

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2558

September Term, 2013

DEAN ROY THOMAS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Reed,

JJ.

Opinion by Hotten, J.

Filed: February 18, 2015

Following appellant's 2012 conviction for second-degree assault in the Circuit Court for Prince George's County, he appealed, challenging the trial court's denial of his motion requesting a Bill of Particulars from the State. This Court affirmed and the Court of Appeals denied *certiorari*. Two months later, the Court of Appeals issued its opinion in *Dzikowski v. State*, 436 Md. 430 (2013). Appellant thereafter filed a motion for a new trial in the circuit court, predicated on the holding in *Dzikowski*. The trial court denied his motion, prompting this appeal, where the following four questions are presented for our review:

1. Should a new trial have been granted because the State failed to give [a]ppellant the required Bill of Particulars?
2. Is the case of *Dzikowski v. State*, 436 Md. 430, 82 A.3d 851 (2013) controlling as to the case at bar?
3. If *Dzikowski* is to be applied retroactively, was the trial court barred from considering it?
4. Can a reviewing court find "harmless error" under the circumstances of this case?¹

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

On November 2, 2011, Jose Guevera was stabbed outside of a business complex in Hyattsville. Appellant, Dean Thomas, and several other men were inside the building at the time of the assault. While appellant and one other man were initially detained and questioned regarding the incident, only appellant was charged. On November 29, 2011,

¹ Because we conclude that the circuit court did not err, we need not reach question 4.

appellant was indicted on first-degree assault, second-degree assault, openly carrying a dangerous weapon, keeping a common nuisance, possession of marijuana, possession with intent to distribute fifty or more pounds of marijuana, possession with intent to distribute, and possession of a firearm with a nexus to drug trafficking. Prior to trial, appellant prevailed on a suppression motion and as a result, the State proceeded on only three charges: first and second degree assault and openly carrying a dangerous weapon. The first and second degree assault counts were charged in the statutory short form, so appellant filed a demand for a Bill of Particulars to secure the facts that formed the basis of the charges. The State responded by referring appellant to the discovery it had previously provided. During a hearing, appellant argued that he was entitled to a Bill of Particulars, but the court ruled that the State was not required to outline its theory of assault. Following a jury trial on April 24 -26, 2012, appellant was convicted, of second degree assault and acquitted of the other two charges. Prior to sentencing, appellant filed a motion in arrest of judgment or, in the alternative, motion for a new trial in which he re-raised his arguments regarding the denial of the Bill of Particulars. The court denied the motion. Appellant was sentenced on June 6, 2012 to six years' imprisonment with all but one year suspended and three years of supervised probation.

Appellant noted an appeal to this Court raising four issues, one of which was the State's failure to provide him with a Bill of Particulars. In an unreported opinion, we affirmed the trial court's ruling, relying on *Robinson v. State*, 209 Md. App. 174 (2012) [hereinafter *Robinson*]. Appellant filed a petition for *certiorari*, raising the Bill of Particulars issue and on October 21, 2013, the Court of Appeals denied the petition. Then,

on December 30, 2013, the Court of Appeals issued its opinion in *Dzikowski v. State*, 436 Md. 430 (2013) [hereinafter *Dzikowski*], which overruled *Robinson, supra*, in part, holding that discovery was not a permissible substitute for a Bill of Particulars. In response to the *Dzikowski* ruling, on January 15, 2014, appellant filed a Rule 4-331 motion for a new trial. The circuit court considered arguments on January 27, 2014, and denied the motion, finding.

THE COURT: But in any event, it's clear to me and my colleagues that the Court of Special Appeals has decided this case, and for me now without the new case being specifically retroactive for me now to grant a new trial would be to overturn the decision of the Court of Special Appeals, I'm not allowed to do that. They've ruled, they addressed the issue at that point, they didn't feel that certainly in this case that the [B]ill of [P]articulars question was dispositive such as to grant a new trial, or reverse the jury verdict in some fashion. I can't overturn the Court of Special Appeals, so I have to deny the motion.

* * *

I understand. And I, you know we grant new trials if we have new evidence, that's not the issue in this case, the time for this motion may well have passed, but I don't know that that is necessarily dispositive. Again, had there been a situation where the new case said it was retroactive I think we might well have been able to revisit this. Okay. . . .

Appellant noted a timely appeal.

STANDARD OF REVIEW

We review a trial court's denial of a new trial pursuant to Maryland Rule 4-331 for an abuse of discretion. In *Jenkins v. State*, 375 Md. 284, 295-96 (2003), we explained:

[D]enials of motions for new trials are reviewable on appeal and rulings on such motions are subject to reversal when there is an abuse of discretion. *Mack v. State*, 300 Md. 583, 600, 479 A.2d 1344, 1352 (1984); *Wernsing v. Gen. Motors Corp.*, 298 Md. 406, 420, 470 A.2d 802, 809 (1984). We have noted that the discretion afforded a trial judge 'is broad but it is not boundless.' *Nelson v. State*, 315 Md. 62, 70, 553 A.2d 667, 671 (1989). The

abuse of discretion standard requires a trial judge to use his or her discretion soundly and the record must reflect the exercise of that discretion. Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law. *Ricks v. State*, 312 Md. 11, 31, 537 A.2d 612 (1988). . . .

On appellate review of trial court's denial of a motion for a new trial, we review for abuse of discretion. *See Jackson v. State*, 164 Md. App. 679, 700 (2005) ("Under either subsection of Rule 4-331, the abstract standard of appellate review is the abuse of discretion standard."); *see also Crippen v. State*, 207 Md. App. 236, 249 (2012).

MOTION TO DISMISS

Before this Court, the State filed a motion to dismiss appellant's appeal, alleging that the circuit court lacked authority to entertain appellant's motion for a new trial and therefore, there was no appealable issue.

Appellant sought a new trial pursuant to Maryland Rule 4-331, which provides:

(a) **Within ten days of verdict.** On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.

(b) **Revisory power.**

(1) Generally. The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:

(A) in the District Court, on motion filed within 90 days after its imposition of sentence if an appeal has not been perfected;

(B) in the circuit courts, on motion filed within 90 days after its imposition of sentence. Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.

Appellant argued that “Maryland Rule 4-331(a) allows a Court to set aside a verdict and order a new trial ‘in the interest of justice.’ The Court’s discretion to do so is limitless.” First, we note that 4-331(a) applies only to a motion filed within ten days of a verdict, which renders it inapplicable here. Second, we disagree with appellant’s assertion that a trial court’s discretion to order a new trial is limitless. *See Nelson v. State*, 315 Md. 62, 70 (1989) (“A trial judge is blessed with discretion in the exercise of many of his[her] functions. The discretion is broad but it is not boundless.”). Maryland Rule 4-331 and the interpreting case law make it clear that the only instances when a court may grant a new trial are the ones enumerated in the Rule. So long as the moving party can establish one of the specific grounds, a trial court may grant a new trial in the interests of justice. There are five grounds upon which a trial court may grant a new trial: 1) under subsection (a) upon a motion filed within 10 days of the verdict in the interest of justice; 2) under subsection (b)(1) pursuant to a court’s revisory power upon a motion filed within 90 days of sentencing; 3) under subsection (b)(1)(B) in the case of fraud, mistake, or irregularity at any time after 90 days of sentencing, 4) under subsection (c) based on newly discovered evidence pursuant to a motion filed within one year of sentencing or the date of a final appellate court mandate; and 5) under subsection (d) based on new DNA evidence.

During oral argument, appellant contended that his motion was appropriate pursuant to the court’s revisory power under Rule 4-331(b). Predicated on the language of the Rule, appellant’s motion could only have been considered if it was filed within 90 days of the imposition of his sentence. Appellant contends that it was, because the circuit court stayed

his sentence pending appeal. He argues that the staying of his sentence effectively “stopped everything.”

This Court has not previously addressed the interplay between Maryland Rule 4-331 and the staying of a sentence. A stay of enforcement of a judgment is a principle in both the civil and criminal contexts. *See* Maryland Rule 8-422.² Maryland Rule 4-348 governs stays in criminal proceedings. Subsection (b) provides:

(b) Sentence of imprisonment. The filing of an appeal or a petition for writ of certiorari in any appellate court, including the Supreme Court of the United States, stays a sentence of imprisonment during any period that the defendant is released pursuant to Rule 4-349, unless a court orders otherwise pursuant to section (d) of that Rule. On the filing of a notice of appeal in a case that is tried *de novo*, the circuit court, on motion or by consent of the parties, may stay a sentence of imprisonment imposed by the District Court and release the defendant pending trial in the circuit court, subject to any appropriate terms and conditions of release.

The rule is clear that a stay applies to the execution of the sentence of imprisonment. The purpose of the Rule is to allow a defendant who is sentenced to incarceration to remain free pending appellate review. We are not persuaded by appellant’s general contention that “when a ‘stay’ is entered, the flow of time stops and then resumes when the stay is

² **(a) Civil Proceedings.**

(1) Generally. Stay of an order granting an injunction is governed by Rules 2-632 and 8-425. Except as otherwise provided in the Code or Rule 2-632, an appellant may stay the enforcement of any other civil judgment from which an appeal is taken by filing with the clerk of the lower court a supersedeas bond under Rule 8-423, alternative security as prescribed by Rule 1-402 (e), or other security as provided in Rule 8-424. The bond or other security may be filed at any time before satisfaction of the judgment, but enforcement shall be stayed only from the time the security is filed.

(b) Criminal Proceedings. Stay of enforcement of a judgment in a criminal proceeding is governed by Rule 4-349.

removed.” The Rule provides no indication of this intent, and no Maryland cases have interpreted it as such. If, for example, a court stayed a defendant’s sentence of imprisonment under Rule 4-331(d), under appellant’s interpretation, the thirty day time limit required to note an appeal would also be tolled. We find no support for this contention. Furthermore, in the instant case, the trial court’s order indicated that appellant’s sentence was stayed pending the posting of an appeal bond, indicating that the stay pertained to his sentence of incarceration.

Maryland Rule 4-331 requires that a party file a motion for a new trial within 90 days of the imposition of a sentence. Based on the docket entry, appellant’s sentence was imposed on June 7, 2012. The court only stayed the execution of the sentence. Accordingly, we hold that the staying of a sentence under Md. Rule 4-348 does not automatically toll the time requirements provided in Maryland Rule 4-331. Therefore, the motion filed on January 15, 2014 was not the proper avenue for appellant to pursue because it was untimely and did not fall under any of the other grounds enumerated in Rule 4-331. However, notwithstanding this conclusion, we will address appellant’s contention that the circuit court erred in granting him a new trial because the *Dzikowski* decision was retroactive.

I. Was Dzikowski Retroactive?

The thrust of appellant’s appeal is that the circuit court erred in concluding that *Dzikowski* was not retroactive. He argues that under the rule concerning retroactivity discussed in *Denisyuk v. State*, 422 Md. 462 (2011), the circuit court could have, and should have, applied *Dzikowski* to his case. In *Denisyuk*, the defendant pled guilty to second degree

assault and was sentenced to ten years' incarceration with all but two years suspended. *Id.* at 467. However, appellant had immigrated to the U.S. and as a result of his conviction, became subject to deportation. *Id.* After deportation proceedings were initiated against him, appellant filed a petition for post conviction relief, asserting that his counsel did not inform him of the deportation consequences, and if he had known, he would not have pled guilty. *Id.* at 468. The circuit court granted his petition, awarding him a new trial, and the State filed a petition for leave to appeal, before this Court. On appeal, we reversed the circuit court's grant of the defendant's petition, holding that defense counsel did not have a duty to inform a client regarding possible immigration consequences. *Id.* at 469. Two days following our decision, the U.S. Supreme Court issued its opinion in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that effective assistance of counsel requires notification of deportation consequences of a guilty plea. *Id.* The Court of Appeals granted *certiorari*, to decide whether the defendant was entitled to post conviction relief in light of the *Padilla* decision. *Id.* The Court observed that the defendant could only receive relief if the *Padilla* decision applied to his case on collateral review. *Id.* at 478. The Court explained:

Under Maryland law, the question of whether a particular judicial decision should be applied prospectively or retroactively, depends in the first instance on whether or not the decision overrules prior law and declares a new principle of law. If a decision does not, . . . no question of a "prospective only" application arises; the decision applies retroactively in the same manner as most court decisions. *State v. Daughtry*, 419 Md. 35, 78, 18 A.3d 60, 86 (2011) (quoting *Houghton v. County Comm'rs of Kent County*, 307 Md. 216, 220, 513 A.2d 291, 293 (1986)); see *Walker v. State*, 343 Md. 629, 637, 684 A.2d 429, 433 (1996). Of particular relevance to this case, we have explained that, "where a decision has applied settled precedent to new and different factual situations, the decision always applies retroactively[.]" and

it is only “where a new rule . . . constitutes ‘a clear break with the past . . .’” that the question of prospective only application arises. . . .

Id. The Court considered that *Padilla* followed the principles established in *Strickland v. Washington*, 466 U.S. 668 (1984), and made its decision by applying the facts of that case to the previously established principles in *Strickland*. *Id.* Following the decisions of other state and federal courts, the Court of Appeals determined that there was no new rule of law announced, and therefore, *Padilla* had to be applied retroactively to cases on collateral review. *Id.* at 479.

In the case at bar, the question is whether *Dzikowski* established a new principle of law, because if it did not, then it is retroactive. The facts of *Robinson* are similar to appellant’s case. Robinson was on trial for second degree assault and charged in the statutory short form. He requested a Bill of Particulars, to which the State responded that it had provided open discovery, and therefore, had satisfied its requirements under Rule 4-241. 209 Md. App. at 190. The circuit court found that the State had provided enough information through the open discovery and was not required to provide a Bill of Particulars. *Id.* at 194. On appeal, we agreed with the circuit court, holding that “[a]lthough the State technically should have provided appellant with a [B]ill of [P]articulars,” the information provided in discovery was sufficient to meet its requirements under the Rule. *Id.* at 195.

One year later, the Court of Appeals decided *Dzikowski*. There, the defendant was charged with several offenses including reckless endangerment, which was charged in the statutory short form. 436 Md. at 435. Following the State’s refusal to provide the

defendant with a Bill of Particulars because it had already provided open file discovery, the defendant filed exceptions, which the circuit court overruled. *Id.* at 437. Appellant was convicted and unsuccessfully appealed his conviction. *Id.* at 441. In affirming his conviction, this Court held that the State’s open file discovery sufficed and met the requirements of the Rule. *Id.* The Court of Appeals disagreed. It announced that when a defendant requests a Bill of Particulars, the State must provide one, regardless of the complexity of the case. *Id.* at 454. It elaborated, explaining that “[d]iscovery, even open-file discovery, that includes police reports and witness statements, is not the same and cannot substitute for a legally sufficient bill of particulars.” *Id.* at 449.

Returning to the instant case, appellant was sentenced on June 7, 2012. He filed a timely motion for reconsideration which was denied. On appeal, this Court applied *Robinson*, which was the relevant law at that time, and affirmed his conviction, holding that, as had previously been the rule,³ open file discovery was sufficient to satisfy the requirements of a request for a bill of particulars. The *Dzikowski* opinion, overturning *Robinson*, was released one month after appellant’s conviction was affirmed. As explained, *supra*, appellant then filed an untimely motion for a new trial. We hold that based on the facts and record before us, the trial court did not err in declining to consider appellant’s motion for a new trial because the *Dzikowski* opinion was not retroactive. Applying the *Densiyuk* retroactivity rule, since *Dzikowski* overruled in part the holding

³ See also *Jones v. State*, 303 Md. 323 (1985); *Grant v. State*, 55 Md. App. 1 (1983) (both affirming convictions in which the State provided open file discovery in lieu of a Bill of Particulars).

established in *Robinson, Dzikowski* was not retroactive. Accordingly, had appellant's motion been timely and properly before the trial court, we find no error in the court's conclusion that it could not have granted a new trial because Dzikowski was not retroactive.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.