Circuit Court for Baltimore County
Case No.: 03-K-06-000785

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 0567

September Term, 2024

GARY ALEXANDER WESLEY, SR.

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: May 1, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Following trial in the Circuit Court for Baltimore County in 2007, a jury found Gary Alexander Wesley, Sr., appellant, guilty of second-degree murder and second-degree assault. Thereafter, the court sentenced him to a term of thirty years' imprisonment for second-degree murder, plus a consecutive term of ten years' imprisonment for second-degree assault.

On May 1, 2024, appellant filed his third motion to correct an illegal sentence, contending that his consecutive sentences are illegal and should be construed as having been imposed concurrently. On May 10, 2024, the circuit court denied his motion. Appellant noted a timely appeal from that decision presenting us with the following question which we have re-phrased: Are appellant's sentences consecutive?[1]

For the reasons that follow, we answer that question in the affirmative, and therefore, we shall affirm the judgment of the circuit court.

BACKGROUND

On April 23, 2007, when imposing appellant's sentences, the circuit court said the following:

> Mr. Wesley, please stand. The jury in this case has spoken and I am forbidden under the law to comment on that verdict. As such, the sentence of the Court is, in count one, second degree murder, thirty years in the [Division] of Correction dating from February the 2nd, 2006 and in count three, second degree assault, the sentence of the Court is ten years consecutive to count one, the thirty years that I imposed there.

[1] Appellant presented his question as follows: "I only has one question for this court? The question is for count # 1 only. My question is what is count #1[?] Is it concurrent or consecutive???"

Appellant took a direct appeal to this Court, and we affirmed his convictions in an unreported opinion, *Wesley v. State*, No. 634, Sept. Term, 2007 (filed Aug. 14, 2009) (*Wesley I*). In that appeal, appellant raised no claim concerning the legality of his sentence.

In December 2013, appellant filed a motion to correct an illegal sentence, contending that his sentence was illegal because it was ambiguous. According to him, the sentence was ambiguous because, on the one hand, the court imposed his sentences consecutively, and on the other hand, the court ordered that both sentences start on the same date. As a result, he claimed that, under the rule of lenity, the court was required to construe his sentences as having been imposed concurrently instead of consecutively.

On June 6, 2014, the circuit court denied that motion. Thereafter, appellant took an appeal to this Court, and we affirmed the judgment of the circuit court in an unreported opinion, *Wesley v. State*, No. 814, Sept. Term, 2014 (filed May 1, 2015) (*Wesley II*). We found that, contrary to appellant's assertions, the sentences were not ordered to begin on the same date. We also found that there was nothing ambiguous about appellant's sentence because the circuit court "clearly and unambiguously" imposed his sentences consecutively.[2] *Wesley II*, at 7.

Undeterred, in November 2021, appellant filed another motion to correct an illegal sentence wherein he, once again, claimed that his consecutive sentences should be interpreted as having been imposed concurrently. The circuit court denied the motion and

[2] We also held that appellant's contention did not establish that the trial court imposed "an inherently illegal sentence" with respect to the start date of his sentence within the meaning of Maryland Rule 4-345. *Wesley II*, at 5.

we affirmed that judgment in an unreported *per curiam* opinion. *Wesley v. State*, No. 1719, Sept. Term, 2021 (filed June 1, 2022) (*Wesley III*). We determined that appellant's 2021 argument about the legality of his sentence was merely a re-packaging of his 2013 argument to the same effect.[3] From that standpoint, relying on *Nichols v. State*, 461 Md. 572 (2018), we determined that, in light of *Wesley II*, the law of the case doctrine, which bars re-litigation of an issue that has been presented to, and rejected by, an appellate court, barred re-litigation of appellant's contention that his sentences should be interpreted as having been imposed concurrently. *Wesley III*, at 3.

On May 1, 2024, appellant filed a third motion to correct an illegal sentence, contending that his consecutive sentences should be interpreted as having been imposed concurrently. His argument is somewhat difficult to decipher, but it appears he asserted

[3] In *Wesley III*, at 2-3, we observed the following about appellant's argument that his sentences should be construed as concurrent instead of consecutive:

> As evidence that his sentence was ambiguous appellant claimed that: (1) after the court imposed sentence, he asked his lawyer "what [had I] got sentenced to" and his lawyer "told [him] not to worry because the thirty years would eat up the ten years"; (2) his commitment records showed that his 10-year sentence for second-degree assault is consecutive to his 30-year sentence for second-degree murder, but, at the same time, the records also showed that the two sentences have the same start date and are both "to be [run] concurrent with any other outstanding or unserved sentence"; (3) a September 6, 2018 circuit court order denying a request for inpatient substance abuse evaluation/treatment stated that appellant was "convicted in 2007 of Second Degree Murder and Second Degree Assault and was sentenced to 30 years[']] incarceration"; and (4) a September 9, 2021 document titled "Preliminary Review" from the Inmate Grievance Office addressing a Division of Correction disciplinary matter stated that he was "serving a sentence of 30 years for a conviction of First Degree Murder and a concurrent sentence of 10 years for Second Degree Assault."

that his sentences should be viewed as concurrent because he was sentenced "to 30 years concurrent with any other outstanding or unserved sentenced [sic], for second degree murder[,]" and the "only other outstanding sentence [he] had left was the second degree assault which [he] received 10 years consecutive." From that standpoint, he claimed: "by the 30 years being concurrent with any other outstanding or unserved sentence, this ommitted [sic] error by the judge clearly gave me a 30 years [sic] sentence on the record." Appellant also asserted that the sentencing court erred by failing to follow Maryland Rule 4-351(a)(4)-(5), which requires the sentencing court to include certain information in the commitment record.[4] Because of those errors, according to appellant, his consecutive sentences should be treated as concurrent sentences. Finally, appellant argued that the Division of Correction had miscalculated his diminution of confinement credits.

On May 10, 2024, the circuit court denied appellant's motion to correct an illegal sentence on the basis that "[c]onsecutive sentences were imposed for offenses on two different victims."

[4] Maryland Rule 4-351(a) requires that the commitment record contain, among other things:

> (4) The sentence for each count, the date the sentence was imposed, the date from which the sentence runs, and any credit allowed to the defendant by law; [and]
>
> (5) A statement whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of the preceding term or to any other outstanding or unserved sentence[.]

DISCUSSION

I.

In a nutshell, appellant's current argument about the lawfulness of his sentence seems to be that, (1) we should treat his ten-year consecutive sentence for second-degree assault as if it were imposed before the thirty-year sentence for second-degree murder, (2) the thirty-year sentence for second-degree murder was imposed concurrently to any outstanding sentence[5] – including the ten-year sentence for second-degree assault, and (3) the resulting sentence is an aggregate of thirty years, *i.e.*, ten years' imprisonment for second-degree assault plus thirty concurrent years' imprisonment for second-degree murder.

We find that appellant's contention that his sentences were imposed concurrently, or should be treated as though they were imposed concurrently, (1) is without merit given the clear and unambiguous order by the sentencing court, which we affirmed in *Wesley II*, that his sentences were imposed consecutively, and (2) is analytically indistinct from the arguments raised in *Wesley II* and *Wesley III*, and is, therefore, barred by the law of the case. To spell it out, hopefully for the last time, the sentencing court in this matter lawfully, clearly, and unambiguously, imposed appellant's sentences consecutively.

[5] To be clear, the sentencing court never said anything about whether the thirty-year sentence was imposed concurrently or consecutively to any other outstanding and unserved sentence.

II.

Perhaps anticipating that this Court might believe that his current argument is barred by law of the case, in his Brief of the Appellant, appellant attempts to differentiate what he argued in his latest motion to correct an illegal sentence from what he argued in his previous motions to correct an illegal sentence. He stated: "My prior litigation[] argument was that my sentence was ambig[u]ous, now, my argument is that the judge fail[ed] to follow the Maryland Rules 4-351 (A4-5) so these are two total different allegation[s]."

As noted earlier, Maryland Rule 4-351 requires that the commitment record contain certain information about the sentences imposed by the court, to include, the sentence for each count, the date of the imposition of sentence, the date the sentence begins, any credit allowed, whether sentences imposed concurrently or consecutively, and, if consecutively, when each term is to begin.

Maryland Rule 4-345 permits a court to correct an illegal sentence "at any time." Rule 4-345, a limited exception to the contemporaneous objection requirement, applies only to sentences that are "'inherently' illegal." *Bryant v. State*, 436 Md. 653, 662 (2014).

As we explained in *Wesley II*, at 4-5:

> In *Bryant*, the [Supreme Court of Maryland] discussed the limited applicability of Rule 4-345(a) to inherently illegal sentences. *Bryant*, 436 Md. at 662. The Court explained as follows:
>
> > "We have consistently defined [inherently illegal sentences] as limited to those situations in which the illegality inheres in the sentences itself; *i.e.*, there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful."

> *Id*. at 662-63. The distinction between an "illegal" sentence, which is subject to ordinary review and procedural impediments, and those that are "inherently illegal" subject to correction at any time under Rule 4-345(a), is "the difference between a substantive error in the sentence itself, and a procedural error in the sentencing proceedings." *Id*. at 663; *see Tshiwala v. State*, 424 Md. 612, 619 (2012) (noting that "where the sentence imposed is not inherently illegal, and where the matter complained of is a procedural error, the complaint does not concern an illegal sentence for the purposes of Rule 4-345(a)"); *State v. Wilkins*, 393 Md. 269, 284 (2006) (noting that to be subject to correction at any time, the illegality must "inhere in the sentence, not in the judge's actions"). It follows that when the claim of error concerns a procedural flaw in the sentencing process, and not an illegal sentence as a matter of law, the limited exception to correct the sentence "at any time" pursuant to Rule 4-345(a) does not apply. *See Bryant*, 436 Md. at 663-64.

To the extent that appellant is making a new argument about his sentence based on a perceived error with respect to Maryland Rule 4-351, such an error, presumably, would not be barred by the law of the case. However, any error with respect to Maryland Rule 4-351 does not constitute an inherently illegal sentence within the meaning of Maryland Rule 4-345. This supposed error has to do with the accuracy of the commitment record and not with the legality of appellant's sentence and, therefore, is not the proper subject of a motion to correct an illegal sentence. *Bratt v. State*, 468 Md. 481, 502 (2020).

III.

Finally, appellant claimed in his motion to correct an illegal sentence that the Division of Correction has miscalculated his diminution of confinement credits. In *Bratt*, *supra*, the Supreme Court of Maryland held that a motion to correct an illegal sentence is not the proper mechanism for addressing a different sentencing credit issue, *i.e*., credit for time spent in custody awaiting trial. In our view, *Bratt*'s reasoning applies equally here,

and therefore, appellant's claim concerning the alleged miscalculation of diminution of confinement credits is not cognizable in a motion to correct an illegal sentence.[6]

CONCLUSION

Appellant's argument that his sentences should be construed as having been imposed concurrently lacks merit, and, moreover, is barred by the law of the case doctrine. Appellant's arguments about Rule 4-351, and the calculation of his diminution of confinement credits, are not the proper subject of a Rule 4-345 motion to correct an illegal sentence. As a result, we discern no error or abuse of discretion in the circuit court's denial of his motion to correct an illegal sentence.

Consequently, we shall affirm the judgment of the circuit court.

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

[6] In his Brief of the Appellant, appellant made no mention of his diminution of confinement credit argument. In December 2024, months after the time expired to file a Reply Brief in this Court, appellant filed an Informal Brief of the Appellant, which we treated as a Reply Brief. In that Brief, appellant raised an argument about the calculation of his diminution of confinement credits.

"We shall decline to address any of the issues raised by [a party] for the first time in their reply brief." *Anderson v. Burson*, 196 Md. App. 457, 476 (2010); *see Strauss v. Strauss*, 101 Md. App. 490, 509 n.4 (1994) ("[T]he scope of a reply brief is limited to the points raised in appellee's brief, which, in turn, address the issues originally raised by appellant. . . . A reply brief cannot be used as a tool to inject new arguments.").

Appellant's failure to make his diminution of confinement credit argument in his Brief of the Appellant alone would be enough justification for us not consider it on appeal.