UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2234

September Term, 2013

REBECCA LINN WALTERS

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: January 23, 2015

Following a jury trial in the Circuit Court for Washington County, appellant, Rebecca Walters, was convicted of driving while impaired by alcohol and refusing to take a breathalyzer test. The court sentenced appellant, as a subsequent offender, to one year with all but ten days suspended for driving while impaired, and sixty days, concurrent, for refusing to take a breathalyzer test. Additionally, the court ordered appellant to complete three years of probation with the first eighteen months supervised by the Drinking Driver Monitor Program.

Appellant raises a single question on appeal: "Did the trial judge err in sentencing Appellant as a subsequent offender where the notice requirement has not been met?" Because we conclude that the State's Attorney properly complied with the notice requirement, we affirm the judgments of the circuit court.

BACKGROUND

Because the evidence presented at trial is not relevant to a review of the single question we address on appeal, we shall proceed directly to address the facts related to appellant's post-trial contention that she was not properly notified that the State intended to seek enhanced penalties because she was a subsequent offender. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008) ("Appellant has not challenged evidentiary sufficiency. Therefore, we recite only the portions of the trial evidence necessary to provide a context for our discussion of the issues presented.").

At the sentencing hearing, the prosecutor stated that the subsequent offender notice was sent to appellant at her current address on file with the Motor Vehicle Administration

("MVA"), which was 12064 Big Pool Road in Clear Spring. The prosecutor argued "that by statute, we have satisfied the statute by sending the notice to her to her – her address that was on record with the MVA." Defense counsel responded:

> So we start off by saying, one, that notice here was insufficient because [appellant] does not – she has not received the notice. At the time the notice was sent, [appellant] was represented by counsel, which meant outside of what the statute permits, the notice should have come to us.
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> * * *
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> We did not get anything for subsequent offender notice either directly to us or through any subsequent discovery. And again, my client didn't receive it. And at the time, I can't over emphasize the fact that at the time it was mailed, we had been representing [appellant] for seven months.
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> * * *
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> Then outside of that, on the court date, 12/12, that was the first time we had heard of any subsequent offender additional penalties. Even if the Court were to permit a postponement in order to properly serve, because they're permissive penalties, the time to serve them has come and gone. They cannot be served after the commencement of a trial. And again, we don't have them. We have not received proper notice. And that would have had direct bearing on what [appellant] would do had this matter been negotiated out as opposed to have gone to trial. So we oppose – we object to any additional penalties for a lack of notice. And we'd object to any postponement in order to provide the State to give notice.

The court ruled, as follows:

> All right, thank you, [defense counsel]. I believe that the State having sent the record and the Notice of Subsequent Offender to the Defendant at her last known address, which has not been updated by the Defendant through the Motor Vehicle Administration satisfies the statute. She has constructive notice. Your request I not consider subsequent offender penalties is denied. You have your objection, [defense counsel].

Thereafter, the prosecutor informed the court that appellant had a prior conviction in 2011 for driving under the influence of alcohol. The court confirmed with the parties that this prior conviction subjected appellant to a maximum of one year incarceration for driving while impaired, sixty days for refusing the breathalyzer test, and up to a $500.00 fine on each charge. The court sentenced appellant to an enhanced sentence for being a subsequent offender and this appeal followed.

DISCUSSION

Appellant argues that the court erred in sentencing her as a subsequent offender because she did not receive the subsequent offender notice prior to trial. The State responds that "[u]nder the circumstances, where the State's notice was sent to the defendant at her last known address well before her trial, the sentencing court properly concluded that [appellant] was subject to a non-mandatory enhanced sentence."

Appellant was convicted of driving while impaired pursuant to Maryland Code (1977, 2012 Repl. Vol.), Transportation Article ("Trans"), § 21-902(b)(1). Trans § 27-101(f)(1)(ii) provides:

> (f)(1) A person is subject to a fine not exceeding $500 or imprisonment not exceeding 1 year or both, if the person is convicted of:
>
> * * *
>
> (ii) Except as provided in subsection (q) of this section, a second violation of:
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> 1. § 21-902(b) of this article ("Driving while impaired by alcohol")[.]

Appellant does not challenge that her 2011 conviction for driving under the influence of alcohol subjected her to the enhanced penalties, but rather, she argues that the State did not comply with the notice requirement under Maryland Rule 4-245(b).

Maryland Rule 4-245 (b) provides:

> **Required Notice of Additional Penalties.** When the law permits but does not mandate additional penalties because of a specified previous conviction, the court shall not sentence the defendant as a subsequent offender unless the State's Attorney serves notice of the alleged prior conviction on the defendant or counsel before the acceptance of a plea of guilty or nolo contendere or at least 15 days before trial in circuit court or five days before trial in District Court, whichever is earlier.

On July 29, 2013, the State's Attorney mailed the subsequent offender notice to appellant at her last known address, which was the same address that appeared in the court file and the same address that was on file with the MVA. While appellant was represented by counsel at the time, Maryland Rule 4-245 only requires the State's Attorney to serve the notice on the defendant or counsel.

Maryland Rule 1-321(a) governs service of pleadings and papers after the original pleading:

> **(a) Generally.** Except as otherwise provided in these rules or by order of court, every pleading and other paper filed after the original pleading shall be served upon each of the parties. If service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. **Service upon the attorney or upon a party shall be made by delivery of a copy or by mailing it to the address most recently stated in a pleading or paper filed by the attorney or party, or if not stated, to the last known address. . . . Service by mail is complete upon mailing.**

(Emphasis added).

In *Lee v. State*, 332 Md. 654, 671 (1993), the Court of Appeals analyzed the relationship between Rule 4-245(b) and Rule 1-321(a) and explained:

> A straightforward reading of Rules 4-245(b) and 1-321(a) demonstrates that service of an enhanced penalty notice may be upon the defendant when not represented by counsel, but should be upon counsel once counsel's appearance has been entered. But even assuming that Rule 4-245(b) allows service upon either a defendant represented by counsel or upon defendant's counsel, this fact does not render Rule 1-321 inapplicable. Rule 1-321 still governs on all matters for which no other provision is provided. The mailbox rule still applies to service of a Rule 4-245 enhanced penalty notice when service is mailed to a defendant's attorney.

The Court further explained that, in reading the statutes together, service was complete upon mailing and that Rule 4-245(b) did not require the defendant to receive the notice. *Id.* at 664-65.

Even though the Court in *Lee* opined that service "should be upon counsel once counsel's appearance has been entered[,]" the plain language of Rule 4-245(b) specifically states that service can be made on the defendant or counsel. 332 Md. at 671. Rule 4-245(b), however, does not state the manner and method of service. Rule 1-321 only governs on matters for which no other provision is provided. Accordingly, the manner and method of service addressed in Rule 1-321 is applicable to service of an enhanced penalty notice, but the requirement that service on a represented party must be made on the attorney does not

apply. The State's Attorney, therefore, provided proper notice under Rule 4-245(b), and, as such, the court did not err in sentencing appellant to an enhanced penalty.

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