

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0578

September Term, 2015

OCTAVION DEMETRICE RATCLIFFE

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: June 3, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant Octavion Demetrice Ratcliffe appeals from his convictions in the Circuit Court for Prince George’s County of two counts of possession of a regulated firearm after conviction of a disqualifying crime, two counts of possession of a regulated firearm after conviction of a crime of violence, two counts of possession of a regulated firearm, and possession of drug paraphernalia in distribution. He raises the following questions for our consideration:

“1. Did the court err in denying appellant’s motion to dismiss based on the failure to hold a preliminary hearing?

2. Did the court err in denying appellant’s motion to dismiss the counts charging possession of a regulated firearm after having been convicted of a crime of violence and possession of a regulated firearm after conviction of a disqualifying crime as *ex post facto* violations and, in the alternative, did the court impose an illegal sentence on these counts because the sentences exceed five years?”

Finding no error, we shall affirm.

I.

A Prince George’s County Police Officer filed a statement of charges against appellant in the District Court, sitting in Prince George’s County, alleging possession of cocaine, possession of cocaine with intent to distribute, possession of paraphernalia, possession of a firearm under sufficient circumstances to constitute a nexus to a drug trafficking crime, and possession of a firearm by a person previously convicted of a felony. He appeared before the District Court for an initial appearance on January 20, 2012, at which

time he was advised “that the charge is a felony that is not within the jurisdiction of the District Court; that Defendant has a right to have a preliminary hearing by a request made now or within ten days; [and] that failure to make a timely request will result in a waiver of this hearing.” Appellant requested a preliminary hearing, which the District Court scheduled for February 17, 2012. After the February 17, 2012 hearing was postponed, the State’s Attorney entered a *nolle prosequi* to the felony counts charging possession of a firearm under sufficient circumstances to constitute a nexus to a drug trafficking crime, and possession of cocaine with intent to distribute. A preliminary hearing was not held in the District Court.

The Grand Jury for Prince George’s County returned a true bill indicting appellant with two counts of possession of a regulated firearm after conviction of a disqualifying crime, two counts of possession of a regulated firearm after conviction of a crime of violence, two counts of possession of a regulated firearm, and one count of possession of drug paraphernalia in distribution. Appellant filed a motion to dismiss, and argued at four pre-trial motions hearings that his case should be dismissed because he was never afforded a preliminary hearing in the District Court.

Appellant waived his right to a jury trial and proceeded before the circuit court on a not guilty, agreed statement of facts. As noted above, the court found appellant guilty of two counts of possession of a regulated firearm after conviction of a disqualifying crime, two counts of possession of a regulated firearm after conviction of a crime of violence, two

counts of possession of a regulated firearm, and one count of possession of drug paraphernalia in distribution. The court sentenced appellant to a term of incarceration of fifteen years, all but five suspended, the first five years without the possibility of parole, on each of the counts of possession of a regulated firearm after conviction of a crime of violence, to be served concurrently; two years on the drug paraphernalia count; and, five years of supervised probation upon his release. For sentencing purposes, the court merged the convictions of possession of a regulated firearm and possession of a regulated firearm after conviction of a disqualifying crime into the possession of a regulated firearm after conviction of a crime of violence for sentencing purposes. Appellant argued that the increase in penalties for the possession of a regulated firearm counts between the time of his predicate conviction and the time of sentencing in this case constituted an *ex post facto* violation.

This timely appeal followed.

II.

Before this Court, appellant argues that the circuit court erred in denying his motion to dismiss because he was denied a preliminary hearing. He contends that the State should not have been permitted to proceed on the counts that were *nol prossed* and on which he was not afforded a preliminary hearing. He argues that the State improperly circumvented the purpose of the rule requiring a preliminary hearing upon request by *nol prossing* the felony

counts and then charging appellant in circuit court. Appellant argues that the State's actions deprived him of due process afforded by a preliminary hearing under the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights.

Appellant presents an *ex post facto* argument in regard to the charges of possession of a regulated firearm after having been convicted of a crime of violence and possession of a regulated firearm after conviction of a disqualifying crime as *ex post facto* violations. He argues that the circuit court erred in denying his motions to dismiss. Section 5-133 of the Public Safety Article, Maryland Code (2003, 2011 Repl. Vol.),¹ the statute under which he was convicted for the felon-in-possession charges, was enacted in 2003, after appellant was convicted of robbery in 1993. He argues that in 1993, it was not a crime to possess a regulated firearm following his conviction, and his 1993 conviction is an element of the felon-in-possession charges. Further, that § 5-133 should not apply to events occurring before 2003, and that in convicting appellant and sentencing him under the statute, the State is applying § 5-133 retrospectively in violation of the Constitutional prohibition against *ex post facto* laws.

Appellant continues, arguing that even if it were a crime in 1993 for a person convicted of robbery to possess a regulated firearm, his sentences are illegal because the

¹Unless otherwise noted, all subsequent statutory references herein shall be to the Public Safety Article, Maryland Code (2003, 2011 Repl. Vol.).

penalty in 1993 for such crimes was five years, not the fifteen year sentences he received under § 5-133. Appellant maintains that because the sentences exceed the five-year maximum sentence in effect at the time of appellant's underlying crime of violence/disqualifying crime convictions, any sentence exceeding five years is illegal and must be vacated and remanded for new sentencing not to exceed five years on the two possession of a regulated firearm after conviction of a crime of violence counts and the two possession of a regulated firearm after conviction of a disqualifying crime counts.

The State argues that appellant had no absolute right to a preliminary hearing. The court did not err in denying appellant's motion to dismiss based on failure to hold a preliminary hearing because appellant was brought initially before the District Court on a statement of charges,² not a criminal information, he had no absolute right to a preliminary

²In the District Court, an offense may be tried on a statement of charges. Rule 4-201(b). A statement of charges is a charging document defined in Rule 4-211 as follows:

“(b) Statement of Charges. (1) Before Any Arrest. Except as otherwise provided by statute, a judicial officer may file a statement of charges in the District Court against a defendant who has not been arrested for that offense upon written application containing an affidavit showing probable cause that the defendant committed the offense charged. If not executed by a peace officer, the affidavit shall be made and signed before a judicial officer.

(2) After Arrest. When a defendant has been arrested without a warrant, unless an information is filed in the District Court, the officer who has custody of the defendant shall (A) forthwith cause a statement of charges to be filed against the defendant in the District Court and (B) at the same time or as soon thereafter

(continued...)

hearing and, as such, he was not denied due process. Further, even if appellant were entitled to a preliminary hearing, the failure to conduct one is not reversible error.

As to the *ex post facto* question, the State argues that the court did not err when it denied appellant’s motion to dismiss the felon-in-possession charges because those charges do not violate the prohibition against *ex post facto* laws. The State maintains that appellant is wrong when he asserts that in 1993 it was not was a crime for a person convicted previously of robbery to possess a regulated firearm. Even if not a crime in 1993, the conduct giving rise to appellant’s felon-in-possession charges occurred in 2012 and the application of § 5-133 of the Public Safety Article did not impair any rights that appellant possessed in 2012, nor did it increase his liability for the 1993 robbery conviction. For the same reason, the State argues that the sentencing is not illegal. In 2012, the penalty for a violation of § 5-133 was “imprisonment for not less than 5 years and not exceeding 15 years.” Because appellant’s sentence on each of the felon-in-possession charges did not exceed fifteen years, his sentences on those charges were not illegal.

(...continued)

as is practicable file an affidavit containing facts showing probable cause that the defendant committed the offense charged.”

Md. Rule 4-211

III.

The purpose of a preliminary hearing is to determine whether the accused should be held for action of the grand jury or charged by the State’s Attorney by criminal information. Rule 4-221. A preliminary hearing is primarily for the benefit of the accused, insuring that he or she is not committed to jail or required to furnish bail pending grand jury action, unless the State establishes probable cause to maintain a criminal proceeding against him or her. *Kardy v. Shook*, 237 Md. 524, 543 (1965). The same rights protected by a preliminary hearing can be adequately protected by the grand jury process. *Thomas v. State*, 50 Md. App. 286, 303 (1981). Under Maryland law, a preliminary hearing is not required, *Hartley v. State*, 4 Md. App. 450, 459 (1968), and there is no constitutional right to a preliminary hearing, *Crawford v. State*, 282 Md. 210, 220-21 (1978).

A defendant is entitled by statute to a preliminary hearing in the District Court in certain circumstances. If a defendant is charged with a felony other than a felony within the jurisdiction of the District Court, the right of a defendant to a preliminary hearing is absolute if the defendant is *charged by criminal information*, and the defendant requests a preliminary hearing. Md. Code Ann., Crim. Proc. § 4-103 (2001, 2008 Repl. Vol).³ If, however, the

³In relevant part, § 4-103 of the Criminal Procedure Article, Maryland Code (2001, 2008 Repl. Vol), *Preliminary hearing*, provides as follows:

“(a) *Defendant to be advised of right.* — If a defendant is charged with a felony other than a felony within the jurisdiction of the District Court, at the time of the defendant’s initial

(continued...)

accused is indicted promptly and no preliminary hearing was held, the rights of the accused are not violated. *Kardy*, 237 Md. at 543. A grand jury indictment means that the grand jury has found probable cause—with a criminal information, it is merely the State’s Attorney bringing a charge with no independent determination of probable cause. A defendant charged by grand jury indictment has a right to a preliminary hearing, but it is not absolute. Crim. Proc. § 4-103(c)(2). Even in a case where a defendant had a statutory right to a preliminary hearing, the failure to hold one does not vitiate a criminal trial. *Ferrell v. Warden, Md. Penitentiary*, 241 Md. 432, 436 (1966).

³(...continued)

appearance, as required by Maryland Rule 4-213, a court or court commissioner shall advise the defendant of the defendant’s right to request a preliminary hearing.

* * *

(c) *When right is absolute.* — (1) If a defendant is charged with a felony other than a felony within the jurisdiction of the District Court, the right of a defendant to a preliminary hearing is absolute if:

- (I) the defendant is charged by criminal information; and
- (ii) the defendant requests a preliminary hearing in accordance with subsection (b) of this section.

(2) If the defendant is charged by grand jury indictment, the right of a defendant to a preliminary hearing is not absolute but the court may allow the defendant to have a preliminary hearing.

(3) In any other case, the right of a defendant to a preliminary hearing is not absolute, but on motion of the State’s Attorney or the defendant, and subject to the Maryland Rules, the court may allow the defendant to have a preliminary hearing.”

When the question is whether a constitutional right has been violated, we make our own independent constitutional appraisal by reviewing the law and applying it to the peculiar facts of the particular case. *Crosby v. State*, 366 Md. 518, 526 (2001); *see Stokes v. State*, 362 Md. 407, 414 (2001). Appellant contends that the State circumvented the preliminary hearing by *nol prosequing* the felony counts and then re-charging appellant in circuit court by grand jury indictment. This procedure is allowed by the statute, § 4-103(c) of the Criminal Procedure article, which lays out the right of a defendant to a preliminary hearing. A defendant's right to a preliminary hearing is a means to preserve certain rights that are sufficiently vindicated by the grand jury process, namely that the defendant is not held without a showing of probable cause that he or she committed the crime(s) charged. The choice of how to proceed against the defendant is the State's prerogative, and the decision to charge by different means or change the means of charging a defendant are within the discretion of the State's Attorney.

Appellant's right to a preliminary hearing in this case was never absolute. Section 4-103 of the Criminal Procedure Article sets out the right to a preliminary hearing in cases where a defendant is charged by criminal information with a felony other than a felony within the jurisdiction of the District Court. Appellant was charged initially by a statement of charges, not by criminal information. Although the court may grant a preliminary hearing to a defendant who does not have an absolute right to such a hearing pursuant to

§ 4-103(c)(3) of the Criminal Procedure Article, it is not required. When the State enters a *nolle prosequi* to claims before the District Court to present the case to a grand jury, the process of the State presenting evidence to the grand jury and the grand jury returning an indictment thereupon suffices to protect the defendant's interest that the State show probable cause to hold the defendant. The State did not violate appellant's statutory rights or any Constitutional interest by proceeding against appellant by grand jury indictment instead of holding a preliminary hearing. The circuit court did not err in denying appellant's motion to dismiss for not holding a preliminary hearing.

We next consider appellant's contentions that his convictions for possession of a regulated firearm after having been convicted of a crime of violence and possession of a regulated firearm after conviction of a disqualifying crime are *ex post facto* violations. Since appellant's arguments as to whether the court erred in not granting his motion to dismiss and that the sentence is illegal are both predicated on the basis of an *ex post facto* violation, we consider both together.

For a criminal law to be *ex post facto*, it must include two elements: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The Court of Appeals states the basis of the *ex post facto* prohibition in the United States Constitution and in the Maryland Declaration of Rights as follows:

“The federal prohibition against *ex post facto* laws can be found in Article I, Section 10 of the Constitution of the United States, which states in relevant part: ‘No State shall . . . pass any . . . *ex post facto* Law’ *Ex post facto* laws are also prohibited under Article 17 of the Maryland Declaration of Rights, which states ‘[t]hat retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required.’ Maryland’s *ex post facto* clause has been viewed generally to have the ‘same meaning’ as its federal counterpart.”

Watkins v. Sec’y, Dep’t of Pub. Safety & Corr. Servs., 377 Md. 34, 47-48 (2003). The parties do not dispute that appellant is disadvantaged by the statute under which he was convicted and sentenced. Appellant contends that applying § 5-133 of the Public Safety Article, Maryland Code (2003, 2011 Repl. Vol.),⁴ to his acts is retrospective. We disagree.

A recidivist statute does not violate the *ex post facto* prohibition by taking into account offenses that occurred before the statute was enacted in determining punishment.

⁴In relevant part, Maryland Code, Public Safety, § 5-133 (2003, 2011 Repl. Vol.), *Restrictions on possession of regulated firearms*, provides as follows:

“(b) *Possession of regulated firearm prohibited.* — Subject to § 5-133.3 of this subtitle, a person may not possess a regulated firearm if the person:

(1) has been convicted of a disqualifying crime;

* * *

(c) *Penalty for possession by person convicted of a crime of violence.* — (1) A person may not possess a regulated firearm if the person was previously convicted of:

(I) a crime of violence;”

United States v. Presley, 52 F.3d 64 (4th Cir. 1995) (sentencing under Armed Career Criminal Act taking into account predicate felony convictions entered before effective date of Act does not violate constitutional prohibition against *ex post facto* laws). Sentencing a repeat offender according to an enhanced penalty statute enacted after the predicate conviction does not violate the prohibition against *ex post facto* laws. *Torres v. Warden of Md. Penitentiary*, 227 Md. 649, 653-54 (1961) (claim that amendment increasing penalty for a second offense is an *ex post facto* law as applied to a second offense where the first offense was committed before amendment, and the second years after its passage, is “untenable”). Enhanced punishment statutes that consider predicate offenses within their ambit without regard to when such offenses were committed are constitutionally permitted. *Hawkins v. State*, 302 Md. 143, 148-49 (1985) (statute does not aggravate prior crime nor make it greater than it was when committed; it neither changes prior punishment nor inflicts greater punishment than the law annexed to the crime when committed). Such a statute does not punish the prior act; it enhances a punishment for the later act. It is not retrospective. The Supreme Court held in *Gryger v. Burke*, 334 U.S. 728, 732 (1948), as follows:

“Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive or subjects the petitioner to double jeopardy. The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the

latest crime, which is considered to be an aggravated offense because a repetitive one.”

Appellant was not convicted nor was he sentenced here for his prior conviction—his conviction of and augmented punishment for the more recent crime are based on permissible consideration of that prior conviction. The court did not err in denying appellant’s motion to dismiss on the basis of an *ex post facto* violation, nor did the court err in sentencing appellant under § 5-133 of the Public Safety Article.

**JUDGMENTS OF CONVICTION IN
THE CIRCUIT COURT FOR PRINCE
GEORGE’S COUNTY AFFIRMED.
COSTS TO BE PAID BY
APPELLANT.**