UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1272

September Term, 2014

IN RE: SHANICA B.

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

JJ.

Revised Opinion by Salmon, J.

Filed: October 19, 2015

Shanica B. ("Ms. B.") is the mother of a daughter, Layalia, and two other children. She was charged in the Circuit Court for Prince George's County, sitting as a juvenile court, with violating Md. Code (2012 Repl. Vol.), Education Article ("EA") section 7-301, which makes it a crime (with certain exceptions) for a parent to fail to ensure that a school age child regularly attends school. Ms. B. pleaded "involved" to that charge at an adjudicatory hearing held on March 21, 2012.

At the conclusion of the adjudicatory hearing, the trial judge stated "I'll sentence you to ten days [incarceration] and I will suspend it." The judge then scheduled a review hearing for June 6, 2012. The June 6, 2012 hearing was postponed and was thereafter continued on several other occasions. Finally, on July 1, 2014, a disposition hearing was held to determine if appellant's "probation" should be revoked. At the hearing, it was brought to the trial judge's attention that appellant's daughter had failed to attend school, without a valid excuse, since the March 21, 2012 hearing. Ms. B.'s attorney argued that the judge could not violate his client's probation because she had never been placed on probation in the first place. The trial judge disagreed and found that Ms. B. had violated her probation and, as a consequence of that violation, sentenced her to ten days incarceration.

Ms. B. filed an application for leave to appeal on July 25, 2014. This Court, by an order dated March 25, 2015, granted Ms. B.'s application. Ms. B. raises one question for our consideration in this appeal, *viz*.:

> Must the finding that [a]ppellant violated probation be vacated because she was never validly on probation in the first instance?

For the reasons set forth below, we shall answer that question in the affirmative and vacate Ms. B.'s sentence.

I.
BACKGROUND FACTS

With exceptions not here relevant, EA section 7-301 requires each child who resides in Maryland and is 5 years old or older and under 16, to attend a public school regularly during the entire school year.

EA section 7-301 (e-1), *et seq*. applies to several counties, including Prince George's County, where Ms. B. resides. Section 7-301(e) (2007 Supp.) provides:

> (e) *Penalties*. – (1) Any person who induces or attempts to induce a child to absent himself unlawfully from school or employs or harbors any child who is absent unlawfully from school while school is in session is guilty of a misdemeanor and on conviction is subject to a fine not to exceed $500 or imprisonment not to exceed 30 days, or both.
>
> (2) Any person who has legal custody or care and control of a child who is 5 years old or older and under 16 who fails to see that the child attends school or receives instruction under this section is guilty of a misdemeanor and:
>
> (i) For a first conviction is subject to a fine not to exceed $50 per day of unlawful absence or imprisonment not to exceed 10 days, or both; and
>
> (ii) For a second or subsequent conviction is subject to a fine not to exceed $100 per day of unlawful absence or imprisonment not to exceed 30 days, or both.
>
> (3) As to any sentence imposed under this section, the court may suspend the fine or the prison sentence and establish terms and conditions which would promote the child's attendance. The suspension authority provided for in this subsection is in addition to and not in limitation of the

> suspension authority under § 6-221 of the Criminal Procedure Article.
>
> (e-1) *Applicability of subsection; charge filed in juvenile court.* – (1) This subsection applies only:
>
> (i) In a county in which the circuit administrative judge has established a Truancy Reduction Pilot Program under § 3-8C-02 of the Courts Article; and
>
> (ii) To the extent that funds are provided in an annual State budget for a Truancy Reduction Pilot Program.
>
> (2) A charge under this section may be filed in the juvenile court and assigned to a truancy docket for disposition under Title 3, Subtitle 8C of the Courts Article.
>
> (3)(i) For a person with legal custody or care and control of a child at the time of an alleged violation of this section, it is an affirmative defense to a charge under this section that the person made reasonable and substantial efforts to see that the child attended school as required by law but was unable to cause the child to attend school.
>
> (ii) If the court finds the affirmative defense is valid, the court shall dismiss the charge under this section against the defendant.
>
> (4) The court may condition marking a charge under this section stet on participation of the defendant in the appropriate Truancy Reduction Pilot Program under Title 3, Subtitle 8C of the Courts Article.

(Emphasis added.)

Pursuant to section 7-301(e-1), charges against Ms. B. were filed in the juvenile court for Prince George's County and placed on the truancy docket. When Ms. B. appeared in court on March 21, 2012, she pleaded "involved" to the charges and admitted that her daughter, Lalayia, had attended school only four times that year. Also, at the hearing, it was established that Ms. B. faced additional charges because her two other children had not been attending school regularly, although they were of school age.

When the trial judge asked Ms. B. at the March 21, 2012 hearing why Lalayia had not

been attending school regularly, Ms. B. said:

> She had eczema skin infections and open sores, and plus she had – when she did go to school, she's terrified of the kids calling her stupid. Calling her names. Calling her ugly. Making fun of her because of her eczema.

The trial judge then asked Ms. B. what assurance she could give him that Lalayia would attend school regularly. The following exchange then occurred:

> [MS. B.]: She'll go to school every day. But she is more afraid of the kids making fun of her.
>
> THE COURT: How old is the child?
>
> THE RESPONDENT: Nine.
>
> THE COURT: Okay. You may be missing what – my question. What assurance do I have that this nine year old child will go to school every day.
>
> [LALAYIA]: I will go to school every day.
>
> THE COURT: I will be up-front with you. I will give you a break today, but if you come back in here, and the child's missed a day in school, you'll have some problems. You will not likely go home.
>
> Now, [defense counsel], I have no idea what the medical condition is.
>
> But, Ms. B, you apparently didn't bring the proper documentation today to show your lawyer that the child has missed a day in school. I'm not talking about calling her names or making fun, because it's a medical issue.
>
> [MS. B.]: Yes.
>
> THE COURT: It must be written medical proof the day of the attack.
>
> [MS. B.]: Okay.

THE COURT: Not two, three days later saying on March 23rd the doctor writes a note saying that the child is excused from school for March 20th when the doctor did not see the child on March 20, 21 or 22.

[MS. B.]: Yes, sir.

THE COURT: And if the child is missing school, you will end up serving two days in the county jail.

Now, I have no idea what may be going on in your household, and it is not before me today. . . . It will behoove you to talk to [the social worker] and work out this with her. Second, to be in the house if you're not going to court because there are two other children in the house, who are not going to court, because they tell me there are two other children in the house who are not going to school. That's 30 days in the County jail. That includes this case.

Now, if that happens, I can almost assure you the kids will not be with you when you get out. I can also assure you the kids will be in the custody of the Social Services. And I can almost assure you right now there might not be a good explanation to give as to why all the kids are not going to school and why Social Service should not be investigating and look into removing those children. That to me might be considered neglect, which is a basis for a CINA. A child in need of assistance.

(Emphasis added.)

The circuit court then imposed its sentence on March 21, 2012 as follows:

This nine year old does not have a fighting chance in her life if mom is not going to make her and get her in school every day. I said that back in June.[1] But I'll sentence you to ten days, and I will suspend it. Now, that doesn't mean that we have a whole lot of talking back and forth if the child is not attending school. I'll listen to what your lawyer has to say. And if she has

[1]The record is not clear as to what the judge meant when he said "back in June."

> the medical documentation, I will give it the respect I should give it, but you telling me they're looking at her funny is not going to work.
>
> Court will see you on June 6th.

(Emphasis added.)

After the March 21, 2012 hearing, the clerk prepared, and the trial judge signed, a "Juvenile Delinquency Daily Sheet." The daily sheet shows that Ms. B. was "[s]entenced to the jurisdiction of the county correctional facility as follows: Count 1: for a period of (10) days. All suspended." The daily sheet also states that the proceedings would be "[c]ontinued in present status" and would be "[r]eset . . . for review . . . as to other conditions" on June 6, 2012. Line 16 on that sheet has a place where a check mark can be made showing that the defendant has been placed on probation. That box was not checked nor is there any other indication on the daily sheet that was signed by the judge showing that Ms. B. had been placed on probation.

When a review hearing was finally held in July, 2014, which was about 27 months after the disposition hearing, the trial judge "revoked" Ms. B.'s probation and sentenced her to ten days in jail.

II.
ANALYSIS

Appellant contends that the court's order sentencing her for violation of probation must be vacated because the court never "effectively placed her on probation."

Alternatively, appellant argues that even assuming *arguendo* that the lower court "implicitly ordered probation on March 21, 2012," its finding that Ms. B. violated probation must still be vacated because, the duration of the probation was not specified and therefore the sentence constituted an illegal indeterminate sentence.

In support of her position, Ms. B. relies, *inter alia*, on *Cathcart v. State*, 397 Md. 320 (2007). In *Cathcart*, after the defendant was convicted of first degree assault, the court imposed a sentence of ten years incarceration. The court also convicted the defendant of false imprisonment and imposed a life sentence, with all but ten years suspended, to run consecutive to the first degree assault sentence. *Id*. at 322. The trial judge in *Cathcart*, however, imposed "[n]o period of probation . . . with respect to the suspended part of the life sentence." *Id*. at 322-23. The *Cathcart* Court held that the sentence for false imprisonment was legal inasmuch as "the sentence imposed for false imprisonment, despite its wording, was not a life sentence and has no attribute or collateral consequence of a life sentence." *Id*. at 325. According to the *Cathcart* Court, by failing to order probation, the sentencing court "effectively . . . impose[d] two ten-year sentences, one consecutive to the other," and there was nothing unlawful in doing that. *Id*. In making this determination, the Court of Appeals stressed that a sentence is a *bona fide* split sentence only if the sentencing court: (1) imposes a sentence for a specified time and provides that a lesser time be served in confinement; (2) suspends the remainder of the sentence; and (3) orders probation for a time [authorized by

a statute]. *Id*. at 326. In reaching that conclusion, the *Cathcart* Court relied on Md. Code Annotated (2001) Criminal Procedure Article ("CP"), section 6-222(a), which reads:

> (a) A circuit court or the District Court may:
>
> (1) impose a sentence for a specified time and provide that a lesser time be served in confinement;
>
> (2) suspend the remainder of the sentence; and
>
> (3) (i) order probation for a time longer than the sentence but, subject to subsections (b) and (c) of this section, not longer than:
>
> 1. 5 years if the probation is ordered by a circuit court; or
> 2. 3 years if the probation is ordered by the District Court; or
>
> (ii) if a defendant convicted of sexual abuse of a minor under § 3-602 of the Criminal Law Article or a crime involving a minor under § 3-303, § 3-304, § 3-305, § 3-306, or § 3-307 of the Criminal Law Article, consents in writing, order probation for a time longer than the sentence that was imposed on the defendant, but not longer than:
>
> 1. 10 years if the probation is ordered by a circuit court; or
> 2. 6 years if the probation is ordered by the District Court.
>
> (b)(1) For the purpose of making restitution, the court may extend the probation beyond the time allowed under subsection (a)(3)(i) of this section for:
>
> (i) an additional 5 years if the probation is ordered by a circuit court; or
>
> (ii) an additional 3 years if the probation is ordered by the District Court.
>
> (2) An extension of probation under this subsection may be unsupervised or supervised by the Division of Parole and Probation.
>
> (c) The court may extend the probation beyond the time allowed under subsection (b) of this section if:
>
> (1) the defendant consents in writing; and
>
> (2) the extension is only for making restitution.

If the legal principles enunciated in *Cathcart* were applicable in this case, reversal would be required because: 1) the trial court never explicitly placed Ms. B. on probation; and

2) even if we were to assume, *arguendo*, that she was ever placed on probation, the court never established the duration of probation.

The State argues that the principles of law established in *Cathcart* are inapplicable in this case. The State relies on section 7-301(e)(3) of the Education Article, which we have already quoted in full. *See* page 2-3, *supra*. The State stresses that section 7-301(e)(3) provides that:

> As to any sentence imposed under this section, the court may suspend the fine or the prison sentence and establish terms and conditions which would promote the child's attendance. The suspension authority provided for in this subsection is in addition to and not in limitation of the suspension authority under § 6-221 of the Criminal Procedure Article.

(Emphasis added.)

Section 6-221 of the Criminal Procedure Article reads:

> On entering a judgment of conviction, the court may suspend the imposition or execution of sentence and place the defendant on probation on the conditions that the court considers proper.

The State contends that the legislative history of the language in subsection (e)(3) of section 7-301 which was added to the statute in 1984, demonstrates that its intent was to provide the courts with more flexibility to craft appropriate sanctions in situations where a student had chronic unexcused absences. The State's argument continues that in light of subsection (e)(3) and its legislative history, "the circuit court did not err in imposing the ten days of previously suspended incarceration upon a finding that [Ms. B.] had failed to comply

with the conditions placed on her at the time that the sentence was imposed."

We agree with the State that the General Assembly intended, when it enacted section 7-301(e)(3), to give the sentencing court more flexibility in imposing suspended sentences. But, the General Assembly gave no indication that by enacting section 7-301(e)(3) it intended to allow a circuit court judge to do what was done here, i.e., suspend the sentence without placing the defendant on probation and then later revoking that "probation" for failure to abide by probationary conditions.

Our interpretation is supported by EA section 7-301(e), which is quoted in full *supra*, at pages 2-3. Pursuant to section 7-301(e-1)(e-2), charges were brought against Ms. B. "and assigned to a truancy docket for disposition" pursuant to Title 3, Subtitle 8C of the Courts Article. *See* page 3 *supra*. Title 3, Subtitle 8C of the Courts Article, has 12 subsections that all deal with Maryland's Truancy Reduction Program. Two of those sub-sections are here relevant, i.e., 3-8C-07 and 3-8C-09, which provide:

> **§ 3-8C-07. Probation.**
>
> A criminal defendant under this subtitle is subject to:
>
> (1) Any conditions of probation authorized under § 6-220 of the Criminal Procedure Article [dealing with acceptable conditions for probation before judgment]; and
>
> (2) Any additional condition of probation that would promote the child's attendance in school.
>
> **§ 3-8C-09. Petition governed by Maryland Rules**.
>
> Except as otherwise provided in this subtitle, the Maryland Rules govern the

> format of the petition and the procedures to be followed by the court and the parties under this subtitle.
>
> Maryland Rule 4-346(a) provides:
>
> **Probation**.
> (a) **Manner of imposing**. When placing a defendant on probation, the court shall advise the defendant of the conditions and duration of probation and the possible consequences of a violation of any of the conditions. The court also shall file and furnish to the defendant a written order stating the conditions and duration of probation.

Nothing in subtitle 8C (Truancy Reduction Pilot Program) makes the Maryland Rules inapplicable to the procedures to be followed by the court "under [subtitle 8C]." Therefore, the Maryland Rules were applicable to the proceedings brought against appellant in this matter. Accordingly, we hold that on the date of the disposition hearing, the trial judge failed to comply with three provisions of Md. Rule 4-346(a). Although Ms. B. was told in a general way on the date of disposition what might happen to her if she again failed to ensure that Layalia attended school regularly, Ms. B. was never told that she was on probation nor was she advised of the duration of the probation. Moreover, she was never given a written order stating the conditions and duration of probation. For the same reasons as set forth in *Cathcart,* we hold that no legitimate split sentence was imposed upon appellant, and, as a consequence, the court had no right to impose the ten-day sentence, which had previously been suspended.

FINDING THAT APPELLANT VIOLATED PROBATION VACATED; SENTENCE ALSO VACATED; COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.