

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2244

September Term, 2014

DUANE JOHNSON, JR.

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 17, 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.

On January 3, 2003, in case No. 03-K-02-00044 (the subject case), Duane M. Johnson, Jr. (“Johnson”) and a co-defendant were charged in the Circuit Court for Baltimore County with three counts of armed robbery; three counts of robbery; three counts of first-degree assault; six counts of use of a handgun in the commission of a crime of violence; and three counts of theft.

While the charges in the subject case were pending, Johnson was sentenced in the Circuit Court for Baltimore City to an unsuspended aggregate total of seventeen years’ incarceration, sentences to commence on August 2, 2001. The sentences were imposed after Johnson had pled guilty to nine counts of robbery with a dangerous weapon and other charges.

On March 6, 2003, in the subject case, Johnson was sentenced to ten years incarceration on each of the three armed robbery counts, all sentences to run concurrent, and a consecutive sentence of five years without the possibility of parole for his conviction of use of a handgun in the commission of a crime of violence. When the aforementioned fifteen year (total) sentence was imposed, the sentencing judge and counsel engaged in the following colloquy:

[THE COURT]: . . . In count number one, the sentence will be ten (10) years to the Department of Corrections. That will date from, is this correct 12/17?

State: . . . Give me a second, I’ll tell you. Judge, I believe, I believe, the defendant was arrested on or about August the 2nd of 2001.

[Defense Counsel]: Of 01, that’s correct.

[THE COURT]: August the 2nd?

STATE: Yes, Your Honor.

[Defense Counsel]: Yes, Your Honor.

STATE: These events happened in July, all three of them happened in July.

[THE COURT]: . . . was August the 6th, I see. You say it was the 2nd, it was the 2nd.

STATE: He was arrested and he made his confession on that day.

[Defense Counsel]: That's correct.

[THE COURT]: Ok. Well, we'll date from August the 2nd 2001.

* * *

[THE COURT]: ok and then count seven, the sentence of the court is ten (10) years to the department of corrections concurrent to count one. And is thirteen another armed robbery?

STATE: Yes, Your Honor.

[THE COURT]: Count thirteen is another ten (10) years in the department of corrections (inaudible) concurrent with counts one and seven. In count seventeen, it's five (5) years without parole consecutive to one, seven and thirteen and all of these sentences will be consecutive [to] the sentences he is serving in Baltimore City. That equalizes it out, I believe, that both Defendants have thirty-two years, is that right? That's my intention.

STATE: Yes, your Honor.

[Defense Counsel]: That's correct, Judge.

[THE COURT]: And I'd also like to, I'll recommend Patuxent.

* * *

[THE COURT]: [Prosecutor], do we have the City case number so I can actually (inaudible)?

STATE: Judge, I can tell you what I have from the rap sheet that I have taken to be City case numbers. I don't know if that would actually . . .

[THE COURT]: Okay. [Defense Attorney] do you have the City case number that he got the seventeen years (inaudible)?

[Defense Counsel]: I can call back with it but I don't have . . .

STATE: They are numbers such as this, your Honor, maybe you could recognize them, 101276034, 101276037, they're all like 101276 and then . . .

[THE COURT]: Is that the way they're numbering them now?

[Defense Counsel]: Yes, because 1 is the indictment, 01 is the year, 276 is the date of the year that the case was indicted and 37 is the 37th case on that day that it was indicted.

State: So I can give your Clerk all these numbers.

* * *

[THE COURT]: Thank you. Now, I want you to make in the remark section of the commitment so there's no mistake, the intention of the Court is that the sentence be thirty-two years incarceration.

(Emphasis added.)

The commitment form entered in the subject case showed that the sentences in the subject case were to run consecutive to the sentences totaling 17 years imposed by the Circuit Court for Baltimore City.

On March 11, 2003, Johnson, by counsel, filed a motion for modification or reduction of sentence, in which counsel acknowledged that Johnson's 15-year sentence was to run

consecutive to the Baltimore City sentences. That motion was held *sub curia* for several years. On December 27, 2010, Johnson, again by counsel, filed an amended motion for modification or reduction of sentence, which was denied without a hearing by the sentencing judge on January 6, 2011.

Johnson, *pro se*, on March 21, 2013, filed a “motion for post-conviction [relief]” and motion for hearing (hereinafter the “first petition for post-conviction relief”). He claimed that his counsel, who was present when he pled guilty in the subject case, was ineffective because: 1) he never advised appellant of the “nature and elements of the offense[s] to which” he pled guilty; 2) counsel allowed defendant to plead guilty “to crimes he did not commit (in addition to crimes he did commit)”; 3) the statement of facts read into the record in support of the guilty pleas were “inadequate because that statement indicated that defendant had confessed to all of the crimes when in fact defendant only confessed to the ones that he committed”; and 4) trial counsel recommended that he plead guilty “to obtain benefit of a wrap[-]around plea bargain.”

On March 27, 2013, Johnson, *pro se*, filed a request to withdraw the post-conviction petition without prejudice. The request was granted by the court on April 10, 2013.

Meanwhile, also on March 27, 2013, Johnson filed, *pro se*, a motion to correct an illegal sentence. He asserted in his motion that the sentences totaling thirty-two years (the sentence totaling 15 years imposed in the subject case plus the sentences totaling 17 years imposed in the Baltimore City cases) were illegal because all of the sentences should have

commenced on August 2, 2001 which, according to Johnson, meant that the sentences totaling 15 years imposed by the Circuit Court for Baltimore County would run concurrently with the sentences totaling seventeen years imposed in Baltimore City.

Johnson filed, on October 2, 2014, a second petition for post-conviction relief, to which the State filed a response on October 7, 2014. The State noted in its response, correctly, that Maryland Code (2008 Rep. Vol.), Criminal Procedure Article section 7-103 provides that “[u]nless extraordinary cause is shown . . . a petition [for post-conviction relief] may not be filed more than 10 years after the [petitioner’s] sentence was imposed.” The State argued that Johnson’s second petition for post-conviction relief should be denied because it was filed more than ten years after March 6, 2003, which was the date of his sentencing in the subject case, and nowhere in his second post-conviction petition did Johnson show “extraordinary cause” for his delay in filing the petition.

On November 5, 2014, the Circuit Court for Baltimore County filed an order that denied Johnson’s petition for post-conviction relief and his motion to correct an illegal sentence. The court stated in its order, *inter alia*, that there was nothing illegal about appellant’s sentence and that the petition for post-conviction relief was time-barred because Johnson had failed to show “extraordinary cause” for filing his petition more than ten years after sentence was imposed.

Johnson, on November 17, 2014, filed what he called an “Application for Leave to Appeal” to this Court. Insofar as Johnson contends in his Application that the circuit court

erred in denying his motion to correct an illegal sentence, we will treat his Application for leave to appeal as a notice of appeal.

I.

ANALYSIS

Johnson contends that the sentences, as announced by the Circuit Court for Baltimore County in the subject case, were ambiguous and that the ambiguity should be construed in his favor. According to Johnson, the sentences imposed by the court should run concurrently with the seventeen year sentence (total) imposed by the Circuit Court for Baltimore City.

When Johnson filed his motion to correct an illegal sentence, he relied on Maryland Rule 4-345(a), which provides: “[t]he court may correct an illegal sentence at any time.” In *Bryant v. State*, 436 Md. 653, 659-70 (2014), the Court said that the scope of Rule 4-345(a) creates only a limited exception to the general rule of finality. *Id.* at 662. That limited exception applies only to sentences that are “inherently illegal.” *Id.* A sentence is “inherently illegal” only when the sentence is not permitted by law; that is, in excess of the penalty prescribed for the offense, or where no sentence should have been imposed in the first place. *Id.* at 662-63.

A procedural irregularity, like the one claimed by Johnson, does not render an otherwise legal sentence illegal for Rule 4-345(a) purposes. *State v. Wilkins*, 393 Md. 269, 284 (2006) (to be a proper subject of a motion to correct, the “illegality must inhere in the

sentence, not in the judge’s actions.”); *Pollard v. State*, 394 Md. 40, 47 (2006) (the fact that there is some procedural error in the sentencing proceeding does not establish that there is an illegal sentence within the meaning of Rule 4-345(a) if the error “does not inhere in the sentence itself[.]”).

Each of the sentences imposed after appellant pled guilty in the subject case was permitted by law. In fact, the sentences were relatively lenient in that appellant could have been sentenced to twenty years’ incarceration for each of the armed robbery convictions (Md. Code 2012 Repl. Vol., § 3-403(a) of the Criminal Law Article (“Crim. Law”)), plus an additional twenty-year sentence for his use of a handgun in the commission of a felony conviction. *See* Crim. Law § 4-204(c). Thus, the sentences were both permitted by law and not in excess of the penalty prescribed for any of the offenses. Lastly, and again quite obviously, this is not a situation where no sentences should have been imposed in the first place. Therefore, even if it were true that the sentences imposed in the subject case were ambiguous, appellant’s motion to correct an illegal sentence was correctly denied.

II.

OTHER MATTERS

As already mentioned, Johnson asked this Court for leave to appeal the denial of his most recent petition for post-conviction relief. That petition has no merit. As the circuit court found, the petition was filed more than ten years after the date of sentencing and Johnson never even attempted to allege “extraordinary cause” for his late filing. It is

therefore time-barred. We shall deny appellant's motion for leave to appeal the denial of his most recent petition for post-conviction relief.

**MOTION FOR LEAVE TO APPEAL
DENIAL OF POST-CONVICTION
RELIEF IS DENIED; JUDGMENT
DENYING THE MOTION TO
CORRECT AN ILLEGAL
SENTENCE IS AFFIRMED; COSTS
TO BE PAID BY APPELLANT.**