Circuit Court for Baltimore County
Case No: 03-K-14-002268

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 275

September Term, 2020

JACQUE ALPHONSO BROWN

v.

STATE OF MARYLAND

Graeff,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 30, 2021

*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.

Jacque Alphonso Brown appeals a decision by the Circuit Court for Baltimore County denying his Rule 4-345(a) motion to correct an illegal sentence in which he had claimed that he was convicted and sentenced for a crime for which he was not properly charged. For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND

On the afternoon of April 9, 2014, Baltimore County police officers responded to a call from an apartment complex at 9905 Mill Centre Drive and met Mr. Brown, who was sitting on the curb next to his vehicle in front of 9925 Mill Centre Drive.[1] Mr. Brown informed the police that he had just been the victim of an attempted armed carjacking. He related that, while in the parking lot, he was approached by men, one of whom held a gun to his head and demanded his keys. A struggle ensued and the gun discharged, but misfired. The assailants then fled the scene.

Mr. Brown was transported by a police officer to the police station for the purpose of providing a statement regarding the incident. While at the police station, Mr. Brown acknowledged that he "had dealt drugs in the past"—a statement relayed to a detective still at the crime scene. A canine was then brought to the scene to scan the exterior of Mr. Brown's vehicle that was parked in the lot; the dog alerted for the presence of drugs at the driver's side door handle, as well as at the passenger door. The officers searched the interior of Mr. Brown's vehicle, but they did not recover any drugs. Mr. Brown, who was still at the police station, was placed under arrest and during a strip search a baggie

[1] Mill Centre Drive in some places in the record before us is spelled Mill Center Drive. It appears that Centre is the correct spelling.

containing approximately 6-7 grams of heroin was recovered from his buttocks and $829 in cash from his pocket. A search of an apartment believed to be associated with Mr. Brown, located in the complex where the attempted carjacking had occurred and bearing the address 9925 Mill Centre Drive apartment #475, was also undertaken. Heroin and cocaine were recovered from the apartment.

Pursuant to a Statement of Charges filed in the District Court of Maryland for Baltimore County, Mr. Brown was charged with three counts: possession of a controlled dangerous substance (heroin) in a sufficient quantity to indicate an intent to distribute; possession of a controlled dangerous substance (cocaine) in a sufficient quantity to indicate an intent to distribute; and possession of a controlled dangerous substance (crack cocaine) in the amount of 50 grams or more. The Statement of Charges reflected that the offenses took place on or about April 9, 2014, and on the form indicating "place" it was stated "9925 Mill Centre Drive." The "place" of the offense did not specify an apartment number.

The case was subsequently transferred to the Circuit Court for Baltimore County following an Indictment charging Mr. Brown with the following five counts: possession of heroin with intent to distribute (Count 1); possession of heroin (Count 2); possession of crack cocaine in a large amount (Count 3); possession of cocaine with intent to distribute (Count 4); and possession of cocaine (Count 5). Each count described the offense as occurring on or about April 9, 2014 in Baltimore County, without further reference to the specific locale. Mr. Brown did not request a bill of particulars.

Following a suppression hearing, the court suppressed the contraband recovered from the apartment. The court denied Mr. Brown's motion to suppress the heroin recovered from his buttocks, and later denied his motion to reconsider that ruling.

On November 12, 2015, Mr. Brown appeared in court for a bench trial. At the outset of that proceeding, given the evidence which was suppressed, the State nol prossed Counts 3, 4 and 5 (possession of crack cocaine in a large amount, possession of cocaine with intent to distribute, and possession of cocaine). Defense counsel informed the court that "what we're left with now is seven grams of heroin." The State replied: "6.3 [grams] to be precise." When the court asked where that was recovered, the State answered: "From . . . his buttocks." In short, it was clear from the outset of trial that the State was proceeding on Counts 1 and 2 based on the heroin recovered from Mr. Brown's person at the police station, and not on the evidence recovered, but suppressed, from the apartment. Defense counsel did not object or indicate a contrary position.

At trial, the State presented evidence that about 6.2 grams of heroin was recovered on April 9, 2014 from Mr. Brown's buttocks while he was at the police station, which had a street value of $600-$700. The State also presented evidence that the amount of heroin was indicative of an intent to distribute.

At the close of evidence, defense counsel seemed to argue that Count 1 was based on the heroin recovered from the apartment and did not include the heroin recovered from Mr. Brown's person, pointing to the Statement of Charges filed in the District Court that gave "9925 Mill Centre Drive" as the location of the offense. The court did give thought to this point, stating:

> It's . . . essential that accuracy be given as to what was located, where and when and by whom. To, to put them all together and just give one location it . . . really pushes the envelope as to whether you're giving sufficient notice to . . . for someone to defend themselves, especially when you have different things, somewhat similar things from different locations.

The State responded that (1) the charging document filed in the District Court "no longer exists because" it was "superseded" by the Indictment filed in the circuit court; (2) a precise location need not be included in an Indictment; (3) a bill of particulars may be requested to fill in any details; and (4) in this case, it was very clear to the defense "as to what occurred, and what was found, and what evidence there was."

The court denied the defense's motion for judgment of acquittal and found Mr. Brown guilty of possession of heroin in an amount indicative of an intent to distribute. The court, in apparent reference to defense counsel's attempts at trial to discredit the chain of custody for the 6.3 grams of heroin and the chemist's analysis of the same, noted that it was "not happy about what" it "consider[ed] to be somewhat sloppy paperwork which could lead to confusion[,]" but stated it was "not confused." In our view, the court was not referring to the Indictment, but rather to the chain of custody paperwork. The court subsequently denied Mr. Brown's motion for a new trial.

On direct appeal, Mr. Brown asserted that the suppression court erred in denying his motion to suppress the heroin recovered from his person; argued that the evidence was insufficient to convict him; and maintained that the trial court erred in admitting evidence without a proper chain of custody. This Court rejected those claims and affirmed the judgment. *Brown v. State*, 2881, September Term, 2015 (filed March 10, 2017), *cert. denied*, 453 Md. 360 (2017).

In 2020, Mr. Brown filed a Rule 4-345(a) motion to correct an illegal sentence in which he maintained that his sentence in this case is inherently illegal. Although acknowledging differences, Mr. Brown asserted that his case is akin to that of *Johnson v. State*, 427 Md. 356 (2012) (holding that a conviction and sentence was illegal and could be challenged in a Rule 4-345(a) motion where the defendant was convicted of an offense for which he was not charged or indicted). Mr. Brown's motion stated:

> Mr. Brown was charged in the district court with the heroin found at the apartment, not at the police station. The indictment that followed included one count of possession with intent to distribute heroin in "Baltimore County," which presumably—like the initial charge—referred to the heroin in the apartment. When that heroin was suppressed, the State lacked the evidence to proceed on that count. But it supplanted at trial the suppressed heroin with the heroin at the police station. Although these facts differ from *Johnson's*, they similarly center on the important concept of formal notice. [Parenthetical citation omitted.] The State should not be permitted to file a district court charge for an offense predicated on a set of facts occurring at a particular address, indict that offense, then prosecute on a factual predicate different from that originally charged.
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> That Mr. Brown moved to suppress the heroin from the police station does not moot the impropriety; the charging documents required defense guesswork that the State ultimately exploited. Mr. Brown's conviction and sentence for possession with intent to distribute heroin should therefore be vacated under Rule 4-345(a).

The circuit court summarily denied Mr. Brown's motion.

DISCUSSION

Rule 4-345(a) provides that a court "may correct an illegal sentence at any time," but the Rule is very narrow in scope and is "limited to those situations in which the illegality inheres in the sentence itself[.]" *Chaney v. State*, 397 Md. 460, 466 (2007). An inherently illegal sentence is one in which there "has been no conviction warranting any

sentence for the particular offense," *id.*, where "the sentence is not a permitted one for the conviction upon which it was imposed," *id.*, where the sentence exceeded the sentencing terms of a binding plea agreement, *Matthews v. State*, 424 Md. 503, 519 (2012), or where the court lacked the power or authority to impose the sentence. *Johnson, supra*, 427 Md. at 368. Notably, however, a "'motion to correct an illegal sentence is not an alternative method of obtaining belated appellate review of the proceedings that led to the imposition of judgment and sentence in a criminal case.'" *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *State v. Wilkins*, 393 Md. 269, 273 (2006)). Appellate review of the denial of a motion to correct an illegal sentence is *de novo*. *Rainey v. State*, 236 Md. App. 368, 373 (2018).

On appeal, Mr. Brown asserts that the trial court "entered judgment" and "sentenced [him] for a crime he was never indicted" and, therefore, the court had no "jurisdiction . . . to act." We disagree. Count 1 of the Indictment read as follows:

> The Jurors of the State of Maryland, for the body of Baltimore County, do on their oath present that JACQUE ALPHONSO BROWN, on or about 4/9/2014, in Baltimore County, did possess a controlled dangerous substance of Schedule I, to wit: heroin, which is a narcotic drug, in sufficient quantity reasonably to indicate under all circumstances an intent to distribute same; against the peace, government and dignity of the State. (Possession with Intent to Distribute Heroin; Criminal Law Article 5-602(2), 3 0233)

This count—which provided the defendant's name, the essential facts of the offense, the time and place the crime occurred, and the statutory citation for the charge—complied with the general requirements for the content of a count in a charging document. *See* Rule 4-202(a). In short, Mr. Brown was charged with possession of heroin with intent to distribute. His assertion that Count 1 only included the heroin recovered from the

apartment is speculative. But in any event, even though "the rule is that an indictment or information should not charge the commission of two or more substantive offenses in the same count, it is not objectionable to charge in one count several related acts which enter into and constitute one offense, although when separately considered they may be distinct offenses." *Morrissey v. State*, 9 Md. App. 470, 476 (1970). Here, Mr. Brown's possession of the heroin found in the apartment and his possession of the heroin recovered from his person were based on separate but related acts occurring on the same day and timeframe. Whether the State viewed both acts as one offense when it charged Mr. Brown with only one count of possession of heroin with intent to distribute is not something we need to determine in this appeal. Mr. Brown could have, but did not, request a bill of particulars. *See* Rule 4-241. He also could have, but did not, file a motion prior to trial alleging a defect in the charging document. *See* Rule 4-252.

The defense moved to suppress both the drugs found in the apartment and the heroin recovered from Mr. Brown's person at the police station, and filed a motion for reconsideration when the court suppressed the contraband recovered from the residence but not from his person—which reflects the fact that the defense was on notice that the State was prosecuting Mr. Brown based on all the drugs that were recovered on April 9th. And, as noted, prior to the start of trial the defense was certainly aware that the State was proceeding on Counts 1 and 2 based on the heroin recovered from Mr. Brown's person at the police station, and voiced no objection. Thus, we find disingenuous Mr. Brown's argument on appeal that his due process rights were violated because he was not on notice

that the State was proceeding based on the evidence recovered from his person at the police station.

In *Rainey, supra*, this Court observed that *Johnson* "is limited to situations in which the illegality of the conviction exists because the trial court lacked the 'power or authority' to convict." 236 Md. App. at 381 (quoting *Johnson*, 427 Md. at 371). Here, unlike in *Johnson*, the conviction and sentence were not based on an uncharged offense. Finally, as we stated in *Rainey*, "we do not read *Johnson* as making illegal for purposes of Rule 4-345(a) *any* sentence that is imposed based on an allegedly illegal conviction." Accordingly, we hold that the circuit court did not err in denying Mr. Brown's Rule 4-345(a) motion to correct an illegal sentence.

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