

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0754

September Term, 2013

OMAR JOHNSON

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Sonner, Andrew L.
(Retired, Specially Assigned),

JJ.

Opinion by Sonner, J.

Filed: July 21, 2015

*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.

Omar Johnson, appellant, who is presently serving a life sentence for first-degree murder, filed a *pro se* pleading he captioned “Motion to Amend Under Rule 4-345, Sentencing Revisory Power of the Court” with the Circuit Court for Baltimore City. On March 25, 2013, the circuit court denied the motion, prompting Johnson to file this appeal.

Johnson presents four questions for our review, which are reducible to one: Did the circuit court err in denying appellant’s “Motion to Amend Under Rule 4-345, Sentencing Revisory Power of the Court”?¹ Finding no error, we shall affirm the order of the circuit court.

BACKGROUND

In 1993, Johnson and a co-defendant, Anthony Brown, were tried jointly before a jury in the Circuit Court for Baltimore City. Both were found guilty of first-degree murder and the use of a handgun in the commission of a crime of violence and both received sentences

¹ Johnson phrased the questions presented as follows:

1. Whether the circuit court erred in denying the appellant’s motion for sentencing revisor[y] power of the court, based on the 14th Amendment equal protection of the law?
2. Whether the circuit court erred in failing to consider whether appellant was entitle[d] for relief under Rule 4-345(a) and (b) where the jury convicted him on a standard of proof less than what was required for a conviction of first degree murder?
3. Whether the circuit court erred in denying appellant’s motion under Md. Rule 8-131(a)?
4. Did the lower court fail to exercise it’s discretion in denying appellant’s motion to revisory power of the court?

of life imprisonment for murder and concurrent terms of twenty years for the handgun offense.² Both appealed and this Court, in an unreported opinion, affirmed. *Anthony Brown and Omar Johnson v. State of Maryland*, No. 1529, September Term, 1993 (filed August 9, 1994).

In 2003, Johnson filed a petition for post-conviction relief under the Maryland Uniform Postconviction Procedure Act (§§ 7-101 - 7-301 of the Criminal Procedure Article of the Md. Code). In 2004, he filed a supplement to that petition. Among other things, Johnson alleged that the trial court's instructions to the jury on presumption of innocence, reasonable doubt, and on first-degree murder were flawed and that his trial counsel rendered ineffective assistance of counsel by failing to object to those instructions. Johnson also claimed that his appellate counsel was ineffective for not seeking plain error review of the instructions on appeal. The post-conviction court, with Judge Stuart Berger presiding, denied relief in a 33-page memorandum opinion dated September 24, 2004. Judge Berger specifically addressed and rejected Johnson's assertion that the aforementioned jury instructions were defective. Johnson did not seek leave to appeal that decision.

Several years later, Brown, Johnson's co-defendant, filed a petition for post-conviction relief in which he, like Johnson before him, argued that his trial counsel was ineffective for failing to object to the trial court's jury instruction on presumption of innocence and reasonable doubt. As set forth in a memorandum opinion filed on

² Johnson was also convicted of wearing and carrying a handgun. That offense was merged for sentencing purposes.

September 28, 2007, the post-conviction court, Judge Gale Rasin presiding, concluded that the reasonable doubt instruction that was given “confused the jury and prejudiced the accused.” Accordingly, Judge Rasin granted Brown’s petition and ordered a new trial. On March 23, 2008, Brown pled guilty to second-degree murder and use of a handgun in the commission of a crime of violence. He received a sentence of fifteen years and two months of incarceration for murder and to a concurrent term of five years for the handgun offense – the sentence to begin on October 23, 1992.

In October 2007, after his co-defendant’s successful petition, Johnson filed a motion to re-open his closed petition for post-conviction relief. Judge Berger found that it was not in the interest of justice to re-open the proceeding and denied the request. We denied Johnson’s subsequent application for leave to appeal that decision. *Omar Johnson v. State*, No. 2874, Sept. Term, 2007 (application for leave to appeal denied September 29, 2008).

Not to be deterred, in 2008 Johnson filed a petition for writ of habeas corpus with the Circuit Court for Baltimore City. In that petition, Johnson alleged many of the same errors he raised in his post-conviction petition, including that his trial counsel was ineffective for failing to object to the same jury instruction on reasonable doubt that Judge Rasin, in Brown’s post-conviction case, had found confusing. Johnson asked the habeas court to grant him a new trial.

The habeas court, Judge John Themelis presiding, in a memorandum opinion filed on December 29, 2008, found that all the issues Johnson raised in his habeas petition had been

“raised and fully litigated” by the post-conviction court. As to the jury instruction on reasonable doubt – and the conflicting post-conviction decisions on that issue – Judge Themelis stated that he agreed with Judge Berger’s ruling that the instruction as given was proper and it disagreed with Judge Rasin’s contrary finding in Brown’s post-conviction case. Accordingly, Judge Themelis denied Johnson’s request for habeas relief.

In August 2009, Johnson, still proceeding *pro se*, filed a pleading with the circuit court captioned “Motion to Amend Under Rule 4-345, Sentencing Revisory Power of the Court.” In that motion, Johnson asserted that he was proceeding under § § 3-701 - 3-704 of the Courts & Judicial Proceedings Article (a statute concerning habeas corpus); § 7-106 of the Criminal Procedure Article (a statute within the Postconviction Procedure Act); Md. Rule 8-131 (a) (a rule addressing the scope of review on appeal); and Md. Rule 4-345 (a) - (e) (a rule addressing the court’s limited revisory power over a sentence). As best we can discern from his motion, based on the fact that his co-defendant was granted a new trial and was subsequently convicted of second-degree murder and received a sentence of imprisonment for fifteen years, two months, Johnson was requesting that his sentence be “modified” to conform with his co-defendant’s new sentence.

By order filed on March 25, 2013, the circuit court, Judge Yvette Bryant presiding, denied Johnson’s motion. In its memorandum in support of that order, the circuit court ruled that the sentence imposed in Johnson’s case was legal and the court had no authority under

Rule 4-345 to modify it. The court also found that Md. Rule 8-131 was inapplicable, as that rule pertains to appellate review. Johnson then noted this appeal.³

DISCUSSION

The State moves to dismiss the appeal because Johnson “has not provided complete copies of transcripts of his trial[.]” We deny that motion because the transcripts of Johnson’s 1993 trial are not necessary to resolve this appeal.

Johnson asserts that the circuit court erred in denying his motion. He states that he “is not raising a claim of ineffective assistance of counsel,” but maintains that, because he was tried jointly with Brown, the Equal Protection Clause of the 14th Amendment to the United States Constitution mandates that he should be “awarded the same relief” as Brown was on post-conviction. He incorrectly asserts that the post-conviction court granted Brown the right to file a belated motion for modification or reduction of sentence and pursuant to that relief Brown was “resentenced.” Accordingly, he requests that we reverse the circuit court’s denial of his motion “and remand with instructions to conduct a hearing to determine whether Appellant has established sufficient grounds for a belated modification of sentence.”

³ Johnson also filed a second motion to re-open his closed post-conviction petition. By order dated August 7, 2014, the circuit court denied the motion. Johnson’s application for leave to appeal that decision is presently pending before this Court. *Omar Johnson v. State of Maryland*, No. 1711, Sept. Term, 2014.

In addition, Johnson filed two separate petitions for writ of actual innocence. The circuit court denied those petitions and Johnson appealed. This Court affirmed. *Omar Johnson v. State*, No. 371, Sept. Term, 2013 (filed March 12, 2015) and *Omar Johnson v. State*, No. 1381, Sept. Term, 2014 (filed June 8, 2015).

As we set forth above, the post-conviction court granted Brown a new trial. Thereafter, Brown entered a guilty plea to second-degree murder and received a sentence for that offense. His original sentence was not “modified” pursuant to a belated motion to modify or reduce his sentence.

Moreover, the circuit court correctly determined that it had no authority to modify Johnson’s sentence under Rule 4-345 because the sentence imposed was legal and the time for filing a motion for modification had expired long ago. *See* Rule 4-345(e) (a court has “revisory power” over a sentence “except that it may not revise the sentence after the expiration of five years from the date the sentence was originally imposed on the defendant[.]”).

Johnson, however, points out that, under Rule 4-345(a), a court “may correct an illegal sentence at any time.” But that authority is limited to an “inherently illegal” sentence, that is, a sentence that “exceeded the limits imposed by law,” *Matthews v. State*, 424 Md. 503, 514 (2012), a sentence that exceeded the sentence agreed upon as part of a binding plea agreement, *id.* at 514, or a sentence imposed where there was no conviction warranting any sentence. *Chaney v. State*, 397 Md. 460, 466 (2007). As the Court of Appeals has emphasized, to be subject to correction by motion filed under Rule 4-345(a), the “illegality must inhere in the sentence, not in the judge’s actions.” *State v. Wilkins*, 393 Md. 269, 284 (2006). “[T]he focus,” therefore, “is not on whether the judge’s ‘actions’ are *per se* illegal but whether the sentence itself is illegal.” *Id.*

The sentence imposed in this case was not inherently illegal because Johnson was convicted of first-degree murder and a life sentence is a permitted penalty for that offense. *See* § 2-201(b) of the Criminal Law Article of the Md. Code (2012 Repl. Vol.) (formerly Art. 27, § 413) (the penalty for a conviction for first-degree murder includes life imprisonment). Any challenge to the validity of his conviction should have been raised by Johnson in his direct appeal following his conviction and sentencing.

Johnson’s real complaint is that it is “fundamentally unfair” that his co-defendant was granted post-conviction relief and he was not. He maintains that, because the State “never appealed Judge Rasin’s ruling” granting his co-defendant a new trial, Judge Rasin’s decision is law of the case and it should have applied equally to him. Johnson, however, misconstrues the doctrine. As the Court of Appeals made clear in *Scott v. State*, 379 Md. 170 (2004), a decision by one circuit court judge is not binding on another circuit court judge “because the two judges” are ““colleague[s] of coordinate jurisdiction.”” *Id.* at 183 (quoting *Stewart v. State*, 319 Md. 81, 91 (1990)). Under the law of the case doctrine, “once an *appellate* court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case.” *Id.* (emphasis added). With regard to circuit court judges, however, ““as a general principle one judge of a trial court ruling on a matter is not bound by the prior ruling in the same case by another judge of the court.”” *Id.* at 184 (quoting *Gertz v. Anne Arundel County*, 339 Md. 261, 273 (1995)) (further citations omitted).

In sum, Johnson’s challenge to the jury instructions given at trial was not a proper subject of a motion under Rule 4-345. Such a claim should and could have been raised on direct appeal following his conviction and sentencing or, as was done, in a petition for post-conviction relief. Accordingly, we hold that the circuit court did not err in denying Johnson’s “Motion to Amend Under Rule 4-345, Sentencing Revisory Power of the Court.”

**STATE’S MOTION TO DISMISS THE
APPEAL DENIED. JUDGMENT OF THE
CIRCUIT COURT FOR BALTIMORE CITY
AFFIRMED.**

COSTS TO BE PAID BY APPELLANT.