UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2861

September Term, 2015

JARMAL JOHNSON

v.

STATE OF MARYLAND

Berger,
Reed,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: October 12, 2016

This case arises from appellant Jarmal Johnson's second Motion to Correct an Illegal Sentence from a 1992 conviction for drug and assault related charges in the Circuit Court for Baltimore City. Sixteen years later, in 2008, Johnson filed his first Motion to Correct an Illegal Sentence, arguing that the assault with intent to murder charge he was found guilty of was not contained in the indictments returned by the Grand Jury, and therefore his sentence for that charge was illegal. The circuit court denied appellant's motion, and this Court affirmed. The Court of Appeals, however, agreed with appellant and vacated his conviction and sentence.

Three years later, Johnson filed a second Motion to Correct an Illegal Sentence. He argued that because the Court of Appeals vacated the assault with intent to murder charge, which was the only crime of violence, his conviction for use of a handgun in the commission of a felony or a crime of violence was now illegal as the jury instruction given did not include the words "commission of a felony." According to him, the jury could only have convicted him of use of a handgun in the commission of a crime of violence. Following a hearing, the circuit court denied his motion, finding that there were no appropriate grounds for relief.

Appellant presents the following question for our review:

1. Whether the circuit court erred in denying appellant's Motion to Correct an Illegal Sentence.
2. Was the appellant legally sentenced for Use of a Handgun in the Commission of a Felony when the jury wasn't instructed on that charge, and thus could not have convicted him for it?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

BACKGROUND

On March 6, 1992, police officers executed a search warrant at a residence in Baltimore City. When the officers entered, gunfire erupted. Jarmal Johnson was observed firing a semi-automatic weapon in their direction, and one of the police officers was injured as a result. The ensuing search revealed large quantities of heroin and cocaine, as well as thirteen shell casings identified as having been fired from Johnson's gun. He was arrested with three other co-defendants, and the Grand Jury subsequently returned two sets of indictments. The first set of indictments charged (1) attempted first-degree murder; (2) common law assault; (3) wearing, carrying, or transporting a handgun; and (4) use of a handgun in the commission of a felony or a crime of violence. The second set of indictments included the following related drug offenses: (1) possession with intent to distribute heroin; (2) possession of heroin; (3) possession with intent to distribute cocaine; (4) possession of cocaine; (9) conspiracy to possession with intent to distribute heroin; (11) conspiracy with intent to distribute cocaine; and (13) use of a firearm during and in relation to drug trafficking.

In September of that year, Johnson's trial under both indictments was consolidated with those of his co-defendants'. The trial judge, in giving the jury instructions, described the charge of use of a handgun in the commission of a felony or a crime of violence only as "use of a handgun in the commission of a crime of violence." The court stated:

> The felonies or crimes of violence in this case are assault with intent to murder and attempted murder. In order to convict the defendant, the State must prove: (1) that the defendant committed one of the felonies; that is, guilty of either assault with intent to murder or attempted murder.

Following deliberations, the jury acquitted Johnson of attempted murder, but found him guilty of assault with intent to murder; common law assault; wearing, carrying, or transporting a handgun; and use of a handgun in the commission of a felony or crime of violence. The jury also found him guilty of the drug charges listed above.

At sentencing, the trial court imposed a 30-year prison sentence for assault with intent to murder, merging the common law assault conviction; and a 20-year sentence for the use of a handgun in the commission of a felony or crime of violence, merging the wearing, carrying, or transporting a handgun conviction. The trial court also imposed a 20-year sentence for possession with intent to distribute heroin, merging the possession of heroin conviction; a 20-year sentence for possession with intent to distribute cocaine, merging his conviction for possession of cocaine; a 20-year sentence for conspiracy with intent to distribute heroin, merging his sentence for conspiracy with intent to distribute cocaine; and a concurrent 20-year sentence for use of a firearm during and in relation to drug trafficking. Johnson's total time to be served amounted to 110 years.

In January 2008, he filed his first Motion to Correct an Illegal Sentence (the "2008 motion"), claiming that his sentence for assault with intent to murder was illegal because that charge was not included in the indictments returned by the Grand Jury. He also argued that if his conviction for assault with intent to murder was to be vacated, his conviction for use of a handgun in the commission of a felony or a crime of violence should likewise be vacated since the conviction for the latter was predicated on a conviction for the former. *Johnson v. State*, 427 Md. 356, 379 (2012). The circuit court denied Johnson's motion, and this Court affirmed. The Court of Appeals reversed and vacated the assault with intent

to murder conviction. *Id.* at 378. They held that because assault with intent to murder was not charged in the indictments returned by the Grand Jury, Johnson's conviction for the same was illegal. The Court, however, upheld his conviction for use of a handgun in the commission of a felony or a crime of violence, finding "the factual and legal predicate" to support the conviction. *Id.* at 379.

> We do not agree that [the use of a handgun in the commission of a felony or a crime of violence conviction] must be vacated, because three felonies remain to support it…the jury found [appellant] guilty, under a separate indictment, of three other felonies not affected by our holding [vacating the conviction for assault with intent to murder]…Thus, the record shows the factual and legal predicate for [appellant's] conviction for 'use of a handgun during the commission of a **felony** or crime of violence,' and we shall not disturb it.

Id. (emphasis in original).

On December 28, 2015, appellant filed his second Motion to Correct an Illegal Sentence (the "2015 motion"). Johnson noted the trial judge's jury instruction for the charge of use of a handgun in the commission of a felony or a crime of violence, and argued that given this instruction, he could only have been convicted of "use of a handgun" with the "commission of a crime of violence" predicate. He contended that the trial judge gave the appropriate instruction for that predicate, and if the State had wanted to convict him of the "commission of a felony" predicate, a different instruction was needed. As such, he argued that his conviction for use of a handgun in the commission of a felony or a crime of violence should be vacated.

The circuit court denied his 2015 motion, pointing to the opinion by the Court of Appeals. The court held that, under the 'law of the case' doctrine, they were bound to

uphold the conviction. Further, the court found that, even if the law of the case doctrine did not apply, appellant's contention was not proper for a Motion to Correct an Illegal Sentence.

This appeal followed.

STANDARD OF REVIEW

The only question under Rule 4-345(a) "[o]nce the outer boundary markers for a sentence are objectively established…is whether the ultimate sentence itself is or is not inherently illegal." *Carlini v. State*, 215 Md. App. 415, 443 (Md. Ct. Sp. App. 2013). Whether a "sentence is an illegal sentence under Rule 4-345(a) is a question of law, which we will review *de novo*." *Meyer v. State*, 445 Md. 648, 663 (2015).

DISCUSSION

I. The Law of the Case Doctrine Controls Johnson's 2015 Motion to Correct an Illegal Sentence.

Appellant urges this Court to reverse the circuit court's denial of his 2015 Motion to Correct an Illegal Sentence. He argues that, because his conviction for assault with intent to murder was vacated, his conviction and sentence for use of a handgun in the commission of a felony or crime of violence should also be vacated. He contends that in his previous appeal, neither this Court nor the Court of Appeals considered whether, given the judge's instruction on the charge at issue, his sentence would be illegal. The State argues that this is the identical claim that was raised in the previous appeal and rejected by the Court of Appeals. They submit that the 'law of the case' doctrine therefore governs the instant matter.

The law of the case doctrine is a "rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950). "The purpose of [the] doctrine is to avoid piecemeal litigation – that is, to prevent litigants from prosecuting successive appeals in a case that raises the same questions that were decided in a prior appeal." *Baltimore County v. Baltimore County Fraternal Order of Police, Lodge No. 4*, 2016 WL 4499209, *7 (citing *Fid.-Balt. Nat'l Bank & Trust Co. v. John Hancock Mut. Life Ins. Co.*, 217 Md. 367, 371-72 (1958)).

Under the doctrine, "once an appellate court rules on a question on appeal, litigants *and lower courts* are bound by the ruling, which is considered to be 'the law of the case.'" *Scott v. State*, 379 Md. 170, 183 (2004) (emphasis added). A statement of a court that is not part of the court's ruling in the case – *i.e.* dicta – is not the law of the case that is necessarily binding on a lower court. *Garner v. Arches Glen*, 405 Md. 43, 57-59 (2008). However, "if an issue is clearly presented to the court and, in rendering a decision, the court necessarily decides that issue, that ruling is the law of the case, regardless of the extent to which the court elaborates its reasoning." *Baltimore County v. Fraternal Order of Police, Lodge No. 4*, 2016 WL 4499209, *7 (2016). The doctrine also extends to questions that "could have been raised and argued" in the prior appeal, but were not, so long as the ruling resolves them. *Id.*; *see also Fid.-Balt. Nat'l Bank & Trust Co. v. John Hancock Mut. Life Ins. Co.*, 217 Md. 367, 371-72 (1958).

In Johnson's 2008 case, the Court of Appeals explicitly found there was a sufficient "factual and legal predicate" to uphold his use of a handgun conviction. The Court stated:

> [w]e do not agree that [the use of a handgun in the commission of a felony or a crime of violence conviction] must be vacated, because three felonies remain to support it…the jury found [appellant] guilty, under a separate indictment, of three other felonies not affected by our holding[vacating the conviction for assault with intent to murder]…Thus, the record shows the factual and legal predicate for [appellant's] conviction for 'use of a handgun during the commission of a **felony** or crime of violence,' and we shall not disturb it.

Johnson v. State, 427 Md. 356, 379 (2012) (emphasis in original).

As such, this court is bound by the previous decision unless an exception to the law of the case doctrine applies. *Hawes v. Liberty Homes*, 100 Md. App. 222, 231 (Md. Ct. Sp. App. 1994). There are three circumstances in which the law of the case doctrine does not apply:

> (1) the evidence in a subsequent trial is substantially different from what was before the court in initial appeal; (2) a controlling authority has made a contrary decision in the interim on the law applicable to the particular issue; or (3) the original decision was clearly erroneous and adherence to it would work a manifest injustice.

Baltimore County v. Fraternal Order of Police Lodge No. 4, 2016 WL 4499209, *7 (2016); *Turner v. Housing Authority of Baltimore City*, 364 Md. 24, 34 (2001); *see also Hawes v. Liberty Homes*, 100 Md. App. 222, 231 (Md. Ct. Sp. App. 1994) (detailing substantially the same exception).

Johnson submits that his case lies within at least one of these exceptions.

A. Johnson's present motion does not present "substantially different" evidence "in a subsequent trial."

The first exception requires that the "evidence in a subsequent trial is substantially different from what was before the court in the initial appeal." *Baltimore County v. Fraternal Order of Police Lodge No. 4*, 2016 WL 4499209, *7 (2016); *Turner v. Housing*

Authority of Baltimore City, 364 Md. 24, 34 (2001). In the case at bar, however, Johnson did not have a second trial and thus there has been no new or additional evidence. He argues, nevertheless, that the jury instruction constitutes "substantially different" evidence than what was presented before the Court of Appeals in his 2008 motion.

We disagree. The entire record, including the jury instruction, is exactly the same. Simply because Johnson did not initially argue that the jury instruction was deficient does now render it "substantially different." *See Turner v. Housing Authority of Baltimore City*, 364 Md. 24, 35 (2001) (holding the first circumstance inapplicable given that "[t]here ha[d] been no subsequent trial, nor any contention that there is substantially different evidence relative to the issue under review.").

Moreover, Johnson's claim is not "substantially different." In his 2008 motion, he argued that if the Court vacated his conviction for assault with intent to murder, they "must also vacate his conviction for use of a handgun in the commission of a felony or crime of violence." *Johnson v. State*, 427 Md. 356, 379 (2012). He averred that "at the time of trial, simple assault, the only remaining relevant conviction in this indictment, was not considered a crime of violence," thus, he could not be convicted for the use of a handgun charge on a "crime of violence" predicate.

In his present motion, Johnson again argues his conviction for use of a handgun must be vacated because it was based on his conviction for assault with intent to murder. He adds in this motion, however, that the jury based their verdict solely on the crime of violence predicate and did not consider the felony predicate, because of the jury instruction.

Ultimately, under either circumstance, Johnson's argument is the same. As such, the exception does not apply.

Furthermore, assuming *arguendo*, Johnson's argument was "substantially different," the result is the same as the doctrine applies to issues, like the jury instruction, that "could have been raised and argued," in a prior appeal but were not, as long as they were resolved. *Baltimore County v. Baltimore County Fraternal Order of Police, Lodge No. 4*, 2016 WL 4499209, *7 (2016). Contrary to Johnson's assertion, the Court's holding is not dicta. He notes that the "brief discussion on this issue came at the end of a long decision devoted to other, larger issues and in that sense fits within the exception of *Hawes*." Nevertheless, the Court's holding, "regardless of the extent to which the court elaborate[d] its reasoning," was a "final determination" that necessarily decided the issue. *Baltimore County v. Fraternal Order of Police, Lodge No. 4*, 2016 WL 4499209, *7 (2016).

B. Johnson has presented no "controlling authority [that] has made a contrary decision in the interim on the law applicable to the particular issue."

Appellant has not asserted that the previous decision is "patently inconsistent with controlling principles" announced by either this Court or the Court of Appeals. *Hawes v. Liberty Homes*, 100 Md. App. 222, 231 (Md. Ct. Sp. App. 1994). Thus, we shall instead focus on his final claim.

C. The original decision was not clearly erroneous nor would adherence to it work a manifest injustice.

Johnson contends that adhering to the law of the case doctrine would be "manifestly unjust" because "[o]nly a jury can convict him of [use of a handgun in the commission of

a felony or a crime of violence]." He admits that although "[i]t would have arguably been correct for the trial judge to instruct on both [felony and crime of violence]," "the presumption must be that the jurors followed the instructions of the trial judge" and "[t]he conviction was *only* for a crime of violence." "[T]he crux of Appellant's complaint" is that "a jury never convicted him of use of a handgun in [the] commission of a felony." At the hearing below, he argued:

> I'm saying that yes, of course he was convicted. There was no doubt he was…But this one crime has two – it's forked. It can be either felony or crime of violence. And I'm saying there's no mystery. It was crime of violence…

"[O]nly a jury can enter a guilty verdict – not reviewing judges after-the-fact."

Appellant, however, mischaracterizes the statute. At the time Johnson was convicted, the crime of unlawful use of a handgun in the commission of a felony or crime of violence was defined in Maryland Code Article 27, Section 36B(d).[1] It provided

> Any person who shall use a handgun or an antique firearm capable of being concealed on the person in the commission of any felony or any crime of violence as defined in § 441 of this article shall be guilty of a separate misdemeanor.

The statute was not bifurcated or "forked," and did not have "modalities." Rather, it was one provision of a larger statute, with no subdivisions or parts. There was no separation between "use of a handgun in the commission of a crime of violence" and "use of a

[1] This charge is now found in Maryland Code, Criminal Law § 4-204(b). It now provides: "A person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime." Maryland Code Criminal Law Section 4-204(c)(1)(i) of the current statute, outlining the sentencing for the crime, also refers to the statute as one inclusive charge.

handgun in the commission of a felony." Further, count four of the indictment charged Johnson with "use a handgun in the commission of a felony or a crime of violence." The use of the word "or" in the statute does not indicate a demarcation of two separate charges, but is merely a connective, making the sentence true when at least one of the alternatives is present.

Appellant also mischaracterizes our review. The Supreme Court has made clear that a court reviewing the validity of a conviction under an erroneous jury instruction does not "'become in effect a second jury to determine whether the defendant is guilty.'" *Neder v. United States*, 527 U.S. 1, 20 (1999).

In both *Neder v. United States* and *Musacchio v. United States*, the Supreme Court analyzed the effect of an incorrect jury instruction on the validity of a conviction. *See Musacchio v. United States*, 136 S. Ct. 709 (2016) (reviewing the effect a jury instruction with an additional element); *Neder v. United States*, 527 U.S. 1 (1999) (reviewing the effect of an element omitted from the jury instruction). The Court held that, in reviewing a faulty jury instruction, "a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 19. This consideration by the reviewing court "does not intrude on the jury's role to resolve conflicts in the testimony, to weigh evidence, and draw reasonable inferences from basic facts to ultimate facts." *Musacchio*, 136 S. Ct. at 715. A reviewing court merely determines whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* "[A]nswering the question

whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Neder*, 527 U.S. at 19.

In the present case, the Court of Appeals' 2008 holding was not clearly erroneous. It was fully supported by the record and the law. Adherence to its decision would not work a manifest injustice.

II. Appellant's sentence is not illegal, and therefore not proper for a Rule 4-345(a) Motion.

Assuming, *arguendo*, that appellant's claim was not barred by the law of the case doctrine, it would not be proper under Maryland Rule 4-345(a).

Rule 4-345(a) provides:

> The court may correct an illegal sentence at any time.

Generally, if a sentence is illegal under Rule 4-345(a), "the defendant may file a motion in the trial court to 'correct' it, notwithstanding that (1) no objection was made when the sentence was imposed, (2) the defendant purported to consent to it, or (3) the sentence was not challenged in a timely-filed direct appeal." *Chaney v. State*, 397 Md. 460, 466 (2007).

However, "[t]he *scope* of this privilege…is narrow[.]" *Id.* "[A]s a general rule, a Rule 4-345(a) motion to correct an illegal sentence is not appropriate where the alleged illegality 'did not inhere in [the defendant's] sentence." *Evans v. State*, 382 Md. 248, 278 (2004) (citing *State v. Kanaras*, 357 Md. 170, 185 (1999)). A "procedural irregularity, even in a capital sentencing proceeding," does not always result in a sentence "not permitted by law." *Burch v. State*, 346 Md. 253, 289 (1997). "A motion to correct an

illegal sentence ordinarily can be granted only where there is some illegality in the sentence itself or the sentence never should have been imposed." *Evans*, 382 Md. at 278-79 (citing *Ridgeway v. State*, 369 Md. 165, 171 (2002)); *see also Carlini v. State*, 215 Md. App. 415, 419-20 (Md. Ct. Sp. App. 2013); *Tshiwala v. State*, 424 Md. 612, 618 (2012); *Holmes v. State*, 362 Md. 190, 195-96 (2000). Judge Moylan detailed the history and scope of Rule 4-345(a) in *Bashawn Montgomery Ray v. State*. In his analysis, he quotes:

> "Emerging from [a] survey of a quarter of a century of Maryland caselaw is the overarching principle that the values of finality and closure still abide. Rule 4-345(a) has been consistently interpreted to be a narrow window that permits a trial judge to correct at any time a sentence that is obviously and facially illegal in the sense that it is a sentence the court had never been statutorily authorized to impose. It is not, on the other hand, some unlimited 'Reopen, Sesame,' licensing the court to revisit and to relitigate issues that have long since become faits accompli."

Bashawn Montgomery Ray v. State, citation forthcoming, 5 (quoting *Matthews v. State*, 197 Md. App. 365, 375 (2011), rev'd on other grounds, 424 Md. 503 (2012)). Appellate review of an illegal sentence, therefore, has been limited to three recognized grounds:

> (1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits.

Jackson v. State, 364 Md. 192, 200 (2001) (citations omitted). Where the sentence itself was lawful, however, such a motion is not appropriate. *Evans v. State*, 382 Md. 248, 278-79 (2004).

The omission of an element in a jury instruction does not make the subsequent sentence illegal. In *Neder*, the Supreme Court found that the omission is subject to harmless-error analysis as long as the omission does not "vitiat[e] all [of] the jury's

findings." *Neder v. U.S.*, 527 U.S. 1, 10-11 (1999). Because Neder did not contest that the indictment properly charged him or that there was sufficient evidence to have proved that element, the Court ultimately found the omission harmless. Under harmless-error analysis, an error or omission is 'harmless' if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 17; *see also U.S. v. Clinton*, 547 F.App'x 261, 262 (4th Cir. 2013).

Johnson's first Motion fell under the first category of sentences reviewable under Rule 4-345(a) – sentences violative of constitutional requirements. *Johnson v. State*, 427 Md. 356, 377-78 (2012). His sentence for assault with intent to murder was never "statutorily authorized" because Johnson was never indicted with that charge, violating his due process right to adequately be made aware of the charges against him in order to properly defend himself.

Johnson's sentence for use of a handgun in the commission of a felony or a crime of violence, conversely, is not illegal. As discussed, the jury convicted him of use of a handgun in the commission of a felony or a crime of violence. As in *Neder*, Johnson does not contest that the indictment here properly charged him with use of a handgun in the commission of a felony or a crime of violence, nor does he dispute that the evidence was sufficient to convict him.

The impropriety of the jury instruction does not establish that Johnson's sentence is one "the court had never been statutorily authorized to impose." It is a "procedural irregularity" that does not "inher[e] in the sentence itself." *See State v. Kanaras*, 357 Md. 170, 185 (1999) (holding that, although subsequent activities by the Parole Commission

removed defendant's possibility for parole, resulting in an illegal ex post facto increase in his sentence, the impropriety was not inherent in the sentence itself and therefore not proper for review under Rule 4-345(a)).

Johnson does not argue, and the record is devoid of any evidence, that "the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations" or that "the sentence is [not] within statutory limits." Appellant's Motion, therefore, is not proper under Rule 4-345(a).

Accordingly, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY DENYING MOTION TO CORRECT AN ILLEGAL SENTENCE AFFIRMED. COSTS TO BE PAID BY APPELLANT.