UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0856

September Term, 2013

THOMAS McNEIL

v.

STATE OF MARYLAND

Meredith,
Graeff,
Leahy,
JJ.

Opinion by Graeff, J.

Filed: March 2, 2015

Thomas McNeil, appellant, was convicted by a jury in the Circuit Court for Baltimore City of distribution of a controlled dangerous substance (CDS), possession of CDS with intent to distribute, and possession of CDS.[1] The court imposed the following sentences: 25 years without the possibility of parole for the conviction of distribution of CDS; and 25 years, concurrent, without the possibility of parole, for the conviction of possession of CDS with intent to distribute.[2]

On appeal, appellant presents the following three questions for our review:

1. Did the circuit court abuse its discretion in denying appellant's request for a continuance, and thereafter err in granting the State's motion *in limine* to preclude examination of a law enforcement witness on an unrelated investigation?

2. Did the circuit court err in imposing two separate sentences of 25 years without the possibility of parole?

3. Did the circuit court err in failing to merge appellant's conviction for possession of a controlled dangerous substance with the intent to distribute into his conviction for distribution of a controlled dangerous substance for sentencing purposes?

For the reasons set forth below, we agree that the court erred in imposing two separate sentences of 25 years without parole. Accordingly, we shall vacate the sentences for distribution of CDS and possession of CDS and remand for resentencing. Otherwise, we shall affirm the judgments of the circuit court.

---

[1] Appellant was tried jointly with Derrick Vaughan, who was acquitted of all charges.

[2] The court merged the possession conviction into the possession with intent to distribute conviction for sentencing purposes.

FACTUAL AND PROCEDURAL BACKGROUND

On December 22, 2011, at approximately 3:00 p.m., a squad of five Baltimore City police officers were working undercover looking for drug activity in the 1900 block of North Collington Avenue. Detective Michael Vodarick was observing the area with binoculars from a covert location in a wooded area on a hill, looking down on North Collington Avenue from about a block away.

Detective Vodarick saw appellant engage in what he believed to be two drug sales. The first suspected sale was to two women. Those women were not stopped. The second suspected sale was to a man named Darnell Johnson. After witnessing this sale, Detective Vodarick contacted the other members of his team, and he asked them to stop Mr. Johnson. Detectives Joshua Fidler and William Janu stopped Mr. Johnson and recovered a purple topped vial of suspected cocaine from Mr. Johnson's mouth.

Detective Vodarick observed appellant working with his co-defendant, Derrick Vaughn, in making both sales. Appellant yelled to Mr. Vaughn, who was across the street, and Mr. Vaughn responded by standing up and looking down the street. Detective Vodarick believed that Mr. Vaughn was acting as a "lookout" for appellant. At times during the suspected drug transactions, appellant left Detective Vodarick's view and walked toward a church that was on North Collington Avenue.

After Mr. Johnson's arrest, Detective Vodarick called the members of his team and gave them descriptions of appellant and Mr. Vaughn. Sergeant Matthew Day, one of

Detective Vodarick's team, observed appellant kneeling near the corner of the church, appearing to be retrieving a plastic bag of CDS. When appellant saw Sergeant Day, he immediately fled.

Detective Kenneth Scott apprehended appellant. Prior to the apprehension, Detective Scott saw appellant throw a bag into the air. Purple-topped vials fell out of the bag, sixteen of which eventually were collected. Detective Fidler searched the area around the church and recovered a bag containing 25 purple-topped vials of suspected cocaine from between a wall and a shed on the church grounds. The suspected cocaine was tested and confirmed to be cocaine.

DISCUSSION

I.

Appellant's first contention involves the court's ruling on a motion *in limine* filed by the State. He asserts that the ruling was improper for two reasons: (1) the court abused its discretion in denying his request for a continuance to prepare a response to the motion; and (2) the court erred in granting the motion.

A.

Proceedings Below

At the beginning of the first day of trial, the State filed a written motion *in limine* to preclude the defense from questioning Detective Vodarick regarding an unrelated investigation by the police department's Internal Investigation Division ("IID"). Defense

counsel advised the court that he was not prepared to proceed with the motion because he had just received it, and he had not had an opportunity to investigate the information. Defense counsel asked the court to postpone the case for a week to allow him to prepare to address the motion.

The court denied the motion to postpone, stating:

> Well, [counsel for Mr. Vaughn] has already made similar argument about the ability to have this motion heard now. And as I said before we took the lunch break, I'm going to hear the State's argument in connection with the motion and in conjunction with your opposition I'll hear the way in which the Defendants allege that they're prejudiced by the timing of the motion and then I'll decide at that point once I assess what information the State has and any other questions I may ask the State, whether it's [ripe] for a decision.

The State then explained the substance of the underlying investigation of Detective Vodarick in the unrelated matter:

> Okay. Your Honor, as you can see this goes back to September 21st, 2012. Detective Vodarick was involved in an arrest with other officers. One of the officers attempted to make an investigative stop of a citizen, Mr. Anthony Anderson and a physical encounter ensued. The results thereof was Mr. Anderson died.
>
> Detective Vodarick and the other officers involved were suspended pursuant to standard procedures and an investigation is underway jointly by [IID] in conjunction with the State's Attorney's Office. That investigation is ongoing, unresolved. There have been no charges criminally, administratively or otherwise with respect to any of those involved.

The State argued that, because the alleged underlying conduct was assaultive in nature, it was not probative of Detective Vodarick's credibility, and therefore, it was not impeachable pursuant to Maryland Rule 5-608(b). It further argued that, pursuant to *Height*

v. State, 185 Md. App. 317, *vacated on other grounds*, 411 Md. 662 (2009), a police officer's suspension is not, without more, admissible to impeach his or her credibility, and because *Height* was so directly applicable to this case, appellant would suffer no prejudice due to the timing of the motion.

Defense counsel adopted the arguments made by Mr. Vaughn's counsel, who argued as follows:

> We are not suggesting that we should or would be permitted to talk about any assaultive behavior because obviously that does not go to credibility; however, Your Honor, in this case there were reports in the public domain when this event occurred that the cause of death of this young man was due to the ingestion of drugs. That was I'm sure within a day or so of this incident.
>
> About a week to ten days later the autopsy report was revealed which said that he died from blunt force trauma, which certainly suggests that there was some lying, misinformation, whatever it is that we want to call it. Somebody gave information that he died one way and we then find out about a week later that he died from a ruptured spleen and fractured ribs.

Defense counsel then requested the opportunity to examine Detective Vodarick in a hearing outside the presence of the jury, stating that he wanted to ask Detective Vodarick if he initially reported that Mr. Anderson died from "swallowing drugs." Counsel asserted that, if Detective Vodarick lied about the cause of Mr. Anderson's death, his credibility could be impeached.

Defense counsel then reiterated that he had not had enough time to research the issue. He also complained that he had been provided only a summary of the incident, which impaired his ability to effectively argue the motion.

The court then asked the prosecutor to respond to the argument that further investigation might reveal that Detective Vodarick had made a false statement. The State responded that it was not aware of any such statement, and it would have turned such a statement over to the defense if it was aware of such a statement. The prosecutor argued that defense counsel had the burden to present a factual basis from which the court could conclude that Detective Vodarick had been untruthful during the investigation.

After taking a recess to read the cases cited in the State's motion, the court granted the motion, stating as follows:

> I conclude on the first issue that the motion is [ripe] for a decision. Both Defendants have asked for additional time, perhaps only a short amount of time to conduct further investigation, but I conclude that in these circumstances that investigation is unlikely to yield any information that would change the nature of the ruling on the motion in this case. Specifically because this concerns an ongoing investigation in which Detective Vodarick is involved and I've received no information that would suggest that that investigation is going to [be] concluded or that there would be any outcome of that investigation in the near term as opposed to - - on an indefinite schedule.
>
> With respect to the motion[,] I'm guided by the cases cited by the State, particularly both the [Height] case and Colkley both cited by the State in its papers and both cases in which the court affirmed decisions of the trial court not to allow inquiry at trial into either the fact of suspension of an officer or into the underlying issues involving an investigation of an officer.
>
> In this case under [Md.] Rule [5-608(b)], the Defendants would have to establish first that the information they're proffering to ask the officer would be relevant, then they would have to establish a factual basis outside of the hearing of the jury of the truth of that information and then they would be able to ask the question of the detective and be bound by his answer. Because the investigation is ongoing, I conclude that the Defendants would be unable to satisfy the showing of the truth of any of the information that they propose to ask.

The court further stated:

> Any inquiry of Detective Vodarick in this – in these circumstances would inevitably lead into a mini trial or a side trial of the issues in the separate incident. And for reasons of trial management and a fairness to the officer, it is not possible to try that collateral issue within the context of this trial. Therefore, the State's motion will be granted.

B.

Parties' Contentions

Appellant contends that the circuit court erred and abused its discretion in its ruling. As indicated, he contends that the ruling was improper because: (1) the court abused its discretion in failing to grant a continuance; and (2) it erred in granting the State's motion *in limine* to preclude examination of Detective Vodarick about an unrelated investigation. In support, he asserts that the court erred in "granting the motion, where the defense was not given any opportunity to determine whether 'a reasonable factual basis' existed 'for asserting that' the witness had lied during the IID investigation of his wrongdoing."

The State contends that appellant's argument that a continuance was necessary "to review an IID file is not preserved for review because [appellant] never sought, by subpoena or otherwise, to review an IID file below." It asserts that appellant "could have sought to obtain the IID file at any time after the trial court ruled and before the close of the evidence at trial," and appellant's appellate argument, "that a continuance was necessary so that he could subpoena the IID file, therefore, should be rejected as unpreserved." In any event, the State contends that the court did not abuse its discretion in denying appellant's request to

continue the trial for a week. It asserts that "the contents of the IID file in this case – if one existed and had counsel sought to obtain it – was not even arguably relevant and usable, and a motion to continue, therefore, would have been fruitless." It contends that there was no evidence that Detective Vodarick lied about the unrelated case.[3]

C.

Analysis

We address first the contention that the court erred in granting the motion *in limine* to exclude questioning of Detective Vodarick regarding the unrelated case. In *Fields v. State*, 432 Md. 650, 673-74 (2013), the Court of Appeals discussed the requisite analysis to determine whether a person may impeach a witness' credibility with prior bad acts pursuant to Maryland Rule 5-608(b).[4] The Court explained as follows:

---

[3] The State further asserts that, because Detective Vodarick now has been cleared of any wrongdoing, there would be no basis for impeaching Detective Vodarick in a new trial. Accordingly, it argues, the issue before us is moot. Because the sole basis for this argument is a citation to a newspaper article, appellant has not responded to this argument, and we conclude that the argument fails on the merits, we shall not address this contention.

[4] Maryland Rule 5-608(b) provides:

> **Impeachment by Examination Regarding Witness's Own Prior Conduct Not Resulting in Convictions.** The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

> [A]lthough "mere accusations of crime or misconduct may not be used to impeach," we have allowed, given a proper showing, cross-examination of a witness regarding "prior bad acts which are relevant to an assessment of the witness' credibility." [*State v. Cox*, 298 Md. 173, 179 (1983)]. To be sure, "if the bad acts are not conclusively demonstrated by a conviction, the trial judge must exercise greater care in determining the proper scope of cross-examination." *Robinson v. State*, 298 Md. 193, 200, 468 A.2d 328 (1983). Nevertheless, such inquiry is allowed "when the trial judge is satisfied that there is a reasonable basis for the question, that the primary purpose of the inquiry is not to harass or embarrass the witness, and that there is little likelihood of obscuring the issue on trial." *Cox*, 298 Md. at 180, 468 A.2d 319. . . . [T]he trial judge must be alert to the possibility of prejudice outweighing the probative value of the inquiry. *Id.*; *see* Md. Rule 5-403. Indeed, "when impeachment is the aim, the relevant inquiry is not whether the witness has been accused of misconduct by some other person, but whether the witness actually committed the prior bad act. A hearsay accusation of guilt has little logical relevance to the witness' credibility." *Cox*, 298 Md. at 181, 468 A.2d 319.

Id. at 673-74.

In *Fields*, the Court of Appeals held that, where IID had investigated allegations of timesheet tampering by a detective who was a witness, and found the allegation sustained, this constituted a reasonable basis that the asserted bad conduct, which was probative of credibility, had occurred. Id. at 674-75. In this case, however, the investigation was ongoing. Unlike in *Fields*, there was no undisputed allegation involving credibility that was "sustained." The trial court properly prevented appellant from questioning Detective Vodarick about whether he lied about the cause of death in the unrelated case where appellant did not proffer a reasonable basis to believe that this conduct occurred.

Appellant contends, however, that the court erred in failing to grant him a postponement to give him an opportunity to determine whether "a reasonable factual basis"

existed that Detective Vodarick had lied during the IID investigation in the unrelated case. We have described the standard of review for the denial of requests for continuance, as follows:

> We review the decision to deny a motion for a continuance for an abuse of discretion: "[t]o grant or deny a . . . motion for continuance is 'in the sound discretion of the trial court.'" *Serio v. Baystate Props., LLC*, 209 Md. App. 545, 554, 60 A.3d 475 (2013) (quoting *Das v. Das*, 133 Md. App. 1, 31, 754 A.2d 441 (2000)); *see also* Md. Rule 2-508. Unless we conclude that the trial court acted arbitrarily, we will not review its decision on appeal, *Das*, 133 Md. App. at 16, 754 A.2d 441, and will reverse only in "exceptional instances where there was prejudicial error." *Thanos v. Mitchell*, 220 Md. 389, 392, 152 A.2d 833 (1959). We have described such an abuse of discretion as occurring only "'where no reasonable person would take the view adopted by the [trial] court,'" *North v. North*, 102 Md. App. 1, 13, 648 A.2d 1025 (1994) (quoting *In re: Marriage of Morse*, 240 Ill.App.3d 296, 180 Ill.Dec. 563, 607 N.E.2d 632, 640 (1993)), or where the court acts "'without reference to any guiding rules or principles,'" *id.* (quoting *Long John Silver's, Inc. v. Martinez*, 850 S.W.2d 773, 775 (Tex.App.1993)).

Prince v. State, 216 Md. App. 178, 203-04, *cert. denied*, 438 Md. 741 (2014).

Here, the circuit court denied the motion to postpone after finding that a postponement was unlikely to generate any information that would change the court's ruling, noting that the investigation was ongoing, with no indication that it would be concluded in the near future. We perceive no abuse of discretion in this regard.

II.

Appellant's next contention involves his sentence. At the time of sentencing, appellant had two prior drug convictions, which qualified him for an enhanced sentence as a third-time offender under Md. Code (2012 Repl. Vol.) § 5-608(c) of the Criminal Law

Article ("C.L."). The court imposed the mandatory sentence of 25 years without the possibility of parole on appellant's conviction for distribution of cocaine *and* on his conviction for possession with intent to distribute cocaine, and it ordered that the two sentences run concurrently.

Appellant contends that the court erred when it imposed two separate sentences of 25 years without parole. Citing our opinion in *Veney v. State*, 130 Md. App. 135, *cert. denied,* 358 Md. 610 (2000), appellant contends that one of the two sentences must be vacated. The State agrees that, "pursuant to *Veney*, the trial court should have imposed only one sentence of 25 years without parole."

In *Veney*, the defendant had been convicted of possession of cocaine, possession with intent to distribute cocaine, possession of heroin, and possession with intent to distribute heroin. *Id.* at 139. The defendant was a second-time offender, and the court imposed the mandatory sentence of 10 years without parole for each conviction. *Id.*

On appeal, this Court concluded that it was ambiguous whether the enhanced penalty statute applied only to the "second conviction" or to all convictions arising from a course of conduct. *Id.* at 147. Because an ambiguous penal statute is subject to the rule of lenity, this Court construed the statute against the State and in favor of the defendant, holding: "The enhanced penalty may only be imposed upon the second conviction, and while either [of] appellant's possession with intent to distribute convictions so qualify, we conclude that both

do not qualify." *Id.* at 149. The Court ordered that the sentences for each of the intent to distribute convictions be vacated and the case be remanded for resentencing. *Id.* at 156.

Similarly, here, either of appellant's convictions, possession with intent to distribute CDS or distribution of CDS, qualified for enhanced sentencing pursuant to C.L. § 5-608(c). The court, however, was permitted to impose the enhanced penalty on only one of those convictions, not both. Accordingly, as in *Veney*, we vacate appellant's sentences and remand for re-sentencing.

III.

Appellant's final contention is that the circuit court erred in failing to merge, for sentencing purposes, his conviction for possession of CDS with the intent to distribute into his conviction for distribution of CDS. Appellant implicitly acknowledges that the evidence supported a jury finding that the convictions were based on separate acts: (1) the act of distribution to Mr. Johnson, and (2) possession of the baggie of 16 purple-topped vials of cocaine that he threw after the detective approached him or constructive possession of the baggies with 25 vials secreted next to the church. Appellant argues, however, that because the jury did not specifically delineate the basis for each conviction, fundamental fairness requires merger of the convictions.

The State disagrees. Noting that appellant agreed below that the two convictions should not merge, the State argues that appellant affirmatively waived this issue, and therefore, it is not before this Court for review. In any event, the State contends that the

conviction for distribution and the conviction for possession with intent to distribute were based on separate acts, and pursuant to *Hawkins v. State*, 77 Md. App. 338 (1988), separate sentences were appropriate.

With respect to appellant's claim of ambiguity regarding the jury verdict, the State notes that the prosecutor clearly argued that the two charges were based on distinct acts. It contends that "there is nothing fundamentally unfair about imposing separate sentences for offenses that are based upon separate acts or transactions."

We have already indicated that we are vacating the sentences for distribution of CDS and possession of CDS with the intent to distribute and remanding for resentencing. Accordingly, we need not address this issue. Appellant is free to raise this issue at resentencing, if he deems it to be warranted.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. SENTENCES FOR DISTRIBUTION OF CDS AND POSSESSION OF CDS WITH INTENT TO DISTRIBUTE VACATED. CASE REMANDED FOR RESENTENCING. COSTS TO BE PAID 34% BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, AND 66% BY APPELLANT.