised of the right to counsel.
>
> The clerk shall note compliance with this section in the file or on the docket.

As a threshold requirement to finding a valid waiver of counsel by a defendant, a trial court first must find that all requisite Rule 4-215(a) advisements have been rendered previously.

Rule 4-215(a) expressly provides that "the court shall . . . (3) [a]dvise the defendant of the nature of the charges in the charging document, and the allowable penalties,

including mandatory penalties, if any." Here, the trial court delegated that duty to the prosecutor, requesting that he, at appellant's initial appearance on February 6, 2018, "look [ ] up" the penalties so the court could "make sure" it knew what the penalties were. The prosecutor then stumbled over the recitation of the penalties, having to correct himself on several counts.

At the pre-trial hearing on October 15, 2018, the court again asked the prosecutor, "What are the penalties?" because it did not "know off the top of my head." The stand-in prosecutor repeated the penalties for the charged offenses, with no further input from the court.[7]

The advisement of the potential penalties by the prosecutors, even though done "at the express direction of the court" and "summarily reiterated" by the court, does not provide strict compliance with the dictates of Rule 4-215(a). *Webb v. State*, 144 Md. App. 729, 742 (2002). As we explained in *Webb*, "[t]he plain language of Rule 4-215(a) contemplates advisements 'by a judge' or 'the court.'" *Id.* [8]

"The language of the rule 'means what it says.'" *Id.* at 742-43 (quoting *Johnson v. State*, 355 Md. 420, 464 (1999)). The recitation of the potential penalties "must come from

[7] The State, in its brief, concedes that the prosecutor's summary of the penalties during the October 15, 2018, hearing "would not, standing alone, have complied with the rule."

[8] For the sake of comparison, *see* Rule 4-242(c), governing acceptance of guilty pleas, and Rule 4-246(b), governing acceptance of waivers of jury trial, which provide that a defendant may be examined by the court, the State's Attorney, the defendant's attorney, or any combination thereof.

the trial court. As recognized by the Court of Appeals, '[t]he commands to the court are that it "***shall***" do the acts set out; the Rule mandates the ***court's conduct.***'" *Id*. at 743 (quoting *Parren*, 309 Md. at 280) (emphasis added in *Webb*). Requiring advisements by only "the court" or "a judge," this Court continued in *Webb*, "is consistent with the rationale behind strict compliance. The 'specific procedure [of Rule 4-215] . . . must be followed by the trial court in order for there to be a knowing and intelligent waiver.'" *Id*. (quoting *Johnson*, 355 Md. at 444).

The necessity for strict compliance with Rule 4-215 precludes a finding of waiver of counsel by inaction based on advisements given by anyone other than a judge or the court. Advisements by a prosecutor, as made here, "are insufficient because a prosecutor is neither a judge nor a court." *Id*.[9] For that reason alone, reversal is required in this matter.

The error is compounded by the fact that the advisements by the prosecutors did not alert appellant to the maximum allowable penalties, including mandatory penalties, of all the charged crimes, as required by Rule 4-215(a)(3). The prosecutors advised appellant that the maximum penalty for possession of a handgun in a vehicle was three years (with a mandatory minimum of 30 days) and a $2,500 fine, which would be the maximum penalty

[9] In her concurring opinion in *Webb*, Judge Ellen Hollander, now a judge on the U.S. District Court for the District of Maryland, expressed her view that, "under the watchful eye of the trial judge, a trial judge ought to be able to delegate, in. . .a limited way, this portion of the advisement" to the prosecutor. Judge Hollander agreed, however, that "even if a prosecutor's accurate recitation of the charges and penalties satisfies the spirit of the rule, it does not comport with the letter of the rule" and that reversal was therefore required in *Webb* because "[a]ny changes in the literal text of Rule 4-215(a)(3), or in its construction, are matters that fall within the exclusive province of the Court of Appeals." 144 Md. App. at 748-49.

only if appellant had not "previously been convicted under this section, 4-204 of this subtitle [use of a firearm in the commission of a crime], or 4-101 [wear or carry a concealed dangerous weapon] or 4-102 [carry or possess a firearm, knife, or deadly weapon on public school property] of this title." Md. Code Ann., § 4-203(c)(2) of the Criminal Law Article ("CL"). If, however, appellant had previously been convicted under any of the aforementioned sections, the maximum penalty for possession of a handgun in a vehicle is ten years (with a mandatory minimum of one or three years—and more if the violations occurred on school property—depending on the number of prior convictions). CL § 4-203(c)(3)(i) and CL § 4-203(c)(4)(i).

Although a trial court, at the time it makes its Rule 4-215 advisements, may not know if a defendant is a subsequent offender, the court nonetheless must advise a defendant that *if* he is a subsequent offender, there may be enhanced penalties, and recite the possible enhanced penalties. *Knox v. State*, 404 Md. 76, 89 (2008). As the *Knox* Court pointed out, "[a] defendant cannot have full understanding of the consequences of the waiver of counsel if the defendant is unaware of the more severe potential penalties because of prior convictions." *Id*. at 91.

In this matter, although it is undisputed that the trial court never advised appellant of additional penalties he may be exposed to on the possession of a handgun in a vehicle charge if he were a subsequent offender, the State asserts that the advisement as given was sufficient because there is nothing in the record to indicate that appellant was a subsequent offender subject to enhanced penalties or that the State sought to charge him as a subsequent offender. By the same token, however, the record does not permit us to resolve

whether appellant would have been exposed to enhanced penalties as a subsequent offender, so the trial court was not absolved from advising appellant that if he were a subsequent offender, the maximum penalty for the charge of possession of a handgun in a vehicle would be ten years.

And, although the maximum penalties appellant faced on that charge were no more than the maximum potential sentence on the most serious charge of possession of a firearm after a disqualifying charge, for which he was properly advised and sentenced, the failure of proper advisement cannot be considered harmless error. *Moten v. State*, 339 Md. 407, 411-12 (1995). *See also State v. Camper*, 415 Md. 44, 58 (2010) ("We refuse to depart from the rule established in *Moten*. . . that a Rule 4-215(a)(3) violation is not subject to harmless error analysis.").

For this reason, and because the court relied overmuch on the prosecutors to give the required advisements, the advice as given to appellant was insufficient under the strict compliance standard of Rule 4-215.

JUDGMENTS OF THE CIRCUIT COURT FOR SOMERSET COUNTY REVERSED; CASE REMANDED TO CIRCUIT COURT FOR NEW TRIAL; COSTS ASSESSED TO SOMERSET COUNTY.