UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2672
September Term, 2013

STATE OF MARYLAND
v.
KARIEM YOONUS AKA FARIEN YOONUS

No. 2673
September Term, 2013

STATE OF MARYLAND
v.
DASHAWN PAYTON

CONSOLIDATED CASES

Zarnoch,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: February 11, 2015

On January 17, 2014, in two separate cases, a Baltimore City circuit court judge struck a sentence imposed pursuant to an ABA guilty plea[1] and dismissed all charges against the defendants with prejudice. The circuit court took this action solely because an assistant state's attorney for Baltimore City failed to obey a scheduling order.

The question presented in these consolidated appeals, as phrased by the State, is:

> Did the lower court act without authority when it set aside [a]ppellees' convictions, permitted them to withdraw from their binding plea agreements and dismissed their indictments for the State's technical violation of a scheduling order?

We shall answer that question in the affirmative and reverse the judgments entered in favor of the appellees.[2]

I.
STATE V. DASHAWN PAYTON

On the morning of November 26, 2013, Dashawn Payton, one of the appellees, along with Kirk Nowlin, appeared before a Baltimore City circuit court judge for arraignment.

---

[1] In *Gross v. State*, 186 Md. App. 320, 322, n.1 (2009), we said that

> [a]n ABA plea agreement is an agreement by the sentencing judge, the defendant, and the prosecutor as to what the maximum sentence will be if the plea is accepted. In the subject case, the ABA plea agreement specified the exact sentence that would be imposed. In some ABA plea agreements, however, the judge, prosecutor and the defendant simply agree that if the plea is accepted the sentence imposed will not exceed a specified number of days or years.

[2] The State's right to appeal the dismissal of the indictment rests on Md. Code (2013 Repl. Vol., 2014 Cum. Supp.), Courts & Judicial Proceedings Article (CJP), Section 12-302(c)(2), which provides that "[t]he State may appeal from a final judgment granting a motion to dismiss or quashing or dismissing any indictment, information, presentment, or inquisition[.]"

When the cases were called, counsel for both Payton and Nowlin indicated that their clients were interested in entering into a binding ABA plea agreement if the prosecutor and the court would consent to the terms of that agreement. After negotiating, the prosecutor, counsel for the defendants, and the judge agreed that if each defendant would plead guilty to count IV of the indictment, which charged the defendants with conspiracy to distribute heroin, the judge would impose a five-year sentence but suspend all of that sentence except for time served and place the defendants on three years active probation. The terms of the plea agreement were put on the record and the prosecutor, both defense counsel, both defendants, and the trial judge stated that the plea agreement was acceptable.

The defendants were then advised by counsel, in commendable detail, of all the rights that they were giving up by agreeing to plead guilty to count IV. Both defendants indicated that they understood these rights and waived them. At that point, the following exchange occurred between the court and Ronald Kurland, Esquire, counsel for Mr. Nowlin:

> THE COURT: Mr. Kurland, any additional questions for your client?
>
> MR. KURLAND: I have one additional statement, if Your Honor please.
>
> THE COURT: Okay.
>
> MR. KURLAND: Your Honor, I want Mr. Nowlin to know that prior to the plea, the matter being called and the plea being qualified, I was told by the State that the [drug] analysis has not been done or completed. I have no question of the State's integrity, and I believe will, if in fact the analysis comes back negative, immediately notify my office as well as the Public Defender's Office, and we'll take the appropriate steps beyond that.

At that point, although no one had agreed to it, the presiding judge interjected:

> THE COURT: They're going to have that analysis to you on or before December 15th to the[c]ourt and to the defense. That analysis will be given to you.

Counsel and Mr. Nowlin then engaged in the following brief colloquy:

> MR. KURLAND: So, Mr. Nowlin, do you understand that it's a little bit (inaudible) today, but we're proceeding because of the negotiations and what we've accepted as far as the State is concerned?
>
> MR. NOWLIN: Yes.
>
> MR. KURLAND: If for any reason the analysis comes back negative, then the State will take the appropriate steps as will I to perhaps cure the problem. Do you understand?
>
> MR. NOWLIN: Yes.

Shortly after the above exchange, the court and Mr. Payton had the following on the record discussion:

> THE COURT: Mr. Payton, the same thing goes for you with regards to the chemical analysis. Do you understand that, sir?
>
> MR. PAYTON: Yes.
>
> THE COURT: That will be given to your attorney on or before December 15th, and if it's anything but heroin[ ], the matter will be brought back, and the proper remedy will be given. Do you understand that?
>
> MR. PAYTON: Yes, ma'am.

The prosecutor next read into the record a statement of facts that would have been proven if the case had gone to trial:

[PROSECUTOR]: Your Honor, the facts in support of the plea with regards to (inaudible) matters of Kirk Nowlin 113303019 and Dashawn Payton 113303018 (inaudible) as follows. On October the 1st, 2013 at 11:45 a.m., in the unit block of West Jeffery Street in Baltimore City, State of Maryland, officers did receive a tip of suspected narcotics sales in the area (inaudible) covert location.

At this time, officers observed defendants, later identified as Kirk Nowlin and Dashawn Payton[,] the same individuals standing to the left and right of counsel at trial table before Your Honor at court today, standing in the corner, matching the description of the CI, officers observed an unknown male approach both defendants and hand Mr. Nowlin U.S. currency.

Mr. Payton then went to the alley as Mr. Nowlin kept watch and moved back from the bushes in the alley, removed suspected narcotics from a bag. Mr. Payton then returned to the unknown male and gave him the suspected narcotics. Officers then responded to the bag and found it to contain 37 gel caps of a schedule I narcotic, heroin[ ]. The search incident to arrest of the defendants, officers did recover $255.00 U.S. currency from Mr. Payton along with $183.00 U.S. currency from Mr. Nowlin.

Per my conversation with counsel, the suspected narcotics were submitted to the Baltimore City Evidence Control Unit and later to the Chemical Analysis Unit and are pending analysis. But the State and defense would stipulate that per the examination, the 37 gel caps would come back as schedule I narcotic heroin[ ].

If called to testify, the officers and the State's witnesses would identify the defendants Kirk Nowlin and Dashawn Payton as conspiring to distribute schedule I narcotic heroin[ ] to an unknown individual on the date and time. That would be the State's case. State would submit.

MR KURLAND: If Your Honor please, there will be no additions, corrections or deletions subject to the possibility that the analysis would come back other than positive.

Counsel for Mr. Payton then said: "[N]o additions, corrections or modifications subject to the analysis coming back positive."

The judge then found, beyond a reasonable doubt, that both Mr. Payton and Mr. Nowlin had violated "the narcotics laws of this [S]tate," and sentenced both defendants in exact accordance with the ABA plea agreement. The court then added: "the analysis in this matter will be submitted to the court and the defense on or before December 15, 2013."

On December 20, 2013, counsel for Mr. Payton filed a motion to reopen case and dismiss charges. The grounds for the motion were that: 1) as of December 19, 2013, defense counsel "ha[d] not received any drug analysis for this case;" and 2) "this . . . [c]ourt ordered the State to provide both the [c]ourt and [c]ounsel with copies of the drug analysis No Later Than December 15, 2013 and advised the State that appropriate action would be taken should they fail to comply."[3]

On January 17, 2014, a hearing was held on Payton's post-guilty plea motion. At the hearing, the prosecutor told the court that the drug analysis had not been completed by the drug laboratory until January 10, 2014 and that it was given to Payton's counsel on January 14, 2014. The prosecutor argued, in pertinent part, that under the circumstances of this case, dismissal with prejudice would be an inappropriate remedy. Defense counsel replied that the drug tests had not been given to him until twenty-nine days past the December 15, 2013 deadline and that dismissal with prejudice was the appropriate remedy

[3]The judge did not say to either appellant or Mr. Nowlin that "appropriate action would be taken" if the State failed to meet the December 15, 2013 deadline. When their plea was accepted, the court told the defendants that if the chemical analysis came back as anything other than heroin then the matter would be brought back and the "proper remedy will be given."

because there would be "no purpose . . . in having the court order disclosure . . . [by a] deadline if the remedy is simply a dismissal . . . [inasmuch as] the State [could] recharge, with the loss of any jeopardy issues."

The same circuit court judge who had accepted the ABA guilty plea from Payton then stated:

> At this time, the [c]ourt will strike the guilty finding and the matter will be dismissed with prejudice. And the [c]ourt also finds and . . . let the record reflect that the State did violate the [c]ourt's order.

II.
STATE V. KARIEM YOONUS

Mr. Yoonus was indicted in the Circuit Court for Baltimore City for possession with intent to distribute cocaine and possession of cocaine. On November 26, 2013, which was the same date that Payton entered his ABA guilty plea, Yoonus appeared for arraignment before the same judge who had accepted Payton's plea. Also, Yoonus was represented by the same counsel who had represented Payton at the hearing where the plea was accepted. Thereafter, almost the same thing occurred in Yoonus's case as had happened in the Payton matter.

As in the Payton case, counsel for Mr. Yoonus and the prosecutor approached the bench to discuss a possible plea agreement. Yoonus's counsel made it clear that his client was interested in a possible guilty plea. After some discussion, the prosecutor made an offer of a five-year suspended sentence with three years of probation, which the court agreed was

"reasonable." The presiding judge also agreed to consider a motion for modification of sentence in the future once the cases had been resolved against two individuals who were the targets of the search warrant that had been executed at Yoonus's residence on the date of Yoonus's arrest. Counsel for Mr. Yoonus then discussed the plea agreement with his client and advised the court that his client would accept the terms of the ABA plea agreement.

Later that afternoon, Yoonus's case was recalled for the purpose of taking the ABA guilty plea. The prosecutor accurately set forth on the record the terms of the plea agreement, saying that if Yoonus would plead guilty to count I of the indictment, which charged him with possession with intent to distribute cocaine, the State would recommend a five-year sentence, all suspended with three years of supervised probation. At that point, the court interjected that it reserved the right to modify the defendant's sentence after the cases had been resolved against two other persons who were the targets of the search warrant just mentioned. Yoonus confirmed that these representations were consistent with his understandings of the terms of the plea agreement.

Yoonus was then fully advised of the rights he was giving up by agreeing to enter an ABA guilty plea. Among other things, counsel fully explained to Mr. Yoonus the nature of the charge of possession with the intent to distribute cocaine and the exact sentence he would receive if the plea was accepted. Yoonus indicated that his agreement to plead guilty was a free and voluntary one on his part. The presiding judge then said that she found that

Yoonus's decision to plead guilty was freely and voluntarily entered with the full understanding of the consequence of his decision.

The prosecutor then read into the record the facts that the State would have proven if the case had gone to trial, *viz*.: On October 1, 2013, Baltimore City police officers executed a search and seizure warrant at the place where Yoonus resided in Baltimore City. Mr. Yoonus was the only person in the house when the warrant was executed. A search of the house recovered from the kitchen a plastic bag containing 63 grams of suspected cocaine, a digital scale with suspected cocaine residue, and Yoonus's Maryland identification card. From the living room, where Yoonus was found when the warrant was executed, police officers recovered another plastic bag with fifty-one white top vials of suspected cocaine. The prosecutor then said that the chemical analysis of the substances found in Yoonus's home had not yet been completed but the parties stipulated that a chemical analysis would confirm that the suspected cocaine was in fact cocaine, a schedule II controlled dangerous substance.[4] Defense counsel offered no corrections or modifications. Yoonus's counsel next said: "We'll stipulate to the drug analysis at this time." The presiding judge then determined

---

[4] The exact statement by the prosecutor in regard to the drug analysis was:

> There is no chemical analysis that is in the State's file at this time, Your Honor, but per my conversation with counsel, in the stipulation that the recovered CDS was submitted to the Baltimore City Evidence Control Unit and later to the Chemical Analysis Unit. It would be testing positive for the Schedule II narcotic cocaine. That would be the State's case in chief, and the quantity of narcotics recovered was sufficiently indicative of street level distribution.

that the factual basis that the State had proffered was sufficient to support Mr. Yoonus's plea of guilty to possession with intent to distribute cocaine. Consistent with the ABA plea agreement, the judge sentenced Yoonus to five years in the Division of Corrections, but suspended that sentence except for time served. The court ordered that Yoonus be subjected to supervised probation for three years. After the sentence had been imposed, the presiding judge then added: "The State will provide to the defense and the [c]ourt on or before December 15, 2013 a copy of the analysis. Of course, if not, the defense can move to bring it back, and it will be gone."

On December 20, 2013, counsel for Mr. Yoonus filed a motion to reopen the case and dismiss the charges. Movant said that as of December 19, 2013, the State had not provided Yoonus's counsel with the chemical analysis of the drugs recovered when the search warrant was executed. Therefore, Yoonus asked the court to reopen the matter and dismiss the charges with prejudice.

A hearing on the motion to reopen the case and dismiss the charges was held on January 17, 2014, immediately after the court had dismissed all charges in Payton's case. The prosecutor told the judge that he had forgotten the December 15, 2013 deadline and as a consequence, was four days late in delivering the results of the test to Yoonus's counsel.

The prosecutor added that the analysis was provided to defense counsel on December 20, 2013.[5]

The prosecutor noted that the plea was a binding plea agreement and objected to the court striking the guilty plea. The court dismissed Yoonus's case with prejudice. The judge then added that the fact that the prosecutor had simply forgot to meet the deadline was "just not acceptable."

III.
DISMISSAL OF CHARGES WITH PREJUDICE

The State argues:

> The lower court acted without authority when it set aside appellees' convictions, permitted them to withdraw from their binding plea agreements and dismissed their indictments for the State's technical violation of a scheduling order.

Relying exclusively on Md. Rule 4-323(c), appellees first contend that the issue the State raises is not preserved for appellate review. Rule 4-323(c) provides, in relevant part: "For purposes of review . . . on appeal of any other ruling or order [except rulings regarding evidence], it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court."

---

[5]The due date, December 15, 2013, fell on a Sunday. Therefore the results were not actually due until December 16, 2013. *See* Md. Rule 1-203(a); *Grayson v. State*, 354 Md. 1, 14 (1999) (although the "next day" provision in Rule 1-203(a) expressly governs statutorily prescribed time periods ending on a Saturday, Sunday, or holiday, it also applies to a filing deadline set on a specific day when that day is a Saturday, Sunday, or holiday).

The appellees argue: "Because the State did not make contemporaneous objections to the circuit court's November 26, 2013, orders," the issue is not preserved for appellate review. The short answer to this contention is that the State is not appealing from the November 26, 2013 order by the plea judge. The only action that the court ordered on November 26, 2013 in either of the cases here at issue was that the drug analysis reports be delivered to the court and counsel by December 15, 2013.

In this appeal, the State does not contend that the court erred in entering those scheduling orders. Instead, the State objects to the action taken by the court on January 17, 2014, when the court dismissed both cases with prejudice. In both cases, the State, at the January 17, 2014 hearing, objected to the request of the appellees that the cases be dismissed. Thus the issue the State raises is preserved for appellate review.[6]

In regard to the merits of the State's argument that the motions judge had no authority to dismiss the cases, appellees, while admitting that the court's dismissal of the cases was

---

[6]In Payton's case, the plea judge said that she would take further action only if the drug analysis report showed that the material Payton possessed was not heroin. There was no contention in either the circuit court or in this Court that the drug analysis submitted did not show that the material was heroin.

In the Yoonus case, the court, after ordering that the drug test be provided by December 15, 2013, said if the drug test was not provided by December 15, "the defense can bring it back and it will be gone." Arguably, those words might be interpreted as meaning that the judge would dismiss the case. But no rule, statute, or case law requires a party to object to a statement by a judge concerning what the judge intends to do or threatens to do; instead, under Rule 4-323(c) to preserve an objection for appeal, a party must only object to what a judge actually does or fails to do. That objection was made in both cases by the prosecutor.

"unorthodox," nevertheless assert that the court did not abuse its discretion in striking the convictions and dismissing the cases with prejudice. In support of this assertion, appellees argue that the situation here presented is analogous to a violation of a discovery order. Appellees' exact argument is as follows:

> The circuit court's orders in these cases were not mere scheduling orders; rather, they were orders for the State to provide timely verification that the substances were actually the CDS alleged, *i.e.*, that the defendants actually were guilty of the crimes charged. Because they required the State to provide evidence, they were in the nature of discovery orders. Rule 4-263, pertaining to discovery in the circuit courts, provides in pertinent part:
>
> > If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, *or enter any other order appropriate under the circumstances.*
>
> Md. Rule 4-263(n) (2014). The circuit court has the discretion to determine the appropriate remedy for a violation of a discovery order. *See Williams v. State*, 364 Md. 160, 178 (2001). In light of the important societal interests served by the judge's orders and the prosecution's failure to comply with those orders and its failure to show good cause for its noncompliance, the remedy selected by the judge was an appropriate exercise of her discretion.

Md. Rule 4-263(n) is not applicable here because it applies only when the "court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule . . . ." The State did not fail to comply with Rule 4-263, nor was the court's order issued pursuant to that discovery rule. There was no discovery initiated in this case. As the State argues, there is simply no authority for the court to dismiss a criminal case where, as here: 1) the

defendant has entered into a binding ABA plea agreement; 2) the judge agrees to be bound by that agreement; and 3) at the time the plea is entered, the court imposes a sentence in exact conformity with the ABA agreement.[7]

By convincing the judge to dismiss these cases with prejudice, the appellees, who both freely admitted their guilt to very serious criminal offenses, obtained a benefit for which they had not bargained and to which they were not entitled.[8]

IV.
OTHER MATTERS

The State filed an appendix to its brief. Four pages of the appendix concern what purport to be the drug reports in the two cases here at issue, showing that: 1) the drugs recovered in the Payton case were in fact heroin; and 2) the drugs recovered pursuant to the search warrant issued in Yoonus's case were cocaine. Appellees filed a motion to strike the aforementioned four pages of the State's appendix because those drug reports are not in the circuit court record. We shall grant that motion because, as appellees argue, it is improper to include in an appendix documents that were not before the circuit court.

---

[7]Even if we were to assume, as appellees do, that these cases were governed by Md. Rule 4-263(n), the appellees would not benefit because it could not be clearer that the court's action in dismissing the cases was arbitrary and an abuse of discretion. The late filing of the drug reports did not even arguably harm the defendants or prejudice their counsel or anyone else. Moreover, prior to agreeing to the binding plea agreement, no one agreed in either case that the cases would be dismissed if the prosecution missed the December 15, 2013 deadline.

[8]It is clear that the only reason that the judge dismissed these cases was because she was offended by the fact that her order was disobeyed. Even if the appellees were right, and the discovery rules were applicable, this plainly did not provide justification for dismissal. *See Hart v. Miller*, 65 Md. App. 620, 625 (1985).

The fact that the drug analysis reports were not made a part of the record does not change the results of these cases. This is so because under the plea agreement, the guilty pleas could only be stricken if the drug results were negative. Appellees have never contended that either of the drug results were in fact negative.

JUDGMENTS REVERSED; CASES REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY WITH INSTRUCTIONS TO: 1) REINSTATE THE CONVICTION OF DASHAWN PAYTON AS TO COUNT IV OF THE INDICTMENT FILED IN CASE NO. 113303018; 2) REINSTATE THE CONVICTION OF KARIEM YOONUS IN CASE NO. 113303009 AS TO COUNT I; COSTS OF REPRODUCING THE FOUR PAGES OF THE APPENDIX THAT WE HAVE ORDERED STRICKEN TO BE PAID BY THE STATE; ALL OTHER COSTS TO BE PAID BY APPELLEES.