UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1874

September Term, 2011

VICTOR TORRES

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: August 10, 2015

Victor Torres appeals a judgment of the Circuit Court for Wicomico County denying his motion to revise his sentence of life imprisonment for first-degree murder. He contends that the sentence was illegal because it was based upon an ambiguous pronouncement of the verdict by the jury. Mr. Torres presents four issues, which we have consolidated and reworded for the purposes of our analysis:

1. Was Torres's sentence illegal?

2. Did the circumstances under which the jury rendered its verdict constitute an "irregularity" pursuant to Maryland Rule 4-345?

3. Did the motions court err by failing to consider the merits of Torres's motion?

We will affirm the judgment of the circuit court.

Background

In September 1991, Torres was charged by way of criminal information with murder, conspiracy to commit murder, wearing/carrying a dangerous weapon, and malicious destruction of property, all in connection with the death of Tyrone Maxfield.

Torres was tried by a jury in the Circuit Court for Wicomico County in March, 1992. Before the case was submitted to the jury, the conspiracy and carrying a dangerous weapon counts were dismissed. At the beginning of the jury instructions, the trial court instructed the jury: "[W]hen you begin your deliberations you will only consider two of the counts, two of the four original counts. Count number one, felonious homicide, and count number four, malicious destruction of property." The trial court instructed the jury

regarding first degree murder and second degree murder. Defense counsel indicated that he had no objections to the jury instructions.

The court prepared a verdict sheet for the jury. The verdict sheet read as follows for Count 1:

> A. First Degree Murder Guilty ____ Not Guilty ____
> (If "A" is Not Guilty, go to "B")
>
> B. Second Degree Murder Guilty ____ Not Guilty ____.

Counsel did not object to the verdict sheet.

Before the jury retired to deliberate, the trial court explained:

> Count number one, the question before you first is whether or not the Defendant is guilty or not guilty of first degree murder. You are to assign no significance to where guilty and not guilty is situated on the form, that's just the way it came out of the machine, actually. If you determine that the Defendant is not guilty of first degree murder, then you are to go down to count 1B, and then determine whether or not the Defendant is guilty or not guilty of second degree murder[,]

The jury returned the following verdict:

> THE CLERK: . . . . Ladies and gentlemen of the jury, have you agreed upon a verdict?
>
> THE JURY: We have.
>
> THE CLERK: Who shall say for you?
>
> THE JURY: Our foreman.
>
> THE CLERK: Mr. Torres, will you please stand up?

Ladies and gentlemen of the jury, look upon the Defendant. ***Under count one, do you find the Defendant, Victor Torres, guilty of first degree murder or not guilty?***

[FOREMAN]: Guilty.

THE CLERK: Under count four, malicious destruction of property less than three hundred dollars, guilty or not guilty?

[FOREMAN]: Guilty.

The jury was then hearkened to its verdict:

THE CLERK: Ladies and gentlemen of the jury, hearken to your verdict as the Court has recorded it. ***Your foreman says you find the defendant, Victor Torres, guilty under first degree murder*** and guilty under malicious destruction of property less than three hundred dollars and so say you all.

THE JURY: **All.**

Torres's counsel requested that the jury be polled. The following occurred:

THE COURT: The jury will be polled.

THE CLERK: ***Ladies and gentlemen of the jury, your foreman says you find the Defendant guilty under first degree murder*** and guilty under count four, malicious destruction of property less than three hundred dollars. [J.A.], Mr. Foreman, is that your verdict?

JUROR [J.A.]: Yes.

THE CLERK: [D.A.], is your verdict the same?

JUROR [D.A.]: Yes.

THE CLERK: [G.B.], is your verdict the same?

JUROR [G.B.]: Yes.

THE CLERK: [A.B.], is your verdict the same?

JUROR [A.B.]: Yes.

THE CLERK: [B.H.], is your verdict the same?

JUROR [B.H.]: Yes.

THE CLERK:, is your verdict the same?

JUROR [D.H.]: Yes.

THE CLERK: [N.M.], is your verdict the same?

JUROR [N.M.]: Yes.

THE CLERK: [C.R.], is your verdict the same?

JUROR [C.R.]: Yes.

THE CLERK: [V.S.], is your verdict the same?

Juror [V.S.]: Yes.

THE CLERK: [E.A.], is your verdict the same?

JUROR [E.A.]: Yes.

THE CLERK: [.C.C.], is your verdict the same?

JUROR [C.C.]: Yes.

THE CLERK: [D.C.], is your verdict the same?

JUROR [D.C.]: Yes.

(emphasis added).

On the verdict sheet, there was a check mark next to "Guilty" for First Degree Murder, and no check mark for Second Degree Murder. On April 30, 1992, Torres was

sentenced to "a term of life imprisonment with the Division of Correction" on the first degree murder count. Defense counsel did not object at any point during the pronouncement of the verdicts, the hearkening of the jury to its verdicts, or the polling of the jury.

In his direct appeal, Torres raised two issues: whether the suppression court erred in failing to suppress a confession and whether the trial court erred in denying a motion for new trial. The latter contention arose out of Torres's assertion that the prosecutor had improperly delayed nol prossing charges against a co-defendant to prevent her from testifying as a witness on Torres's behalf. We affirmed the judgments in an unreported opinion issued on February 3, 1993. *Victor Angel Torres v. State*, No. 721, Sept. Term, 1992, filed February 3, 1993). We now come to the present action.

In 2011, Torres filed a "Motion to Revise Sentence/Or Motion for New Sentencing Based Upon an Ambiguous Pronouncement." He asked for a "new sentencing hearing based upon the ambiguous pronouncement of sentence in conjunction with the commitment record conflicting with the sentencing court's actual pronouncement, and the jury failed to state the degree of murder in their verdict[.]" After a hearing, the circuit court denied the motion saying:

> The Court, as I indicated previously, was very familiar with this case. I still recall it even 20 years later.

> The nature of the facts in this case were very troubling to this Judge at the time. I did consider his age at the time.[1] That was something that was very much on the mind of this Judge. And nonetheless, after reviewing the file, reviewing the transcript to which you make reference, and considering your motion, the Court finds that there was not an illegal sentence.
>
> The Court feels it's not appropriate to revise the sentence, and the Court is not going to grant a new sentencing hearing.
>
> Your motion is denied.

Analysis

(1)

Torres's first contention is that his sentence was illegal because the members of the jury failed to expressly state that he had been found guilty of first-degree murder and this failure was a substantial deviation from the procedure required by Chapter 138, § 3 of the Laws of Maryland of 1809 and its current counterpart, Md. Code, Criminal Law Article ("C.L.") § 3-302.[2] He bases this argument on language from the Court of

---

[1]Torres was fifteen years old when he murdered Mr. Maxfield.

[2]C.L. § 3-302 statute provides:

> When a court or jury finds a person guilty of murder, the court or jury shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

Chapter 138 of the Laws of 1809 was the General Assembly's first attempt to codify, at least in part, Maryland's criminal law. Among its other provisions, Chapter 138 divided the common law of murder into two degrees. *See* The Honorable Charles E. Moylan, Jr., CRIMINAL HOMICIDE LAW 32 (2002). Section 3 of Chapter 138 stated in pertinent part (emphasis added):

(continued...)

Appeals' decisions in *Ford v. State*, 12 Md. 514 (1859) and *Williams v. State*, 60 Md. 402 (1883).

In response, the State first argues that Torres waived this contention by (1) failing to object to the procedure followed by the trial court; and (2) failing to raise the question in his direct appeal. Torres responds that the asserted procedural error renders his sentence illegal, and illegal sentences can be reviewed at any time. As to the latter point, Torres is correct. *See* Md. Rule 4-345(a) ("The court may correct an illegal sentence at any time."). However, as the Court of Appeals has explained on numerous occasions, the concept of "illegality" contemplated by Rule 4-345 is limited. *See, e.g.*, *Bryant v. State*, 436 Md. 653, 663 (2014) ("A motion to correct an illegal sentence ordinarily can be granted only where there is some illegality in the sentence itself or where no sentence should have been imposed."); *State v. Wilkins*, 393 Md. 269, 272-73 (2006) (The notion of "illegal sentence" deals with substantive, not procedural, law, such that a sentence proper on its face is not an "illegal sentence" within the meaning of Rule 4-345(a)).

The State argues that the concept of illegality for purposes of Rule 4-345 does not extend to procedural irregularities in sentencing. This is correct. *See Wilkins*, 393 Md. at

---

[2](...continued)
BE IT ENACTED, That all murder which shall be perpetrated by means of poison, or by lying in wait, or by any kind of wilful, deliberate and premeditated killing, . . . shall be deemed murder of the first degree; and all other kind of murder shall be deemed murder of the second degree; and ***the jury*** . . . ***shall, if they find such person guilty thereof ascertain in their verdict, whether it be murder in the first or second degree*** . . . .

273 ("The notion of an 'illegal sentence' . . . . does not remotely suggest that a sentence, proper on its face, becomes an 'illegal sentence' because of some arguable procedural flaw in the sentencing procedure.") (some quotation marks and citation omitted).

It seems to us that Torres and the State are talking past one another. If the *verdict* was defective as a matter of law, then necessarily the resulting sentence was illegal. *See, e.g., Jones v. State*, 384 Md. 669, 686 (2005) (The jury's failure to announce that it had convicted defendant of a specific crime rendered a sentence for that conviction illegal for purposes of Rule 4-345.). Resolving the issue of preservation requires us to weigh the parties' substantive contentions. In other words, if the verdict was defective, Torres's sentence was illegal and can be corrected at any time; if the verdict was not defective, then he waived whatever procedural irregularity might have occurred by failing to object. We now turn to the first of the two cases that Torres relies upon, namely, *Ford v. State*, 12 Md. 514 (1859).

Ford was indicted for murder. After a trial, the jury returned a verdict of "guilty" to the charge of murder, without specifying a degree. Ford asked that the jury be polled and the trial court directed the clerk:

> to ask the jury, when he polled them, "Whether they found the prisoner guilty of murder in the first degree, or murder in the second degree?" To which question, when it was put to the jury, the foreman answered for the jury, in the words, "Guilty of murder in the first degree," in an audible voice; and each of the remaining eleven jurors, when polled, responded, "Guilty," without specifying the degree of murder in words.

Id. at 527.

The Court of Appeals concluded that the verdict was deficient. It explained:

> ***[A]t no time did all the jury*** find the prisoner "guilty of murder in the first degree." At first their foreman simply said, "guilty," for the whole panel; and when the latter was polled, so that each might answer for himself, eleven of them replied, severally, "guilty," ***without specifying the degree in words.***
>
> * * * *
>
> The law says, that when a person shall be found guilty of the crime of murder, by a jury, the jury ***shall, in their verdict***, find the degree; and this has not been done.
>
> In the eye of the law, there has been no valid and sufficient verdict; and, as a consequence, there must be a new trial.

12 Md. at 547-48 (emphasis in original).

Torres also directs us to *Williams v. State*, 60 Md. 402 (1883). In *Williams*, the foreman declared that the defendant was guilty of first degree murder but, "each juror, when called upon to answer for himself and in his own language, responded 'guilty,' without specifying the degree of murder." *Id.* at 403. Citing to *Williams*, the Court stated:

> The prisoner was entitled, as a matter of right, to a poll of the jury, and he could not be convicted, except upon the concurrence of each juror. ***Upon the poll, it was the duty of each juror to say for himself, whether he found the prisoner guilty of murder in the first or second degree.*** We all know that jurors sometimes, upon the poll, dissent from the verdict declared for them by their foreman, and it is for the purpose of compelling each juror to declare his own verdict, in his own language, that a poll of the panel is allowed. Upon the poll in this case, there was not a single juror who, in finding the prisoner guilty, ascertained the degree of murder as required by the Code. On the contrary, the verdict was "guilty," and such a verdict is . . ., on an indictment for murder, a nullity.

Id. (emphasis added).

In our view, *Ford* and *Williams* set forth the rule that, in order for a verdict of guilty for first-degree murder to be valid, the words "guilty of first-degree murder," or something equivalent, must be expressly articulated by each member of the jury if the jury is polled. *Ford* was decided in 1859 and *Williams* in 1883. Torres was tried in 1991. The State asserts that the holdings in *Ford* and *Williams* were modified by an intervening decision of the Court of Appeals, *Strong v. State*, 261 Md. 371 (1971), *vacated on other grounds*, 408 U.S. 939 (1972). We agree.

Strong was convicted of first-degree murder. When the jury returned to the courtroom to render its verdict, the clerk asked whether Strong was "guilty of the matters wherein he stands indicted or not guilty?" The foreperson responded "Guilty. Guilty of first degree murder, the first degree." *Id.* at 373. Defense counsel asked that the jury be polled. The Court of Appeals described what then occurred:

> [T]he clerk said: 'Juror No. 2, you have heard the verdict as given by your Forelady. Is your verdict the same?' Juror No. 2 replied: 'Yes, it is.' Each of the other ten jurors was asked the identical question by the clerk and each replied 'Yes' or 'Yes, it is.' After juror No. 12 had answered yes, the clerk intoned:
>
> > Hearken to the verdict as the Court has recorded it. You say Cornelius Thomas Strong is guilty of murder in the first degree as to Indictment 3029 of the Docket of 1969, and so say you all?
>
> to which, as the transcript indicates, there was a general jury response of 'yes.'

Id. at 373–74.

The *Strong* Court cited *Williams* as standing for the proposition that:

> The prisoner was entitled, as a matter of right, to a poll of the jury, and he could not be convicted, except upon the concurrence of each juror. Upon the poll, it was the duty of each juror to say for himself, whether he found the prisoner guilty of murder in the first or second degree. * * * Upon the poll in this case, there was not a single juror who, in finding the prisoner guilty, ascertained the degree of murder as required by the Code. On the contrary, the verdict was 'guilty,' and such a verdict is, as we have said, on an indictment for murder, a nullity.'

Id. at 374.

The *Strong* Court continued:

> In the present case it is clear to us that the requirements of the law were met. The forelady said explicitly, with repetition, that the accused had committed first degree murder and, when each juror was asked individually whether his verdict was the same as that of the forelady, he replied in the affirmative. ***This was the equivalent of each juror saying: 'I find the accused guilty of murder in the first degree' and we are entirely persuaded that each juror knowingly and intentionally so stated when he answered 'yes' or 'yes, it is' to the clerk's standard question.***

261 Md. at 374 (emphasis added).

We believe that the Court's analysis in *Strong* is controlling. In the present case, the foreperson, speaking for the entire jury, was asked whether the jury found "the Defendant, Victor Torres, guilty of first degree murder or not guilty?" The foreperson responded "guilty." When the jury hearkened the verdict, the jury was asked "Your foreman says you find the defendant, Victor Torres, guilty under first degree murder . . . and so say you all." The jury responded in unison, "all." When the jury was polled, they

were asked "Ladies and gentlemen of the jury, your foreman says you find the Defendant guilty under first degree murder . . . ." Each juror answered in the affirmative.

Torres is correct that, in his case, the clerk, and not the foreperson, used the words "guilty of first degree murder," whereas, in *Strong*, that phrase was initially uttered by the foreperson. But we believe this is a distinction without a difference. As *Strong* makes clear, the test is whether the reviewing court is persuaded that each juror "knowingly and intentionally" indicated his or her agreement that the defendant was guilty of first degree murder. Based upon the record before us, we are so persuaded. In light of the Court's reasoning in *Strong*, for us to conclude otherwise would be to elevate form over substance.

(2)

Torres also contends that the manner in which the verdict was returned and the jury polled constituted an "irregularity," warranting exercise of the court's revisory authority over his sentence pursuant to Rule 4-345(b).[3] We are not persuaded for two reasons.

First, as Torres acknowledges, in the context of a court's exercise of its revisory power, an "irregularity" is "a failure to follow required process or procedure." *Radcliff v. Vance*, 360 Md. 277, 292-93 (2000) (citing *Early v. Early*, 338 Md. 639, 652 (1995)). As

[3]Rule 4-345(b) states: "Fraud, Mistake, or Irregularity. The court has revisory power over a sentence in case of fraud, mistake, or irregularity."

we have explained, there was no failure to follow required process or procedure in the rendition of the verdict, or in the hearkening and the polling of the jury in this case. Second, unlike a motion to correct an illegal sentence, which can be filed at any time, a motion to revise a sentence to correct an irregularity must be filed within 90 days of the date of sentencing. Md. Rule 4-345(e). Torres's motion was filed 19 years after he was sentenced.

(3)

Torres's final contention is the motions court abused its discretion because it failed to consider the substance of his contention and instead "focus[ed] only on the action he had taken 20 years prior," that is, sentencing Torres to life imprisonment. We do not agree. In denying Torres' motion, the court stated: "after reviewing the file, review the transcript to which you make reference, and considering your motion, the Court finds that there was not an illegal sentence." This was sufficient. *See Beales v. State*, 329 Md. 263, 273 (1993) ("[T]rial judges are not obliged to spell out in words every thought and step of logic" in reaching their decisions.").

THE JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.