Circuit Court for Baltimore County
Case No.: C-03-CR-21-001756

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 249

September Term, 2023

DEXTER ALPHONSO KESS, III

v.

STATE OF MARYLAND

Reed,
Beachley,
Sharer, J. Frederick.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: August 29, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

After a jury trial in the Circuit Court for Baltimore County, appellant, Dexter Kess III, was found guilty of first-degree murder and several related offenses. On appeal, appellant asserts three questions for our review:

1. Did the trial court err in accepting Mr. Kess' waiver of his right to testify?
2. Did the trial court err in scheduling Mr. Kess' initial trial date beyond the *Hicks* deadline?
3. Was Mr. Kess deprived of the effective assistance of counsel?

For the reasons set forth below, we answer appellant's first question, the only question properly before us in this appeal, in the negative. Accordingly, we shall affirm.

BACKGROUND

Appellant was charged with the murder of Davontae Eden, who was found dead in his recording studio in Baltimore County in November, 2020. In February of 2023, the matter proceeded to a trial by jury. At trial, defense counsel advised appellant of his right to testify or to remain silent, and appellant elected to remain silent:

> [DEFENSE COUNSEL]: Okay. So, now you also need to be advised that if you do take the witness stand, you'd be sworn, placed under oath, sworn to tell the truth. You could be asked questions during that cross examination potentially about any prior convictions that you may have suffered since you were eighteen years of age or when, or you were under the age of eighteen, but waived up to the adult court jurisdiction.
>
> So, any of those types of cases, if they are within the past fifteen years, if they are convictions of the relevant crimes that have a bearing on your credibility or your voracity [sic] or your believability, those crimes, if properly within that other window of after your eighteenth birthday or waived up, represented by counsel or waived your right to have counsel, within the past fifteen years, suffered those convictions, those convictions that are relevant generally are murder, robbery, rape, arson, kidnapping, the serious felony offenses, felony drug offenses have been deemed to be

relevant, first degree assault could be a relevant type of conviction, if that was one that was in the world of possibilities that could be asked of you.

Mr. Kess, isn't it true you were convicted of this? The State doesn't get to say, well, here's the, let's talk about all the facts of that case, but they could ask you, isn't it true you were convicted of a felony drug offense, or murder, robbery, rape, arson, kidnapping, theft offenses, burglary offenses, the fraud type offenses, credit card fraud, forgery, theft, identify theft, those types of things that have a bearing as the Courts have determined in Maryland, that have a bearing on your credibility or your believability.

The Judge would instruct the jurors they are not to use that to say well, he did that crime in the past, he got convicted of that crime, so I think he did this one too. But they are allowed to use that to decide your, or assess your believability or your credibility. You understand that?

MR. KESS: Yes, sir.

[DEFENSE COUNSEL]: Okay. Now, you also need to be advised that if you don't want to testify, you can exercise your right to remain silent. And if you exercise your right to remain silent, nobody can force you to testify. Nobody can force you to become a witness against yourself.

And if you exercise your right to remain silent, at the conclusion of the trial, upon our request, the Honorable Judge will instruct the jurors not to use your silence in the deliberations of the verdict, not to consider your silence in deliberating the verdict. They can't even bring it up, okay? And if you exercise that right to remain silent, the Judge, upon our request, would give that instruction to the jurors. Do you understand that?

MR. KESS: Yes, sir.

[DEFENSE COUNSEL]: Now, could we have a minute, Your Honor?

THE COURT: Of course.

[DEFENSE COUNSEL]: Thank you. So, Mr., Mr. Kess, it's my understanding that you are going to elect to remain silent, is that correct?

MR. KESS: Yes, sir.

The jury found appellant guilty of first-degree murder, second-degree murder, first-degree assault, use of a firearm in a felony or crime of violence, wearing, carrying, or

transporting a handgun on his person, carrying a loaded handgun on his person, illegal possession of a firearm, possession of a firearm with a disqualifying conviction, and possession of a firearm with a felony conviction.

This appeal timely followed.

DISCUSSION

I. The court did not err in accepting appellant's waiver of his right to testify.

Appellant contends that the court erred in "failing to intervene" during his counsel's advice of his right to testify or to remain silent. Specifically, he asserts that counsel "incorrectly advised [him] that he could be impeached with prior convictions for serious felony offenses, felony drug offenses, and first-degree assault[,]" and that accordingly, he was "'led to believe that [his convictions] would be automatically admitted to impeach him[,]'" quoting *Morales v. State*, 325 Md. 330, 339 (1992). The State disagrees and asserts that "although counsel's challenged remark was imprecise, the colloquy as a whole was constitutionally sufficient to allow [appellant] to waive his right to testify, as he ultimately chose to do." We agree with the State.

Generally, the trial court has "no affirmative duty to inform represented defendants of their right to testify[.]" *Savoy v. State*, 218 Md. App. 130, 150 (2014) (citing *Gilliam v. State*, 320 Md. 637, 652-56 (1990)). Indeed, although the court is required to advise a *pro se* criminal defendant "of his constitutional rights to testify and to remain silent, so that he may make an informed choice to invoke one right and waive the other[,]" this Court has

made clear that "[w]hen the defendant is represented by counsel, no such requirement exists." *Tilghman v. State*, 117 Md. App. 542, 554 (1997).

Nonetheless, we have noted that "[c]ircumstances may occur, however, that require a trial court to take measures to assure that a represented defendant has been properly advised of his rights to testify and to remain silent." *Id.*at 555. This includes when "words and conduct of the defendant evidencing confusion about his testimonial rights serve to place the court on notice that action must be taken to avert a constitutional violation." *Id*. at 563. Additionally, a duty to intervene "will arise upon counsel imparting advice to the defendant, in the presence of the court, that is intrinsically and facially incorrect, *i.e.*, is readily identifiable as erroneous, without reference or resort to extrinsic information." *Id*. at 564. Otherwise, "criminal defendants represented by counsel are presumed to have been informed of their constitutional rights, including the right to testify." *Thanos v. State*, 330 Md. 77, 91 (1993).

Here, appellant does not allege that his words or conduct demonstrated confusion regarding his constitutional rights. Instead, he asserts that defense counsel incorrectly "characterized serious felony offenses, felony drug offenses, and first-degree assault as impeachable offenses." Specifically, he points to defense counsel's statement that the offenses he may be asked about include "murder, robbery, rape, arson, kidnapping, *the serious felony offenses, felony drug offenses have been deemed to be relevant, first degree assault could be a relevant type of conviction, if that was one that was in the world of possibilities that could be asked of you*[.]" (Emphasis added.)

First, as the State asserts, and appellant does not dispute, defense counsel's statement regarding "serious felony offenses" was "counsel's summation of the general nature of the 'infamous crimes' at common law that he listed immediately before, and not a new category of his own making." Further, we disagree that the advice that felony drug or first-degree assault offenses may be relevant was "readily identifiable as erroneous[.]" *Tilghman*, 117 Md. App. at 564. Convictions of "infamous crime[s] or other crime[s] relevant to the witness's credibility" are relevant for impeachment, Md. Rule 5-609(a), and trial courts have "discretion over the admissibility of impeachment evidence of a prior conviction[,]" to which we give "great deference[.]" *Calloway v. State*, 141 Md. App. 114, 121 (2001). Finally, our appellate courts have found both a felony conviction for distribution of cocaine and a conviction for assault with a deadly weapon relevant to a defendant's credibility. *See State v. Giddens*, 335 Md. 205, 217 (1994); *Taylor v. State*, 226 Md. 561, 565-67 (1961). Accordingly, we decline to hold that defense counsel's statements that felony drug or first-degree assault offenses "could" be asked about for impeachment purposes was necessarily "intrinsically and facially incorrect[.]" *Tilghman*, 117 Md. App. at 564.

Although we agree that the wording of defense counsel's advice was broad, a parsing of his presentation reveals the essence of the information that satisfies what a defendant needs to know in exercising his testimonial rights. Therefore, we cannot say that counsel's advice regarding appellant's testimonial rights was improper. Appellant was correctly advised that he had the right to testify, and that if he chose to, he may be asked about certain prior convictions. Indeed, defense counsel correctly noted several limitations

on the types of impeachable crimes, including the type of crime, year of conviction, and the age of the defendant when convicted, while twice stating that the relevant crimes are those relating to appellant's "credibility[.]"

Finally, appellant asserts that the court erred in failing to intervene, relying upon *Morales v. State*, *supra*. However, the pertinent facts in this case are readily distinguishable from those in *Morales*. As an initial matter, Morales was unrepresented. 325 Md. at 332. After he sought to testify, the trial court advised him of his right to remain silent and, as Morales later challenged on appeal, of the possibility of his impeachment by prior convictions:

> THE COURT: . . . I don't know if, for instance, if you have ever been convicted of a crime before. And I don't want to know right now. But if you take the stand and testify and you have been convicted of a crime before, they may ask you, they meaning the State may ask you about that. Not to prove that because you were guilty before that you are guilty now, but they may bring it up to show whether or not you should be believed or not. It goes to what they call veracity, believability.

Id. at 334 (emphasis omitted). After the court's advice, Morales exercised his right to remain silent. *Id*.

On appeal, Morales challenged the court's advice regarding the use of prior convictions for impeachment purposes, and the Court agreed that the trial court's statements were improper. *Id*. at 335. The Court explained that "while the trial court was not required to further inform Morales that he could be impeached by his prior convictions if he took the witness stand, since the trial judge elected to do so, he should have done so correctly[,]" noting the "extreme[] difficult[y] for the judge to give an unrepresented

defendant a meaningful summary of the general law of impeachment by prior convictions[.]" *Id*. at 335, 337.

No such circumstances are present in the facts before us. Rather, appellant was represented – a "crucial distinction[]" from the facts in *Morales*, and accordingly, he was "presumed to have been informed of [his] constitutional rights, including the right to testify." *Thanos*, 330 Md. at 91-92. Assuming, *arguendo*, that appellant had appeared *pro se* and received the challenged advice from the trial court, the statements are readily distinguishable from *Morales*, where the court broadly advised that the defendant could be impeached if he had ever been "convicted of a crime[,]" without limitation to the types of crimes which may be asked about for impeachment purposes. *Morales*, 325 Md. at 334. As we have noted, *supra*, defense counsel correctly noted several limitations on the types of impeachable crimes, twice stating that the relevant crimes are those specifically relating to appellant's "credibility," "v[e]racity," or "believeability[.]" Accordingly, we are unpersuaded that appellant was led to believe that his convictions "would be automatically admitted to impeach him." *Id*. at 339.

Instead, looking to counsel's advisement as a whole, we disagree that the isolated statement challenged on appeal rebutted the presumption that appellant had properly been informed of his testimonial rights. The decision to testify or to remain silent "must be made with a basic appreciation of what the choice entails[.]" *Id.* at 335. We are not persuaded that appellant lacked that basic appreciation based on the facts before us.

II. Appellant forfeited his assertion regarding the *Hicks* deadline.

Appellant asserts that "dismissal is required because Mr. Kess' initial trial date was scheduled beyond the 180-day *Hicks* deadline and this initial trial date was not approved by the administrative judge or her designee." (Footnote omitted.) The State responds that we should decline to consider appellant's contention because he "forfeited his appellate contention by neglecting to move to dismiss in the circuit court." Appellant does not dispute that he did not seek dismissal based upon the *Hicks* violation before the circuit court and asserts that if the issue was not properly raised, that "that forfeiture amounts to ineffective assistance of counsel."

We agree that appellant forfeited his assertion for our review.[1] Appellant did not raise a *Hicks* violation[2] at any point before the circuit court. Accordingly, he cannot do so for the first time on appeal. *See* Md. Rule 8-131(a). Assuming, *arguendo*, that appellant had raised the *Hicks* violation before the circuit court, we see no error under the facts before

[1] As appellant correctly points out, traditional waiver principles do not apply in the context of a *Hicks* rule violation. *Jackson v. State*, 485 Md. 1, 33 (2023). For the avoidance of doubt, we hold that appellant forfeited his assertion, not that it has been waived. *See Gutloff v. State*, 207 Md. App. 176, 197 (2012) (noting "the distinction between a 'waiver,' which is an intentional and voluntary relinquishment of a known right, and a 'forfeiture,' which is conduct that 'results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right'" (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995))).

[2] Although the deadlines are now set forth by statute and rule, *see* Md. Code Ann., Criminal Procedure § 6-103(a)(2) and Md. Rule 4-271(a)(1), as we recently observed in *Griffin v. State*, "the very name *Hicks* has assumed an eponymous status as the widely recognized mantle for Maryland's statutory law and accompanying Rule of Procedure described by [*State v. Hicks*, 285 Md. 310 (1979)], as well as for a critically dispositive date identified in that opinion." *Griffin v. State*, 262 Md. App. 103, 115 (2024).

us. Indeed, the record indicates that when asked if the proposed trial date – February 24 – was agreeable, defense counsel expressly responded that "February 24th would work for Defense, yes." As the Supreme Court of Maryland reiterated in *State v. Brown*, where a case is postponed beyond the 180-day limit in violation of *Hicks*, dismissal is inapplicable "'where the defendant, either individually or by his attorney, seeks or expressly consents to a trial date[.]'" *State v. Brown*, 307 Md. 651, 658 (1986) (quoting *Hicks*, 285 Md. at 335). Indeed, as the Court explained in *Brown*, it would "be entirely inappropriate for the defendant to gain advantage from a violation of the rule when he was a party to that violation." *Hicks*, 285 Md. at 335.

III. We decline to address appellant's ineffective assistance of counsel claim on direct appeal.

Finally, we decline to address appellant's claim regarding ineffective assistance of counsel in this direct appeal. "[A] claim for ineffective assistance of counsel ordinarily should be addressed in a post-conviction proceeding[.]" *Crippen v. State*, 207 Md. App. 236, 253 (2012). The reason behind this practice is that:

> "[G]enerally, the trial record does not provide adequate detail upon which the reviewing court could base an assessment regarding whether counsel rendered ineffective assistance because the character of counsel's representation is not the focus of the proceedings and there is no discussion of counsel's strategy supporting the conduct in issue."

Duvall v. State, 399 Md. 210, 239 (2007) (quoting *Smith v. State*, 394 Md. 184, 200 (2006)). We see no compelling reason to depart from this well-established principle based on the record before us. *See Harris v. State*, 295 Md. 329, 337 (1983).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.