

Circuit Court for Baltimore City  
Case No. 117251013

UNREPORTED\*  
IN THE APPELLATE COURT  
OF MARYLAND

No. 793

September Term, 2022

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ANTONIO R. GREEN

v.

STATE OF MARYLAND

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Wells, C.J.,  
Nazarian,  
Adkins, Sally D.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Adkins, Sally D., J.

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Filed: October 13, 2023

\*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).

This appeal requires us to review the impact of a retroactive entry of a probation before judgment on subsequent convictions. A jury in the Circuit Court for Baltimore City convicted Appellant, Antonio R. Green, of possession of a regulated firearm after having been convicted of a disqualifying crime, obstructing and hindering a police officer in the performance of his duty, and resisting arrest. The trial court sentenced Green to 10 years in prison, the first five without the possibility of parole.

The statute under which Green was sentenced requires that anyone who has previously been convicted of a crime of violence be subject to a mandatory minimum sentence of five years, none of which may be suspended. Green had previously pled guilty in two cases in the Circuit Court for Baltimore City for conspiracy to commit robbery and robbery. The conspiracy conviction was converted to a probation before judgment in 2016, but the robbery remained on his record. In 2021, the Circuit Court for Baltimore City converted the robbery to a probation before judgment as well and stated in the order that the probation before judgment applied retroactively—specifically that it should have applied during the period when Green was charged and convicted of possessing a regulated firearm.

Relying on the retroactivity of the probation before judgment in the underlying crime of violence, Green filed a motion to correct illegal sentence, claiming he should not have been sentenced under the mandatory minimum sentencing scheme in the statute. The circuit court denied this motion, ruling that the sentence was legal, the court was bound by

the law of the case, and the court could not amend the charge or vacate the conviction.

Green now appeals and asks us to consider the following question:

1. Was there an illegal sentence due to the retroactive entry of a probation before judgment?<sup>1</sup>

We conclude that the sentence was legal and, therefore, shall affirm the judgment of the Circuit Court for Baltimore City.

## **FACTS & PROCEDURAL HISTORY**

### *Underlying Convictions*

On August 12, 2014, Green entered into a plea agreement with the State for charges stemming from two related cases in the Circuit Court for Baltimore City. In the first case, number 114121007 (“007 case”), Green pled guilty to one count of conspiracy to commit robbery, and in the second case, number 114121008 (“008 case”), Green pled guilty to one count of robbery. Judge John Howard sentenced Green to two concurrent five-year terms of incarceration, suspending all but time served, with five years of supervised probation. During sentencing, Judge Howard indicated that he would “consider after two years from this date . . . entering a probation before judgment if the Defendant is fully in compliance with the terms of his probation and he is otherwise acting appropriately.”<sup>2</sup>

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<sup>1</sup> Green stated the question in his brief as:

Are the conviction and sentence for prohibited possession of a regulated firearm under Section 5-133(c) of the Public Safety Article illegal, and must the conviction and sentence be vacated?

<sup>2</sup> Judge Howard also noted during sentencing that one of the facts he would consider during a future modification hearing would be whether he continued his education.

Shortly after sentencing, Green filed a motion to modify his sentences in both the 007 and 008 cases, which the court held *sub curia* for two years. During this time, Green was arrested for drug-related charges in July 2015. At a hearing in May 2016, Green admitted to the violation of probation and Judge Howard sentenced Green to a suspended sentence except time served and continued his probation on the same terms and conditions. Judge Howard held a hearing on the motion to modify on September 19, 2016, during which the judge only called the 007 case. The court granted and entered probation before judgment with one year of supervised probation for only the 007 case, as the request for a modification hearing in case 008 was never called and therefore never ruled on.

Green subsequently filed a motion to correct sentence because of mistake on November 15, 2016, requesting the court to strike the guilty finding in the 008 case and enter a probation before judgment. Judge Yolanda Tanner denied this motion on December 20, 2016, without prejudice<sup>3</sup> and directed trial counsel to file a second request for a modification hearing in the 008 case. Counsel never filed a second request.

#### *New Charges and Trial*

On September 8, 2017, while still on probation for the probation before judgment in the 007 case and the conviction in the 008 case, the State charged Green in case

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<sup>3</sup> Judge Tanner determined she could not modify the sentence without a hearing since the 008 case was never called during the September 19, 2016, hearing.

117251013 (“013 case”) with, *inter alia*, two violations of Section 5-133 of the Public Safety Article: possessing a regulated firearm with a felony conviction for a crime of violence<sup>4</sup> (“count 1”), Md. Code (2003, 2022 Repl. Vol.) Pub. Safety (“PS”) § 5-133(c);<sup>5</sup> and illegal possession of a regulated firearm after being convicted of a disqualifying crime (“count 2”), *id.* at § 5-133(b). Green’s attorney then filed a motion to correct an illegal sentence in the 008 case, requesting a hearing to convert his sentence into a probation before judgment. Counsel later withdrew this motion.<sup>6</sup>

After opening arguments at trial, both sides stipulated that “on July 31<sup>st</sup>, 2017, the Defendant was prohibited by law from possessing a regulated firearm due to a prior disqualifying conviction,” and the jury was instructed on this agreement. The jury ultimately convicted Green of three counts on March 14, 2018.<sup>7</sup> Judge Dana Middleton sentenced Green in the 013 case on June 25, 2018, to 10 years, the first five without the

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<sup>4</sup> The predicate felony conviction for this charge was the robbery in the 008 case.

<sup>5</sup> The State only sent count 1 to the jury along with four other counts.

<sup>6</sup> During the July 5, 2018, probation revocation hearing in front of Judge Schiffer, Mr. Van Bavel, counsel for Green, stated on the record,

“I had filed a motion, which I’m withdrawing right now because [it is] moot for all intent[s] and purposes. It really makes no difference . . . as we all know . . . [Green] thought he was entitled to two PBJs and he thought that would mean he wouldn’t be qualifying for the five years without, which is a question too on how you read the statute.

<sup>7</sup> These were: possessing a regulated firearm with a felony conviction for a crime of violence (count 1); obstructing and hindering a police officer (“count 6”); and resisting or interfering with arrest (“count 7”).

possibility of parole, for count 1;<sup>8</sup> three years to be served concurrently on count 6; and three years to be served concurrently on count 7.<sup>9</sup>

Green then appeared before Judge Jennifer Schiffer on July 5, 2018, for a violation of probation hearing in the 007 and 008 cases. Green admitted to a violation in both cases due to his conviction in the 013 case. Judge Schiffer sentenced him to three years to be served consecutively<sup>10</sup> to his sentence in the 013 case and struck his probation before judgment in the 007 case.

#### *Post-Conviction Motions*

On September 14, 2018, Green filed a petition for post-conviction relief in the 008 case, alleging he received ineffective assistance of counsel due to his trial attorney's failure to request a modification hearing, and then Green filed a supplemental petition for post-conviction relief on March 6, 2020.<sup>11</sup> Judge Jeannie Hong held a hearing on the petition

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<sup>8</sup> This charge carries a mandatory minimum sentence of five years, none of which may be suspended. Md. Code (2003, 2022 Repl. Vol.) PS § 5-133(c)(2). The person is also not eligible for parole during the mandatory minimum sentence. *Id.*

<sup>9</sup> This Court affirmed the convictions and sentences on direct appeal. *Green v. State*, No. 2044, Sept. Term, 2018, 2019 WL 3226680 (Md. App. Ct. July 17, 2019).

<sup>10</sup> Green was sentenced to three years in both the 007 and 008 cases, to be served concurrently to each other, and consecutively to the 013 case.

<sup>11</sup> He raised the following allegations of error, as stated in the Circuit Court for Baltimore City's Statement of Reasons: (1) Trial counsel failed to request a hearing on the motion to correct sentence because of mistake to address whether the 008 case was mistakenly not converted into a probation before judgment; (2) The trial court's failure to convert the 008 case into a probation before judgment was a breach of his plea agreement; (3) Trial counsel provided ineffective assistance of counsel by failing to correct the error that resulted in the court failing to enter a probation before judgment in the 008 case; and (4) Trial counsel

on October 5, 2020, and issued an order granting the petition in part by allowing Green to file a belated motion to correct sentence and a belated motion for modification.<sup>12</sup>

Judge Schiffer issued an order in the 008 case, on October 6, 2021, which stated:

**ORDERED** that Defendant's Belated Motion to Correct Sentence is **GRANTED**;

**ORDERED** that Petitioner was entitled to and should have had a probation before judgment in case 114121008 from September 19, 2016 through July 5, 2018;

**ORDERED** that probation before judgment was not entered in case 114121008 because of clerical error and ineffective assistance of trial counsel;

**ORDERED** that the sentence in case 114121008 be corrected and probation before judgment be entered for the period from September 19, 2016 through July 5, 2018; and

**ORDERED** that the record in case 114121008 be corrected to reflect the corrected sentence and the probation before judgment for the period from September 19, 2016 through July 5, 2018.

Green then filed a motion to correct illegal sentence pursuant to Rule 4-345(a) in the 013 case on December 22, 2021, arguing that he did not have a proper disqualifying conviction for a crime of violence at the time of the offense, conviction, or sentencing under Section 5-133(c). Md. Code (2003, 2022 Repl. Vol.) PS § 5-133(c). Counsel argued that a probation before judgment does not qualify as a conviction for a crime of violence under Section 5-133(c), and due to Judge Schiffer's October 6, 2021, order, Green had

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provided ineffective assistance of counsel by failing to file motions for modification of sentence in both cases.

<sup>12</sup> The court denied all other requests for relief.

retroactively been given a probation before judgment at the time he was charged, convicted, and sentenced.

Green appeared before Judge Middleton for two hearings on this motion, which was ultimately denied. Judge Middleton found that the sentence imposed in the 013 case was legal at the time of sentencing and that the court was bound by the law of the case from the Appellate Court’s 2019 opinion. Additionally, Judge Middleton addressed Green’s request that he should be resentenced under Section 5-133(b) of the Public Safety Article if the court found his sentence illegal. Judge Middleton noted that the jury convicted him under Section 5-133(c) and not 5-133(b), and “the court does not have the discretion to amend the sentence pursuant to the statute of 5-133(c) of the Public Safety Article.” Finally, Judge Middleton determined that the court did not have the authority to vacate the conviction to correct an illegal sentence. This appeal followed.

### **DISCUSSION**

Green argues that his conviction and sentence under PS § 5-133(c) are illegal based on the retroactive entry of a probation before judgment for the predicate offense—robbery. We must consider whether this claim is cognizable under Rule 4-345(a).

#### *Standard of Review*

Whether a sentence is illegal and whether “an alleged defect relating to a sentence is cognizable in a motion to correct an illegal sentence” are questions of law and this Court reviews both *de novo*. *Farmer v. State*, 481 Md. 203, 222–23 (2022). *See Johnson v. State*, 467 Md. 362, 389 (2020); *State v. Crawley*, 455 Md. 52, 66 (2017). We defer to the trial



court’s findings of fact, and do not “disturb these findings unless they are clearly erroneous.” *Rainey v. State*, 236 Md. App. 368, 374 (2018) (quoting *Kunda v. Morse*, 229 Md. App. 295, 303 (2016)).

*Claims Under Maryland Rule 4-345(a)*

Rule 4-345(a) permits a court to “correct an illegal sentence at any time.” Motions under this rule are not independent actions, but are “part of the underlying criminal proceedings,” *State v. Clements*, 461 Md. 280, 293 (2018), and provide a “method of opening a judgment otherwise final and beyond the reach of the court.” *Rainey*, 236 Md. App. at 374 (quoting *State v. Griffiths*, 338 Md. 485, 496 (1995)). *See also Johnson v. State*, 427 Md. 356, 367 (2012) (Rule 4-345(a) is “designed to accommodate postconviction motions filed after the time for direct appeal has expired”).

The scope of the motions allowed under this rule are narrow. They are limited to situations where illegality inheres in the sentence itself, meaning 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.” *Chaney v. State*, 397 Md. 460, 466 (2007). *See also Ridgeway v. State*, 369 Md. 165, 174 (2002) (Rule 4-345(a) was the appropriate provision to use when a sentence was erroneously imposed on counts for which defendant had been acquitted).

The Rule is thus not intended to correct procedural errors. *Bailey v. State*, 464 Md. 685, 697 (2019). *See, e.g., Colvin v. State*, 450 Md. 718, 728–29 (2016) (“[O]nly claims sounding in substantive law, not procedural law may be raised through a Rule 4-345(a)

motion.”); *Tshiwala v. State*, 424 Md. 612, 619 (2012) (“[W]here 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 purposes of Rule 4-345(a).”).

Although there may be various legal errors that impact a sentence, if they “do not *inhere* in the sentence, they cannot be challenged through a motion to correct an illegal sentence.” *Farmer*, 481 Md. at 225. Prior decisions have repeatedly held that this type of motion should not be used as an alternative method to belatedly review the trial court proceedings that led to a conviction and sentence in a criminal case. *State v. Wilkins*, 393 Md. 269, 273 (2006); *Farmer*, 481 Md. at 225; *Colvin*, 450 Md. at 725. Therefore, when resolving a motion to correct an illegal sentence under Rule 4-345(a), “a court does not question the underlying conviction, but . . . inquires only whether the resulting sentence is appropriate for that type of conviction.” *Farmer*, 481 Md. at 225.

*Green’s Claim Is Not Cognizable Under Maryland Rule 4-345(a)*

Green argues that the retroactive entry of a probation before judgment in the 008 case renders his conviction and sentence under PS § 5-133(c) illegal because he was no longer convicted of a crime of violence. Therefore, he claims, the statute is inapplicable. In support of this contention, Green relies on the Supreme Court of Maryland’s decision in *Johnson v. State*, 427 Md. 356 (2012).

In *Johnson*, the defendant was convicted and sentenced for a crime—assault with intent to murder—that was not charged in the indictment. *Id.* at 360. The Court noted that one type of sentence that is consistently found to fall under Rule 4-345(a) is one “where no

sentence or sanction should have been imposed.” *Id.* at 368 (quoting *Alston v. State*, 425 Md. 326, 339 (2012)). Ultimately, the Court found the sentence for assault with intent to murder illegal and vacated both the sentence and conviction because the “illegality of [the] sentence [stemmed] from the illegality of the conviction itself.” *Id.* at 378, 380.

We addressed *Johnson*’s impact on prior decisions of this court in *Rainey v. State*— a case involving an illegal sentence claim based on a double jeopardy violation. 236 Md. App. 368 (2018). In that case, we determined that while *Johnson* did impact our holding in *Ingram v. State*, 179 Md. App. 485 (2008), it did not intend to “expand significantly the scope of challenges allowed under Rule 4-345(a).” *Rainey*, 236 Md. at 380. We ultimately read the holding in *Johnson* as “limited to situations in which the illegality of the conviction exists because the trial court lacked the ‘power or authority’ to convict.” *Id.* at 381. This interpretation, we noted, avoided conflict with other Supreme Court decisions that stress “motions to correct illegal sentences are not intended to become alternative methods of belated appellate review.” *Id.*

Green relies on the Court’s holding in *Johnson* and our interpretation in *Rainey* to argue that the circuit court lacked authority to sentence and convict him under PS § 5-133(c), and both should therefore be vacated. That argument is misguided.

What differentiates Green’s case from our prior decisions that have found a cognizable claim under Rule 4-345(a) is that Green’s sentence was not illegal at the time it was imposed so the circuit court acted within its authority. In fact, in his previous appeal to our court, we upheld his sentence under PS § 5-133(c). *Green v. State*, No. 2044, Sept.

Term, 2018, 2019 WL 3226680, at \*11 (Md. App. Ct. July 17, 2019). We noted that Green “declined the court’s 2016 invitation to move to modify the sentence in case number 114121008.” *Id.* Therefore, the robbery conviction—a crime of violence—still stood, and he was thus appropriately subject to the mandatory minimum sentencing scheme set forth in PS § 5-133(c).

Green argues that the retroactive entry of a probation before judgment renders his sentence and conviction for possession of a regulated firearm under PS § 5-133 illegal. Essentially, Green is urging us to consider a variety of hypothetical situations. Yet, Green had the opportunity to correct his conviction before he was charged in the 013 case. He had an opportunity to correct his conviction after he was charged in the 013 case. He stipulated that he had a prior disqualifying conviction at trial. His attorney even filed a motion to correct an illegal sentence after he was charged in the 013 case, but later withdrew the motion in court during the probation revocation hearing.

The circuit court therefore acted within its authority to convict and sentence Green under PS § 5-133(c). Green’s actions fell within the conduct prohibited by the statute, and the court properly sentenced him based on its mandatory minimum scheme.

All of this demonstrates that the illegality does not *inhere* in Green’s sentence. While there may have been errors leading up to his conviction and sentence, they were not of the type that can be challenged through a motion to correct an illegal sentence. Our cases have shown that the scope of Rule 4-345(a) is narrow, and this is not one of the circumstances that falls within that category. Green was not convicted of a crime he did

not commit, nor was he sentenced for a crime he was not charged with. He committed the crime and the underlying offense. His sentence was thus legal at the time it was imposed and is not cognizable under Rule 4-345(a).

### CONCLUSION

The Circuit Court for Baltimore City properly denied Green's motion to correct an illegal sentence. The sentence was not illegal at the time it was imposed, and the circuit court acted within its authority. Thus, we affirm the judgment of the circuit court.

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