

Circuit Court for Anne Arundel County
Case No: 02-K-11-000287

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 64

September Term, 2020

JAMES WILLIAM BRANCH, JR.

v.

STATE OF MARYLAND

Wells,
Gould,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 9, 2021

*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.

James William Branch, Jr. filed a Rule 4-345(a) motion to correct an illegal sentence in the Circuit Court for Anne Arundel County claiming that his sentence of 20 years' imprisonment, all but 12 years suspended, for second-degree rape was illegal because the sentencing court had failed to impose a term of probation. Following a hearing, the court denied relief. For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND

Plea & Sentencing

On December 20, 2011, Mr. Branch appeared in court and pursuant to a plea agreement with the State pleaded guilty to second-degree rape.¹ The offense carried a maximum term of 20 years' imprisonment and, under the terms of the plea agreement, the parties were free to advocate for any legal sentence.

Following an examination of Mr. Branch, the court found that he was entering the plea knowingly and voluntarily. The court also found that the State's proffer of facts supported the plea. The court then turned to sentencing, and the transcript reflects the following:

THE COURT: I am mindful of the sentence that you are currently serving and that is a sentence that certainly is significant and as it ought to be to measure the impact that you have had on the victims [sic] in this case.

¹ The victim was Mr. Branch's god-daughter and close friend of his daughter, who alleged that he had sexually abused her beginning when she was about ten years old and continuing for several years thereafter. The victim came forward years later, after Mr. Branch's biological daughter—the younger sister of the victim's friend—accused him of similar offenses. Prior to pleading guilty in this case, Mr. Branch was tried and convicted of second-degree sexual offense and sexual abuse of a minor (his daughter) and was sentenced to a total active term of 25 years' imprisonment in that case.

And what I impose in this case is to establish an additional measure of punishment but also . . . not ignoring . . . the fact that you are already currently serving a lengthy sentence.

If this were the only offense that you were being sentenced on, I can assure you that the sentence would be in the maximum range without much hesitation.

Given though that I am aware of you serving a 25 year sentence, *I am going to sentence you in this case to a period of 20 years but I am going to suspend all except for 12 years and that will be served consecutive to the time that you are serving so it adds an additional 12 years to an already long sentence.*

Upon your release, you will be on probation to Judge Goetzke as well as to me and the standard conditions will apply.

I am also mindful that by giving you a consecutive sentence, you are going to have a longer period to serve even if you were eligible for parole because it is going to affect your mandatory release date.

The conditions of probation are the standard conditions of probation which is that he is to require - - he is to report as directed, follow the instructions of the agent and all the other conditions of probation.

I am going to order that he is to not have any contact with the victim in this case and that he is to follow all the lawful instructions of the agents.

And I will advise the Defendant he has got 30 days to file a request for leave to appeal, 90 days to ask the Court to modify the sentence, 10 days to file a request for a new trial and 30 days to ask that three judges other than me review the sentence. They could increase it, decrease it or leave it the same.

And if you want to exercise those rights, you or your attorney has to file the papers in writing with the Clerk of the Court.

Madam State's Attorney, you are going to nol pros the remainder?

[PROSECUTOR]: Yes, Your Honor. At this time the State would nol pros all remaining counts.

THE COURT: All right. And I will return the exhibits to counsel, please.

[DEFENSE COUNSEL]: Thank you, Your Honor.

THE CLERK: All rise.

(Whereupon, at 3:53 p.m., the proceeding concluded.)

(Emphasis added.)

The sentencing guidelines worksheet, which was signed by the sentencing judge, reflects that the “actual sentence” imposed was “20 years, s/a/b 12 years consecutive to present sentence probation 5 years.” The Probation/Supervision Order signed by Mr. Branch following imposition of sentence reflects a five-year term of supervised probation. The docket entries reflect a five-year term of supervised probation, as does the commitment record. Mr. Branch did not seek leave to appeal.

Motion to Correct an Illegal Sentence

In 2020, Mr. Branch filed a Rule 4-345(a) motion in which he maintained that under *Cathcart v. State*, 397 Md. 320 (2007), his sentence to 20 years, all but 12 years suspended, was effectively a flat sentence of 12 years because the sentencing court had failed to impose a term of probation. At a March 11, 2020 hearing on the motion, the State (with defense counsel’s consent) submitted an audio recording of the 2011 plea and sentencing hearing, which the State asserted evidenced that the court had, in fact, imposed a five-year term of probation.

The audio recording was played for the motions court, which was transcribed consistently with the transcript of the 2011 hearing, except the following exchange near the conclusion of the proceeding:

[THE COURT]: Madam State’s Attorney, you are going to nol pros the remainder?

[PROSECUTOR]: Yes, Your Honor. At this time the State would nol pros all remaining counts.

THE COURT: All right. And I will return the exhibits to counsel, please.

[DEFENSE COUNSEL]: Thank you, Your Honor.

(Inaudible muffled speaking.)

THE CLERK: All rise.

(Whereupon, the hearing audio concluded.)

(Emphasis added.)

The State and Mr. Branch’s counsel agreed that what the transcriber of the motions hearing described as “[i]naudible muffled speaking” on the 2011 audio recording was the courtroom clerk asking the judge, “How long is the probation?” and the court responding, “Five years.” And the clerk then saying, “And the court costs?” and the court responding, “I’ll waive them.” After that exchange, the clerk—as indicated in both transcripts—says “All rise.” Following the “[a]ll rise” statement, both transcripts reflect that the proceeding “concluded.”

Mr. Branch’s counsel maintained that the audio recording confirmed that the sentencing court “never specified a term of probation[,]” and opined that the “hushed” “dialogue between the clerk and [the judge] as to the length of probation” and was “not

necessarily something that occurred in open court.” The State disagreed, pointing out that the dialogue regarding the term of probation took place prior to the courtroom clerk stating, “All rise”—a statement undisputedly made “on the record” and the phrase which signals the end of a court proceeding. The State also relied upon Md. Rule 4-345(c), which provides that “[t]he court may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the Defendant leaves the courtroom following the sentencing proceeding.” And the State noted that the Probation/Supervision Order, the hearing sheet, the commitment record, and a subsequently filed motion for modification of sentence filed by Mr. Branch all reflect a 5-year term of supervised probation—thus indicating that all parties had understood that the court had imposed a 5-year term of supervised probation.

After listening to the audio recording of the 2011 sentencing hearing and considering the parties’ arguments, the motions court ruled as follows:

All right. So I know, because [Mr. Branch] signed [the Probation/Supervision Order] there, that he either read it or [his defense counsel] read it to him, because I have not only Mr. Branch’s signature, but I have [defense counsel’s] signature.

I have on the record, and it is in muffled tone, Judge Hackner saying the probation period is five years. And, as [the State] points out to me, Rule 4-345(c), even if - - well, I think 4-345(c) gives Judge Hackner a little bit of leeway because the correction or the information was given prior to the time that the case was terminated. So I find that the case terminated upon the clerk saying, “All rise.” That is when the judge indicated to the clerk that the case was over.

So, with all due respect, and I love the argument, I really did, but motion denied.

DISCUSSION

We review *de novo* a circuit court’s ruling on a motion to correct an illegal sentence. *Bratt v. State*, 468 Md. 481, 494 (2020).

Here, there is no dispute that if the sentencing court in this case had not imposed a term of probation, Mr. Branch’s sentence to 20 years, all but 12 years suspended, would have been deemed a flat sentence of 12 years’ imprisonment. *Cathcart*, 397 Md. at 330. The question here is whether the court’s announcement of the five-year term of probation was directed to the clerk rather than to Mr. Branch, as Mr. Branch maintains, and/or was announced after the sentencing hearing had concluded.

The State concedes that the sentencing court initially failed to specify the term of probation when announcing that Mr. Branch would be placed on probation upon release. But the State asserts that the “court’s failure to state the precise length of the probation was a ‘clear or obvious’ mistake,” which the court corrected when the clerk brought it to the judge’s attention while Mr. Branch was still in the courtroom. That Mr. Branch was still in the courtroom, the State maintains, is evident by the fact that the sentencing proceeding did not conclude until after the clerk said, “All rise.”

We have listened to the audio recording of the 2011 sentencing hearing and we agree with the State. There was absolutely no pause of any significance in the proceedings prior to the clerk’s inquiry as to the length of the probationary term. The fact that the specific term of probation was given in response to the clerk’s inquiry, moreover, does not alter our opinion that the court imposed a five-year probationary term prior to the conclusion of the

hearing. Accordingly, we hold that the circuit court did not err in denying Mr. Branch's motion to correct his sentence.

**JUDGMENT OF THE CIRCUIT
COURT FOR ANNE ARUNDEL
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**