Circuit Court for Baltimore City
Case No. 109162003, 11008057-063

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 00739

September Term, 2018

KEVIN PUSHIA

v.

STATE OF MARYLAND

Graeff,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: April 29, 2019

On August 27, 2010, in the Circuit Court for Baltimore City, Kevin Pushia, appellant, pled guilty to conspiracy to commit murder and to seven counts of insurance fraud. On October 17, 2011, the circuit court sentenced appellant to life plus 45 years.[1]

On appeal, appellant presents one question for this Court's review, which we have rephrased slightly, as follows:

> Did the circuit court err in denying appellant's Motion to Correct Illegal Sentence and/or to Compel Specific Performance of the Plea Agreement?

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

FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 2009, appellant was indicted for conspiracy to commit murder. On January 8, 2010, appellant was indicted for seven counts of insurance fraud.

A.

Plea Hearing

On August 27, 2010, the parties appeared in the circuit court for a hearing. The parties agree that appellant pled guilty to the charged offenses, with an agreement to testify against his codefendants. They disagree, however, with respect to whether there was an express agreement between the parties regarding sentencing, and whether the court bound itself to any plea agreement.

A discussion of the plea ensued, as follows:

> [Prosecutor]: Basically (inaudible) [appellant] (inaudible).

[1] The court imposed a sentence of life on the conspiracy to commit murder conviction, 15-year consecutive sentences on three of the convictions for insurance fraud, and concurrent 15-year sentences on the remaining convictions.

THE COURT: Actually, slide over a little bit so you both (inaudible).

[Prosecutor]: (Inaudible) counts. (Inaudible) no less than life suspend all but (inaudible) years. (Inaudible). (Inaudible) court binds itself to no less than that. Given that (inaudible).

THE COURT: So what is it you're asking?

[Counsel for appellant]: Well, let me just preface by saying our understanding at this point was that the State will be making that request and for the Court [t]o bind itself.

THE COURT: To life suspend all but 50?

[Counsel for appellant]: Right.

THE COURT: Okay.

[Counsel for appellant]: I will be asking for the (inaudible) the ability to argue for less. However, what [the State] has (inaudible) my client (inaudible) depending on all of the conditions they met and how well things go, I may do something other than. But I'm letting you know at this juncture, we're not going below 50.

[Prosecutor]: I don't foresee (inaudible).

THE COURT: Okay.

[Prosecutor]: And the (inaudible) insurance fraud would be 15 years concurrent to each other.

THE COURT: Okay. So we're doing the plea today, but you're postponing sentence, or wanted to sentence right now?

[Counsel for appellant]: No.

[Prosecutor]: I'm requesting it be held sub curia.

[Counsel for appellant]: Yes.

[Prosecutor]: (Inaudible).

[Counsel for appellant]: Right.

THE COURT: How long?

[Prosecutor]: And he understands if he were – if he lies, if he is not truthful, if something comes out of his mouth that's not consistent with what we've heard before, I plan to ask for life plus 15 times seven.

[Counsel for appellant]: Right.

THE COURT: Okay. And so we're clear, what we're – well, this is all the record. So it will be stated as he's pleading guilty to what counts?

[Prosecutor]: Conspiracy to commit (inaudible). 109162003, conspiracy to commit murder upon Lemuel Wallace[, and seven counts of insurance fraud].

The court confirmed that the parties wanted sentencing to be held sub curia, and the following occurred:

THE COURT: There's nothing, no discussion of what the plea is at this point in time?

[Counsel for appellant]: Right.

THE COURT: Except for there's an understanding that you're asking for life, minimum, life suspend all but 50.

[Prosecutor]: Right. I'm not going to (inaudible).

THE COURT: I understand, I got that.

[Counsel for appellant]: Right.

* * *

THE COURT: It's my understanding that [appellant] is going to enter a guilty plea to – well, actually all counts.

[Prosecutor]: Correct.

The court again reiterated that there was "a request for the disposition to be held sub curia to December 17, 2010 at 9:30."

Appellant's counsel then proceeded to inform appellant of the rights that he would be giving up by pleading guilty and set forth the relevant elements of the charges for the plea. During this on-the-record discussion with appellant, counsel for appellant stated:

> You also understand that you have – the legality of the sentence. And that's something that we'll be able to deal with later on. But you know that this particular sentence, at least for the conspiracy to commit murder, carries with it a life sentence. And there have been some discussions, and based on those you understand that even if the Court imposed that, that it would still be within, because of the nature of the offense, it would still be within that – and more likely than not, you wouldn't be able to assert an allegation that there was an illegal sentence.

Appellant answered in the affirmative, and he then pled guilty to seven counts of insurance fraud and conspiracy to commit murder.

The circuit court found that appellant was entering into the guilty plea "freely, voluntarily, knowingly, and intelligently." The State then proceeded to read the relevant facts of the case into the record. The facts proffered by the State were that Lemuel Wallace, who was legally blind and developmentally challenged, was picked up at an ARC of Baltimore home on February 4, 2009, by a man who said "he was there to take Lemuel to his new home." Detectives found Lemuel Wallace's bullet-ridden body in a bathroom in Leakin Park in Baltimore City that same day.

On March 31, 2009, a life insurance investigator for Globe Life Insurance contacted the Baltimore City Police Department Homicide Division "to verify life insurance policies

that had been taken out on Lemuel, and [to verify] that beneficiaries were not the suspects." One of the policies was taken out by appellant, who listed on the policy that he was Lemuel's brother. The police then executed a search and seizure warrant at appellant's house, which uncovered a "large amount of paperwork, including life insurance paperwork and a date book."

The police discovered an entry in appellant's date book entered on February 4, 2009, which read "L.W. project completed." He told police that he had been a pastor and that he also had worked at the ARC of Baltimore. He also admitted that he had taken out seven life insurance policies, totaling almost $1.6 million, on Mr. Wallace prior to Mr. Wallace's murder, and that he had arranged to have Lemuel murdered to obtain the insurance money.

When the court asked whether the facts proffered by the State were true, appellant replied: "Yes, they are." The circuit court stated:

> Very well. This Court is satisfied the State has shown beyond a reasonable doubt the Defendant is guilty of conspiracy to commit murder and guilty of seven counts of insurance fraud. The Defendant's had an opportunity to hear the facts as presented and this Court is of the opinion that he has entered into this guilty plea freely, voluntarily, knowingly, and intelligently. Therefore the Court will accept the guilty plea. And I do find the Defendant guilty.[2]

[2] Appellant does not contend that there was an improper factual basis for the plea or that his plea was not knowingly and voluntarily given. *Soloranzo v. State*, 397 Md. 661 (2007) ("The trial court may accept a guilty plea only after it determines, upon an examination of the appellant on the record in open court, that (1) the appellant is pleading voluntarily, with an understanding of the nature of the charge and the *consequences of the plea*, and (2) that there is a factual basis for the plea."). *Accord* Maryland Rule 4-242.

B.

Sentencing Hearing

On October 17, 2011, the circuit court held the sentencing hearing. At this hearing, the State noted that appellant's co-conspirators had been acquitted by a jury months prior, stating that "the only solace I think that the victim's family and the State have is knowing that at least [appellant] will be held accountable for what he did." The State continued: "Based on the most horrendous facts in this case, the State is asking for a sentence of life plus 105 years."

Counsel for appellant opened his statement by noting: "Your Honor, this Court—we're here today because [appellant] has pled guilty to a crime." Counsel then asked the court to "give consideration that [appellant] is someone who . . . has to be punished for what he did, but . . . that he is capable of rehabilitation." Counsel continued:

> That he, although he must be sentenced, but that the Court give consideration that he is someone capable of rehabilitation. With that being said, Your Honor, I would ask that the Court, I know that the State has asked for a period of incarceration of life plus, but I'm asking Your Honor, because there was a role, and there were others involved, and unfortunately how that turned out, it just didn't pan out, I think, in the interest of justice all the way around. But unfortunately, the system that we have is the best we do have. And so I'm asking that the Court impose a sentence of life, if it's going to, and suspend all but 30 years, and provide him with an opportunity to complete a sentence that is commensurate with the part that he played in, and then have an opportunity to return back to society and give back to society.

The court then sentenced appellant. The court stated:

> Certainly, as a judge, it is my job to sentence you, to judge you. But based on what [appellant's counsel] has stated, you have a belief that there is another to do that. I, too, agree that there is another to do that and there is another time for that. But that is not my role. I am not God, but I will punish

> you in a way that I believe is appropriate for your actions, and what you did on that day, and what you put into place. [Counsel] indicates that it was your attempt at some point later to make sure that it didn't happen.
>
> I'll be candid. I've known [appellant's counsel] for a long time. Those are the words that he believes are appropriate to use based on what you've told him. But that, candidly speaking, falls on deaf ears. You put this into play, you were hopeful that you'd be the recipient of $1.5 million for the death of an individual that obviously you didn't think deserved to live. That you didn't think was befitting to walk another day on earth. That you thought was inferior to you. That is unfortunate. I can't take your life, I don't choose to do that. Because as the State pointed out, that's not on the table. So that's not something that will occur. But I do not believe, sir, that you deserve to walk as a free man again. And so my sentence in this case is life. I will not suspend any of it as [appellant's counsel] has asked me. It's certainly his job to ask.

As indicated, the court sentenced appellant to a total of life plus 45 years.

On January 12, 2012, appellant filed a motion for modification of sentence pursuant to Maryland Rule 4-345(E). On February 7, 2012, the circuit court denied the motion. Appellant appealed, but this Court dismissed the appeal as one not allowed by law.[3]

On March 22, 2018, appellant filed a Motion to Correct Illegal Sentence, and/or to Compel Specific Performance of the Plea Agreement, and Request for a Hearing. After the State filed its opposition, the circuit court denied the motion.

This timely appeal followed.

[3] Appellant also filed a second motion for modification, which was essentially identical to the first motion. This Court interpreted the circuit court's denial of the motion for modification as a denial of both motions.

DISCUSSION

Appellant contends that there was a plea agreement whereby, if he pled guilty to conspiracy to commit murder and seven counts of insurance fraud and testified truthfully against his co-conspirators, he "would receive a life sentence, suspend all but an active cap of fifty (50) years for the conspiracy to commit murder, with the defense free to allocute for a sentence below the 50-year cap, and fifteen year concurrent sentences for the insurance fraud." He argues that the court "bound itself to this agreement," and the State and the court subsequently breached the agreement. He asserts, therefore, that the circuit court erred in denying his Motion to Correct Illegal Sentence and/or to Compel Specific Performance of the Plea Agreement.[4]

The State contends that the circuit court properly denied appellant's motion to correct an illegal sentence or compel specific performance of a plea agreement. It asserts that appellant was not sentenced in violation of a binding plea agreement because the court never bound itself to any plea agreement and it is not even clear that there was a definitive agreement between the State and appellant.

The Court of Appeals recently explained the nature of plea agreements, as follows:

> "A plea agreement is, of course, a contract between a criminal defendant and the State in which each seeks to gain a benefit and, in return for such benefit, each agrees to pay a price. It is a very special contract, moreover, in that

[4] Appellant argues that the only way that the State or the court would not have been required to follow the terms of the agreement was if he breached his obligation to testify truthfully against his co-conspirators, but he asserts that he testified truthfully at the trials of his co-conspirators. He does not cite to any place in the record on appeal that affirmatively confirms that he testified truthfully at the other trials, nor could we find anything.

> even after the basic quid pro quo is agreed upon by the primary contracting parties, the entire package may be submitted to a criminal court for its approval and its subsequent enforcement. If it should then be the enforcing authority (to wit, the court) that commits a breach of the contract, what even-handed justice requires is that each of the primary contracting parties, if suffering from the breach, is equally entitled to seek a remedy under equally conducive procedural conditions."

Smith v. State, 453 Md. 561, 573 (2017) (quoting *State v. Smith*, 230 Md. App. 214, 218 (2016)).

As this Court previously has explained:

> There are two steps in the implementation of a plea agreement. *Kisamore v. State*, 286 Md. 654, 657–58, 409 A.2d 719 (1980). First, the State and defendant must reach an agreement. Md. Rule 4-243(a)(1) (2008). Second, the parties must then present the agreement to the court, which has the discretion to accept or reject the plea. Md. Rule[] 4-242(c), (d). If the plea agreement calls for a particular sentence, disposition, or other judicial action, the court must also approve that portion of the plea agreement. Md. Rule 4-243(c).

Rios v. State, 186 Md. App. 354, 362–63 (2009). Thus, an agreement between the State and appellant "relating to a particular sentence, disposition, or other judicial action is not binding on the court unless the judge to whom the agreement is presented approves it." Rule 4-243(c)(2). After the judge is advised of any agreement between the parties, the judge may accept the plea and approve the agreement "or defer decision as to its approval or rejection until after such pre-sentence proceedings and investigation as the judge directs." Rule 4-243(c)(1). If a judge approves the plea agreement, he or she "shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of the parties, a disposition more favorable to the appellant than that provided for in the agreement." Rule 4-243(c)(3).

There is no question that a "sentence is illegal if, without the permission of both parties to [an] agreement, a judge fails to embody in its judgment the terms of the *binding* plea agreement." *Smith*, 453 Md. at 575 (emphasis added). *Accord Matthews v. State*, 424 Md. 503, 506 (2012) (Rule 4-345(a), providing that "[t]he court may correct an illegal sentence at any time," is a proper vehicle to challenge a sentence that is imposed in violation of a plea agreement to which the court bound itself); *Ray v. State*, 230 Md. App. 157, 173 (2016) ("a *binding* plea bargain, *agreed to by a judge*" is "an effective modality for establishing an upper limit on a sentence" and "[a]ny sentence in excess of that limit would be inherently illegal under Rule 4-345(a)") (emphasis added), *aff'd*, 454 Md. 563 (2017). Thus, *if* a court accepts a plea agreement and binds itself to it, the court must follow the terms of the agreement, and it can deviate from those terms only to give the appellant a more favorable disposition if it obtains the consent of both parties. Otherwise, the sentence is illegal. *See* Rule 4-345(a) (A "court may correct an illegal sentence at any time.").

The parties agree with these legal propositions. They disagree, however, regarding whether there was a binding plea agreement in this case.

In resolving that question, we are limited to a review of the record. *See Cuffley v. State*, 416 Md. 568, 582 (2010) (A court must rely solely on the record established at a plea proceeding to "determine what the appellant reasonably understood to be the sentence the parties negotiated and the court agreed to impose."). Indeed,

> Rule 4-243 mandates that the entire plea be articulated for the record, in open court, so that the defendant accepts the agreement as it exists, on the record,

> at the time he tenders his plea, and not as it existed at, for example, a prior conference in chambers.

Id. at 582 n.5.

Here, assuming *arguendo* that a plea agreement existed between the State and appellant, appellant was not entitled to any specific sentence unless the record reflects that the court bound itself to sentence according to that agreement. *See* Rule 4-243(c). Based on our review of the record, there was no binding agreement to a specific sentence.

Although there were discussions at the beginning of the plea hearing indicating that appellant's counsel would be "making [a] request . . . for the [c]ourt to bind itself" to an agreement of a sentence of life suspend all but 50 years, the court never unequivocally stated that it was accepting any such agreement. Indeed, after establishing that the parties wanted to have sentencing held sub curia, the following occurred:

> THE COURT: **There's nothing, no discussion of what the plea is at this point in time?**
>
> [Counsel for appellant]: **Right**.
>
> THE COURT: **Except for there's an understanding that you're asking for life, minimum, life suspend all but 50.**
>
> [Prosecutor]: Right. I'm not going to (inaudible).
>
> THE COURT: I understand, I got that.
>
> [Counsel for appellant]: Right.
>
> * * *
>
> THE COURT: It's my understanding that [appellant] is going to enter a guilty plea to – well, actually all counts.

[Prosecutor]: Correct.

(Emphasis added.)

This colloquy does not support the argument that the court bound itself to a sentence of life suspend all but 50 years. Accordingly, there is no basis to support appellant's contention that the sentence imposed was illegal because the court breached a binding agreement.[5]

Appellant next argues that the State failed to comply with its agreement to request a sentence of life, all but 50 years suspended. In support of the existence of such an agreement, he asserts that there was a plea/proffer agreement between the parties on August 26, 2010. There is no transcript or affidavit in the record, however, to support that assertion.

We agree with the State that the burden is on the appellant to show that an error occurred, *Alford v. State*, 202 Md. App. 582, 616 (2011), and appellant has failed to carry the burden. As indicated, there is nothing in the evidence to show a definitive agreement on August 26, and at the beginning of the plea hearing, the prosecutor said merely that there "might be a plea."

In any event, even if there was an agreement between the State and appellant, and the State breached that agreement by recommending a different sentence, that does not

[5] Defense counsel's advice to appellant regarding the rights he would give up by pleading guilty similarly supports this conclusion. Counsel advised that, although there had been discussions about appellant's sentence, if the court imposed a life sentence, appellant would not be able to argue that an illegal sentence was imposed. Appellant stated that he understood.

necessarily result in an illegal sentence. *See Smith*, 453 Md. at 576 (a sentence is illegal if it "inheres in the sentence itself"); *Burch v. State*, 346 Md. 253, 289 ("not every procedural irregularity . . . results in 'a sentence not permitted by law'" (quoting *Walczak v. State*, 302 Md. 422, 427 (1985)), *cert. denied*, 522 U.S. 1001 (1997). Although there is authority indicating that an appellant may challenge a State's breach of an alleged plea agreement by application for leave to appeal, *see, e.g.*, *McElroy v. State*, 329 Md. 136, 151 (1993); *Hall v. Prince George's County Democratic Central Committee*, 431 Md. 108, 141 (2013), appellant did not cite, nor did we find, authority for the proposition that appellant may challenge the resulting sentence as an illegal sentence.

As the Court of Appeals has stated: "To avoid allowing [Rule 4-345(a)'s] exception [to challenge an illegal sentence at any time] to swallow 'the general rule of finality,' thus making possible endless and belated attacks on convictions, the scope of Rule 4-345(a) 'is narrow.'" *Rainey*, 236 Md. App. at 374 (quoting *Colvin v. State*, 450 Md. 718, 725 (2016)). This case does not fall within that narrow scope.

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