

Circuit Court for Baltimore City  
Case No. 194102008

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 85

September Term, 2018

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ANDREW HORTON

v.

STATE OF MARYLAND

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Reed,  
Friedman,  
Alpert, Paul S.,  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Alpert, J.

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Filed: December 18, 2018

\*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.

In 1994, Andrew Horton, appellant, pleaded guilty to the first-degree murder of Leonardo Davinci Gillus. Horton was sentenced to life imprisonment with all but thirty-five years suspended. In 2017, the State, citing cases decided after Horton's sentencing, moved to correct his sentence on the ground that it was illegal because it did not include a period of probation. The Circuit Court for Baltimore City granted that motion and added a term of probation.

In this timely appeal, Horton raises the following issues:

1. Did the trial court err in sentencing Appellant, and/or did the trial court illegally increase Appellant's sentence?
2. Was the resentencing in violation of Appellant's Fourteenth Amendment Due Process rights?

Concluding there was no legal error or constitutional violation, we affirm Horton's corrected sentence.

### **BACKGROUND**

In November 1994, pursuant to a plea agreement, Horton entered a guilty plea on a charge of first-degree murder. He was sentenced to life with all but thirty-five years suspended. In the absence of any probation period, the sentence was subsequently converted to a term of thirty-five years.

Twenty-three years later, in December 2017, the State filed a Motion to Correct Illegal Sentence, pointing to Court of Appeals decisions issued after Horton's conviction, holding that such "split" sentences (i.e., a life sentence with all but a specified term of years suspended) are illegal unless they contain a period of probation. After a hearing, the Circuit

Court for Baltimore granted the State’s motion and added three years of supervised probation to the previous sentence of life with all but thirty-five years suspended.

### DISCUSSION

Horton contends that the change in his sentence was “an illegal increase[.]” In his view, the original sentence was “lawfully imposed under” *State v. Wooten*, 27 Md. App. 434 (1975), *aff’d on other grounds*, 277 Md. 114 (1976), which “was the prevailing authority at the time[.]” Horton argues that “the belated imposition of probation in 2018, some twenty-four years after his sentencing in 1994, made in connection with subsequently emerging decisional law, violated his fundamental due process rights under the Fourteenth Amendment to the United States Constitution.” Alternatively, Horton contends that the re-sentencing court erred procedurally, by increasing his sentence “after refusing to consider the facts of the case.” We are not persuaded by either contention, for the reasons explained below.

Under Maryland law, the minimum sentence for first-degree murder is imprisonment for life. *See* Md. Code (2017 Supp.), § 2–201(b)(1) of the Criminal Law Article (“[A] person who commits murder in the first degree is guilty of a felony and on conviction shall be sentenced to imprisonment for life without the possibility of parole; or imprisonment for life.”); former Md. Code (1992 Repl. Vol.), Art. 27, § 412(b) (“a person found guilty of murder in the first degree shall be sentenced to death, imprisonment for life, or imprisonment for life without the possibility of parole”). Although a circuit court may “provide that a lesser time be served in confinement” by “suspend[ing] the remainder

of the sentence[.]” when it exercises that discretion to suspend a portion of a life sentence, it must, at the same time, “order probation for . . . not longer than . . . 5 years[.]” Md. Code (2001, 2008 Repl. Vol.), § 6-222(a) of the Criminal Procedure Article.

Because Horton’s sentence of life with all but thirty-five years suspended did not include the required probation, that sentence was illegal. *See generally Waker v. State*, 431 Md. 1, 7 (2013) (“when a court imposes a sentence, and the sentence itself is not authorized by law, the sentence is illegal.”). “An illegal sentence may be corrected at any time.” Md. Rule 4-345(a).

To be sure, the jurisprudence governing sentence corrections in these circumstances developed after Horton’s 1994 sentencing. As Horton points out, the prevailing interpretation of sentencing authority at that time was found in *Wootten*, where this Court concluded that a court imposing a life sentence had discretion to suspend all but a specified term of years without imposing an accompanying term of probation. *Wootten*, 27 Md. App. at 442-43. But that was an ancillary aspect of our decision, which was not reviewed by the Court of Appeals on direct appeal, then abrogated in a series of decisions making it clear that probation is mandatory in these circumstances.

In *Cathcart v. State*, 397 Md. 320, 322 (2007), a defendant convicted of false imprisonment was sentenced to life with all but ten years suspended. The Court of Appeals interpreted CP § 6-222, providing that a court may ““(1) impose a sentence for a specified time and provide that a lesser time be served in confinement; (2) suspend the remainder of the sentence; and (3) order probation for a time [permitted by that statute].”” *Id.* at 326

(emphasis added). The Court concluded that the effect of omitting probation was to convert that “split” life sentence into a term-of-years sentence. *Id.* at 329-30. Disapproving our interpretation of the statute in *Wootten*, the *Cathcart* Court held that when imposing such a sentence, a court also must impose an accompanying period of probation. *Id.* at 327-29.

In *Greco v. State*, 427 Md. 477, 485-86 (2012), the Court of Appeals applied this holding to a mandatory life sentence for murder. Convicted of first-degree murder and first-degree rape, that defendant was sentenced to concurrent terms of life with all but fifty years suspended, without any probation. *Id.* at 513. The Court of Appeals held that the “previously imposed sentence for first degree premeditated murder of life, suspend all but fifty years, was converted by operation of law into a term-of-years sentence of fifty years imprisonment.” *Id.* Whether a life sentence is discretionary, as in *Cathcart*, or mandatory, as in *Greco*, suspending a portion of the life sentence without imposing an accompanying period of probation rendered the sentence illegal. *See id.*

Pertinent to this appeal, the *Greco* Court further held that such an illegal sentence must be corrected by adding a period of probation. *See id.* The Court remanded, mandating that “the Circuit Court must impose a sentence of life imprisonment, all but fifty years suspended, to be followed by some period of probation.” *Id.* Adding a period of probation in these circumstances does not run afoul of statutory protections against an increased sentence after remand, the Court explained, because “[t]he correction of an illegal sentence may result in an increase over the erroneous sentences previously imposed on the

defendant.”” *Id.* at 508, 511 (quoting *Hoile v. State*, 404 Md. 591, 620 (2008)). *See* Md. Code, § 12-702 of the Courts & Judicial Proceedings Article.

Most recently, in *State v. Crawley*, 455 Md. 52 (2017), the Court of Appeals applied these principles to a mandatory life sentence for first-degree murder that, as in this case, resulted from a guilty plea. When *Crawley*, pursuant to a plea agreement, was sentenced to life imprisonment with all but thirty-five years suspended, neither the parties nor the court mentioned probation. *Id.* at 57. Citing *Greco*, *Crawley* later moved to correct that sentence. *Id.* at 61-62. The circuit court, ruling that the sentence was illegal, corrected it by adding four years of supervised probation. *Id.* The Court of Appeals affirmed the revised sentence, rejecting *Crawley*’s attempt to distinguish *Greco* on the ground that his life sentence was the result of a guilty plea rather than a guilty verdict. *See id.* at 54.

The *Crawley* Court synthesized applicable law, explaining:

All forms of first degree murder carry a statutorily-mandated life sentence. *See* Md. Code Ann., Crim. Law § 2–201(b) (2002, 2012 Repl. Vol., 2016 Supp.). Although a life sentence must be imposed, the sentencing court retains the discretion to suspend any portion of it so long as the suspended portion carries with it a period of probation. Md. Code Ann., Crim. Proc. § 6–222 (2001, 2008 Repl. Vol., 2016 Supp.); *Cathcart v. State*, 397 Md. 320, 327 (2007). The absence of a period of probation has the effect of removing the portion of the life sentence that has been suspended, leaving standing only the term-of-years portion of the sentence. *See Cathcart*, 397 Md. at 330. A term-of-years sentence for first degree murder is an illegal sentence that must be corrected by adding a period of probation. *Greco v. State*, 427 Md. 477, 513 (2012).

The case before us presents the question of whether a sentence for first degree felony murder containing such an illegality must be corrected as described in *Greco* when the illegal sentence was imposed pursuant to a plea agreement. . . . [W]e hold that the rule established by *Greco* applies

regardless of whether the sentence was the product of a plea agreement or upon a conviction following trial.

*Id.* at 54-55 (footnotes omitted).

The Court reasoned that

the negotiated split sentence to which Crawley agreed and the court imposed was the statutorily-mandated life imprisonment, with all but 35 years suspended. Because the suspended portion could not remain due to the lack of a probationary period, the sentence was converted by operation of law to an illegal term-of-years sentence, which could not stand. *Crawley’s sentence—unlawful as originally imposed—was properly remedied through the imposition of a period of probation.*

*Greco* instructs that a corrected sentence is “limited by the maximum legal sentence that could have been imposed, with the illegality removed.” The circuit court followed the dictates of *Greco* by vacating the original unlawful sentence, reimposing the mandatory life sentence with all but 35 years suspended, and adding a period of probation to the suspended portion of that sentence. In doing so, the circuit court effectively removed the illegality created by the absence of a period of probation attached to the suspended portion of the life sentence. There is no dispute that the four-year probation period satisfied constitutional standards and statutory limits. *Meyer [v. State, 445 Md. 648, 670 (2015)]* (“When imposing probation conditions, [a] judge is vested with very broad discretion . . . [in order] to best accomplish the objectives of sentencing—punishment, deterrence and rehabilitation[,] and is limited only by constitutional standards and statutory limits.”) (citations and internal quotations omitted). The imposition of that period of probation, moreover, did not constitute an abuse of the circuit court’s “very broad discretion.” *Id.*

*Id.* at 67-68 (emphasis added).

Horton’s appeal is governed by *Crawley*, *Greco*, and *Cathcart*. We hold that his sentence – unlawful as originally imposed – was properly remedied through the imposition of a period of probation. *See id.*

None of Horton’s challenges to this conclusion is persuasive. As a threshold matter, we reject Horton’s contention that his sentence was delimited by this Court’s abrogated

decision in *Wooten*. Although the Court of Appeals affirmed the judgment in *Wooten*, the sole issue before that Court was “whether a trial court had the power to suspend the execution of a portion of a life sentence it imposed following a conviction for murder in the first degree when the only penalty then authorized for that crime under Maryland law was imprisonment for life.” *Wooten*, 277 Md. at 114. The Court of Appeals concluded there was “nothing improper in the trial court’s suspension of all but the first eight years of the life sentence it imposed in this case[,]” without addressing this Court’s ancillary ruling regarding probation. *See generally United States v. Streidel*, 329 Md. 533, 551 n.12 (1993) (recognizing that judicial construction of statute “has little or no applicability when . . . not made by the highest court in the jurisdiction.”).

It was not until the *Cathcart-Greco-Crawley* line of cases that the Court of Appeals considered and rejected that construction of the statutory scheme. When the Court of Appeals interprets a Maryland statute, “the pronouncement of the law offered in that case is viewed generally as what has always been the law, albeit unannounced until that case.” *Att’y Grievance Comm’n v. Saridathis*, 402 Md. 413, 427 (2007). Indeed, Horton ignores that the Court of Appeals corrected the illegal sentences in both *Greco* and *Crawley*, even though, like Horton’s sentence, both were imposed under *Wooten*, before the decision in *Cathcart*. *See Crawley*, 455 Md. at 56-57 (sentencing occurred in 1998); *Greco*, 427 Md. at 513 (sentencing occurred in 1982 and resentencing in 1998).

Finally, Horton’s citation to *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964), for the proposition that the ruling in *Cathcart* and its progeny should not apply to



him, is unavailing. The Supreme Court held that a decision by a state supreme court, interpreting a trespass statute so as to prohibit “conduct that was not criminal at the time [the defendants] committed it, . . . violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits[.]” *Id.* at 350. The *Bowie* Court further reasoned that “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law” that violates due process. *Id.* at 353. “If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.” *Id.* at 353-54.

*Bowie* is inapposite because Horton was not subjected to “judicial enlargement” of a criminal statute by virtue of the decisions in *Cathcart*, *Greco*, and *Crawley*. None of those cases criminalized previously lawful conduct or otherwise authorized an increase in the statutory penalty. To the contrary, first-degree murder, the conduct committed by Horton, has always been prohibited and penalized by a mandatory life sentence. A period of probation must accompany the suspension of a life sentence, even when adding such probation increases the previously imposed sentence because “the correction of an illegal sentence may result in an increase over the erroneous sentence previously imposed on the defendant.” *Greco*, 427 Md. at 508.

Horton fares no better with his alternative complaint that the sentencing court violated his right to procedural due process by refusing to consider the underlying factual record before imposing a three-year period of probation. (Ant.3) As the State points out,

counsel for Horton did not object when, in response to the prosecutor’s offer to review the facts before the sentence was corrected, the court stated that it did “not need the facts” because it was merely “adding a period of probation.” (T.9-10) When the court thereafter gave Horton an opportunity to make a statement and present mitigating information, he did not present his account of the crime. (T.8-9)

Moreover, Horton has not proffered, much less established, how a detailed review of facts underlying the murder would have affected his resentencing. Because Horton pleaded guilty to first-degree murder and his resentencing was limited to adding a probationary period to comply with mandatory statutory sentencing requirements, we see no factual or legal basis to indicate that the addition of a three-year period of probation to Horton’s previous sentence was tainted by vindictiveness. *Cf. Greco*, 427 Md. at 512 (“[T]his Court is limiting the sentencing court’s discretion to sentence, thereby protecting against the threat of vindictiveness.”). In the absence of either objection or prejudice, Horton is not entitled to appellate relief. *Cf. Lopez v. State*, 231 Md. App. 457, 473, *aff’d on other grounds*, 458 Md. 164 (2018) (“Nothing in the record before us indicates that Lopez suffered any prejudice as a result of the State’s violation of Rule 4-342(d)” governing sentencing discovery).

For these reasons, the circuit court did not err in correcting Horton’s illegal sentence by imposing a period of probation.

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