

Circuit Court for Baltimore City
Case Nos. 107198042, 107198044, 107198046, 107198048, 107198050

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0794

September Term, 2023

MARKEZ DAVIS

v.

STATE OF MARYLAND

Reed,
Albright,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: May 7, 2024

*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).

Appellant, Markez Davis, was convicted in the Circuit Court for Baltimore City in 2009 of robbery with a dangerous weapon, conspiracy to commit robbery, reckless endangerment, use of a handgun in the commission of a crime of violence, and prohibited person in possession of a firearm. This Court affirmed those judgments on direct appeal. *Davis v. State*, No. 2665, Sept. Term 2009 (Dec. 28, 2011). This appeal concerns appellant’s motion to vacate an illegal sentence.

Appellant presents the following questions for our review:

1. “Is a sentence illegal when it is putatively based on an indictment concerning an entirely distinct incident—involving a different complainant, date, and location—for which no evidence was presented at trial?”
2. Is a sentence illegal where it is imposed after the trial court stated, before trial, that any sentence would be “for a very, very long time?”
3. Is a sentence illegal where it reflects a substantial upward departure from the sentencing guidelines, with no apparent rationale other than the recommendation of the State that the defendant receive a harsh sentence for exercising his right to a jury trial?
4. Did the circuit court’s (1) failure to recuse after identifying a material conflict of interest based on a pre-existing relationship with a material witness and his business; (2) failure to ensure the defendant was aware of the conflict; and (3) intervention in cross-examination for the benefit of the State based on knowledge gained from his preexisting relationship with the witness and his business; render Appellant’s sentence illegal under Maryland law?”

As to the first question, we agree with appellant and shall hold that the circuit court erred in upholding appellant’s conviction on Count 1 of Indictment 107198046. The conviction was based on a crime for which appellant had not been indicted. As to the remaining issues

he raises herein, we shall hold that a motion to correct an illegal sentence is not the correct vehicle to challenge the matters raised by appellant.

I.

In this case, appellant appeals from the circuit court’s denial of his motion to correct an illegal sentence.¹ As noted above, appellant maintains that his sentence is illegal because he was convicted of an offense for which no evidence was presented at trial.² The issue raised becomes complicated because the Grand Jury for Baltimore City returned

¹ Appellant was tried on October 23 through November 6, 2009, before the Circuit Court for Baltimore City. The jury convicted him of robbery with a dangerous weapon, conspiracy to commit robbery, reckless endangerment, use of a handgun in the commission of a crime of violence, and prohibited person in possession of a firearm. He was sentenced to a total term of incarceration of forty years, and more specifically, a term of incarceration of twenty years for robbery with a dangerous weapon, a consecutive term of incarceration of twenty years for the use of a handgun in the commission of a crime of violence, the first five to be served without parole, and a concurrent term of incarceration of five years for being a prohibited person in possession of a firearm. The court merged conspiracy to commit robbery and reckless endangerment with robbery with a dangerous weapon.

Following sentencing, this Court affirmed Davis’s convictions on direct appeal in an unreported opinion. *Davis v. State*, No. 2665, Sept. Term 2009 (filed Dec. 28, 2011). In 2019, appellant petitioned the trial court for post-conviction relief. He filed an amended post-conviction petition in 2021, alleging ineffective assistance of counsel and illegal sentence. The court held an evidentiary hearing, and in a written decision, denied both Davis’s post-conviction petition and his motion to correct an illegal sentence. Appellant then filed an application for leave to appeal from the denial of post-conviction relief and he noted a separate appeal from the court’s denial of his motion to correct an illegal sentence. This appeal is limited to his challenge to the sentence under Md. Rule 4-345(a).

² As we explain, because we shall hold that a motion to correct an illegal sentence is not the correct vehicle to challenge the matters raised by appellant in his second, third, a fourth questions presented, we will not lay out the facts underlying those claims.

several indictments naming appellant for different events at different times, at different locations, and involving different victims. Appellant was indicted in eight indictments numbered 107178028, 107178029, 107178030, 107198042, 107198044, 107198046, 107198048, and 107198050.

At issue in this case is appellant's sentence on Indictment 107198046. That indictment charged appellant with a single count of being a prohibited person in possession of a firearm on June 10, 2007, at 2406 St. Paul Street. The alleged victim was Falina Loran. This same date, location, and victim were also the subject of indictments 107178028, 107178029, and 107178030. Indictment 107178030 also charges a single count of prohibited person in possession of a firearm and is identical in all respects to Indictment 107198046, except that Indictment 107198046 is captioned *State of Maryland v. Markez Davis & Derrick Strong*, whereas Indictment 107178030 is captioned *State of Maryland v. Markez Davis*. Indictments 107178028, 107178029, and 107178030 were consolidated. However, 107198046, at issue in this case, despite naming the same date, location, and victim, was not consolidated with any of the other indictments for the events of June 10, 2007, at 2406 St. Paul Street with victim Falina Loran.

Instead, it was consolidated with indictments 107198042, 107198044, 107198048, and 107198050. These indictments all charged various crimes associated with an incident on June 3, 2007, at 100 E. 20th Street with alleged victim Johnny Neal.³ Indictment

³ Indictment 107198042 charged attempted first-degree murder, attempted second-degree murder, first-degree assault, second-degree assault, use of a handgun in the commission of a crime of violence, and unlawful wearing, carrying, and transporting of a handgun. Indictment 107198044 charged robbery with a dangerous weapon, robbery, first-

107198046, along with the four indictments for the Johnny Neal incident, were tried in a consolidated trial on October 23, 2009 through November 6, 2009. At that trial, the State presented evidence that appellant and his co-conspirator, Derrick Strong, robbed Johnny Neal on June 3, 2007, and stole his cell phone, cash, and a piece of jewelry. Mr. Neal was shot twice during the robbery but survived. All of the evidence presented at trial pertained to this incident. No evidence was presented about the separate incident involving Falina Loran. At trial, the State and appellant stipulated “that . . . [Davis] is a person that is prohibited from possessing a handgun in the State of Maryland.”

At the close of the evidence, the court provided the jury with a verdict sheet that had been discussed before submission with appellant and his counsel. The verdict sheet provided to the jury differed from Indictment 107198046. It described the charge for Indictment 107198046 as follows:

“Do you find beyond a reasonable doubt that the Defendant, Markez Davis, did after being a prohibited person, possess[ed] a regulated firearm *on or about June 3, 2007 at or around the 100 block of East 20th Street in Baltimore City.*” (emphasis added).

degree assault, second-degree assault, use of a handgun in the commission of a crime of violence, unlawful wearing, carrying, and transporting of a handgun and reckless endangerment. Indictment 107198048 charged conspiracy to commit murder, conspiracy to commit first-degree assault, conspiracy to use a handgun in the commission of a crime of violence, and conspiracy to wear, carry, and transport a handgun. Indictment 107198050 charged conspiracy to commit robbery with a dangerous weapon, conspiracy to commit robbery, conspiracy to commit first-degree assault, conspiracy to use a handgun in the commission of a crime of violence, conspiracy to wear, carry, and transport a handgun.

The jury found appellant guilty of Count 1 of Indictment 107198046, prohibited person in possession of a firearm, among other charges listed in the other indictments. At sentencing, the court imposed a total term of incarceration of forty years, and, more specifically, a term of incarceration of five years on Count 1 of Indictment 107198046 to be served concurrently with the other sentences.

On direct appeal, appellant raised none of the issues he raises today, and this Court affirmed. *Davis v. State*, No. 2665, Sept. Term 2009 (Dec. 28, 2011). Appellant then filed a motion to correct illegal sentence. The circuit court denied the motion. This timely appeal followed.

II.

Appellant argues first that this court should vacate his sentence on Count 1 of Indictment 107198046, prohibited person in possession of a firearm, because it was based on a crime with which he was not charged. A defendant cannot be found guilty of a crime for which he was not indicted. *Johnson v. State*, 427 Md. 356, 370-71 (2012). Appellant argues that, without a formal amendment, the indictment cannot be read to charge him with a crime on June 3, 2007. He argues that no evidence was presented to the jury to support the alleged crime, yet the jury rendered a guilty verdict, finding that he had committed a crime on June 3, 2007. Appellant argues that he was sent to prison for a crime for which he was never indicted, in violation of his constitutional due process rights. A sentence is illegal if it violates the Constitution and, therefore, he argues, we must vacate his sentence on this count.

Appellant argues next that all of his sentences were illegal because the trial judge prejudged the sentence. Specifically, the trial judge stated before trial that, if convicted, appellant would be “going away for a very, very long time.” Appellant argues that this was a predetermination, not based on any evidence or mandatory sentencing scheme. Appellant claims that the court’s prejudgment violated his due process rights to a hearing before an impartial judge who does not prejudge evidence he has not yet heard. As a result, appellant argues, his sentence was illegal.

Appellant next complains that the trial judge’s sole justification for departing upward from the guidelines at sentencing was the “State’s recommendation.” The State’s only reasoning for the recommendation to depart upward was that appellant had exercised his right to go to trial. Appellant argues that the trial judge’s reliance on a recommendation based on such reasoning constituted a penalty for his decision to exercise his constitutional right to trial by jury. This, he argues, was an impermissible consideration at sentencing. Appellant argues that a sentence based upon impermissible considerations is illegal, and, therefore, his sentence must be vacated.

Finally, Appellant argues that all of his sentences were illegal because they were imposed by a trial judge with a conflict of interest that appellant did not know about or waive. During the trial, the trial judge identified a conflict with one of the witnesses. Appellant’s trial counsel did not object. Appellant’s counsel has no recollection of raising the issue with appellant. Appellant argues that a trial court’s bias is an appropriate subject of a motion to correct an illegal sentence and that this trial judge’s bias mandates that we vacate his sentence.

The State argues that appellant’s arguments regarding the sentence on Count 1 of Indictment 107198046, prohibited person in possession of a firearm, are waived. The State argues that the fundamental basis for appellant’s claim is an argument about the evidentiary basis for his conviction, *i.e.*, that no evidence was presented about June 3, 2007. But appellant did not contest the evidentiary basis for his convictions on direct appeal. Nor did he contest the alleged variance from the indictment. Thus, the variance from the indictment and any evidentiary sufficiency arguments are waived, and no motion to correct an illegal sentence may be based on those arguments.

In the alternative, the State argues that the sentence on Count 1 of Indictment 107198046 was not illegal. The State argues that differences between the caption of the indictment and the content of his verdict do not mean that he was convicted of a crime with which he was not charged, because none of the differences (date, location, and complainant) are elements of the crime of which he was convicted. The State notes that, historically, variation between allegation and proof as to something other than an element of the charged crime is not material and, therefore, does not undermine the conviction.

As to all of appellant’s other claims, the State argues that we cannot consider them on the appeal of a motion to correct an illegal sentence because they are not cognizable under Maryland Rule 4-345(a). The State argues that, in order to be cognizable under Rule 4-345(a), any illegality must inhere in the sentence itself, not in the means by which the court reached that sentence. Procedural irregularities and other alleged injustices in the proceedings to determine the sentence do not inhere in the sentences, according to the State. Thus, while illegalities in the sentencing process can be challenged on direct appeal, they

cannot be challenged on a motion under Rule 4-345(a). As a result, the State argues, we cannot consider appellant’s claims rooted in the trial judge’s prejudice or consideration of impermissible factors.

III.

We begin with appellant’s argument that his sentence is illegal because he was not convicted of the crime with which he was sentenced. This Court reviews a denial of a motion to correct an illegal sentence *de novo*. *Blickenstaff v. State*, 393 Md. 680, 683 (2006). Rule 4-345(a) instructs that “the court may correct an illegal sentence at any time.” As a threshold matter, we must determine whether appellant’s motion under Rule 4-345(a) is the correct vehicle to address his concerns, or whether, as the State contends, his concerns are waived evidentiary claims. Rule 4-345(a) is a narrow exemption from normal procedural requirements that an issue must be preserved in order to be raised on appeal. *Carlini v. State*, 215 Md. App. 415, 426 (2013). It is available only for a narrow class of illegal sentences. *Id.*

A sentence may be attacked under Rule 4-345(a) where the illegality inheres in the sentence 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.” *Chaney v. State*, 397 Md. 460, 466 (2007). Any other concerns which might be grounds for vacatur of a sentence must be raised on direct appeal. *Id.* 466-67.

As a general rule, while a sentence based on *no conviction* can be challenged, an argument that challenges *the merits of a conviction* is not raised properly in a motion to correct an illegal sentence. *Rainey v. State*, 236 Md. App. 368, 380 (2018). The State argues that appellant’s concerns about the difference between his indictment and verdict form are concerns merely about a variance, that concerns about a variance are concerns about the merits of a conviction, and that Rule 4-345 does not protect appellant from his failure to preserve at trial or to raise on direct appeal any objection to a variance between the indictment and the evidence presented.

The Maryland Supreme Court has held that a sentence is illegal and cognizable on a motion to correct an illegal sentence when it is based upon a crime for which appellant was never charged. *Johnson*, 427 Md. at 370-71. In such cases, the lack of a proper indictment for the relevant crime renders the trial court without authority to impose a sentence for the uncharged offense and renders any sentence imposed illegal. *Id.*

In *Johnson*, the appellant was convicted of and sentenced for assault with intent to murder, even though the indictment did not charge assault with intent to murder. *Id.* at 360. The Court held that, in such cases, “when the illegality of a sentence stems from the illegality of the conviction itself, Rule 4-345(a) dictates that both the conviction and the sentence be vacated.” *Id.* at 378. Reversing the Court of Special Appeals, (now the Appellate Court of Maryland), the Court explained as follows:

“We shall reverse the judgment of the Court of Special Appeals. Petitioner’s sentence for assault with intent to murder was illegal because that crime was not contained in the indictment returned by the Grand Jury. Petitioner’s motion to correct an illegal sentence was timely because Maryland Rule 4-345(a) allows the trial court to correct an illegal sentence ‘at any time.’ Such

a motion is not waived by the defendant’s acquiescence at trial or sentencing, and we shall not apply the doctrine of laches because the State has failed to allege any prejudice arising from Petitioner’s delay. Therefore, we shall vacate Petitioner’s conviction and sentence for assault with intent to murder. We need not decide whether the ‘constructive amendment’ of an indictment may be valid in some circumstances, as it is clear that no proper amendment occurred in this case. Moreover, because Rule 4-345(a) resolves the case, we need not decide whether Petitioner’s claim is ‘jurisdictional’ in any sense of that word.”

Id. at 362. In accord with *Johnson*, appellant’s motion is before this Court properly and we can consider appellant’s allegation that he was convicted of and sentenced for a crime for which he was not indicted.

The success of appellant’s claim turns on whether the difference between the crime charged in the indictment and the crime for which appellant was convicted was sufficiently material as to render them “different crimes” as in *Johnson*. This Court has made clear that an indictment must “first, characterize the crime; and, second . . . provide such description of the criminal act alleged to have been committed as will inform the accused of the specific conduct with which he is charged, thereby enabling him to defend against the accusation.” *McCree v. State*, 214 Md. App. 238, 269 (2013). The indictment must contain sufficient accurate information so as to protect the defendant from double jeopardy. *Dotson v. State*, 234 Md. 333 (1964).

Where the evidence produced at trial or the jury instructions given render the crime for which a defendant was convicted so far removed from the crime for which appellant was indicted that the defendant no longer has adequate notice or protection from double jeopardy, we must hold that he was convicted of a crime of which he was not charged.

Johnson, 427 Md. at 375-76. In this regard, the Maryland Supreme Court held in *Johnson* as follows:

“Occasionally . . . a judge gives jury instructions that broaden the basis for a defendant's conviction beyond acts charged in the indictment. When this difference impacts the defendant's right to be informed of the nature of the charges against him or her, it . . . warrants reversal of a conviction.”

The State cites cases demonstrating that changes in the name, location, or date of the offense do not necessarily render the indictment insufficient to support a conviction. *See e.g., Malkins v. State*, 6 Md. App. 466, 469-70 (1969) (allowing the trial court to amend an indictment mid-trial to correct the difference between the robbery of “apartment A-1” owned by “Eilie Scott” and “apartment B-1” owned by “Isabelle Scott”); *Thompson v. State*, 412 Md. 497, 517 (2010) (“Nor does the amendment changing the location of the conduct charged from one address to another within Baltimore City change the character of the offense charged.”); *State v. Mulkey*, 316 Md. 475, 482 (1989) (“Here, we conclude the exact date of the offense is not an essential element and is not constitutionally required to be set forth.”).

There are two key differences between the above cases and the present case. First, in all of the above cases, the indictment was amended before the verdict. Here, the indictment was never formally amended, even assuming *arguendo* that it could have been. The only way to get from the indictment alleging that appellant was a prohibited person in possession of a firearm on June 10, 2007, at 2406 St. Paul Street, with victim Falina Loran, to the verdict form asking the jury whether appellant had been a prohibited person in possession of a firearm on June 3, 2007, at 100 E. 20th Street with victim Johnny Neal

would be something akin to a constructive amendment. We note that the Supreme Court of Maryland has, several times, declined to decide whether constructive amendments are possible under any circumstances. *Johnson*, 427 Md. at 362; *Shannon v. State*, 468 Md. 322, 335 n.11 (2020). And, in any case, neither party has alleged that a constructive amendment occurred here. Accordingly, we shall not address constructive amendment.

Second, any change to the charges would need to conform to the standards set out in Md. Rule 4-204, even assuming that a trial court could make such a change without a formal amendment. *Johnson*, 427 Md. at 373. That Rule prohibits changes that prejudice the defendant or amount to charging a different crime than those listed in the original indictment. *Id.* at 375. While the State’s cases demonstrate that a change in any one of date, location, and victim does not automatically preclude an amendment from complying with Rule 4-204, none of the State’s cited cases reached a universally applicable conclusion that a change in victim, location, or date *never* prevents an amendment from complying with Rule 4-204.

Rather, each concluded that the relevant amendment did not deprive the defendant of notice of what he was called upon to defend or of the protections of double jeopardy. *Malkins*, 6 Md. App. at 470 (“[T]he appellant has neither alleged nor shown that the charge in the indictment insufficiently characterized and described the offense to an extent that it failed to give the appellant notice of what he was called upon to defend or that it would not prevent a future prosecution for the same offense.”); *Thompson*, 412 Md. at 519 (upholding the change in address because it was made clear to the defendant prior to trial of the address of the location of the alleged crime); *Mulkey*, 316 Md. at 488 (approving an amendment

as to time frame because “Mulkey was apprised of the continuing nature of the offenses such that his defense was not prejudiced.”). Thus, we consider whether the *indictment* informed appellant sufficiently of the particular crime with which he was charged and, significantly, protected him from double jeopardy.

Here, appellant was charged in several indictments with two incidents, the incident on June 3, and the incident on June 10. An indictment listing the same victim, the same location, and the same date as the June 10 incident could reasonably be assumed to be about the June 10 incident rather than the June 3 incident. We agree with appellant that the indictment did not give adequate notice to appellant that he was charged for the June 3 incident and would need to defend against a charge of prohibited person in possession of a firearm stemming from the events of June 3, 2007.

Nor did Indictment 107198046 adequately protect appellant from double jeopardy. In Maryland, we look to the charging documents to determine which crimes a defendant cannot be prosecuted for. *Anderson v. State*, 385 Md. 123, 140-141 (2005). We do not look to the actual evidence presented at trial to determine sameness in fact between two indictments. *Id.* at 141. The Maryland Supreme Court explained as follows:

“In determining the scope of the former conviction, the court must ordinarily look at the effective charging document upon which judgment was entered, not just the evidence presented in support of that charge. We have often made clear that the primary purpose of a charging document is to inform the defendant of the accusation against him/her by so describing the crime ‘as to inform the accused of the specific conduct with which he is charged,’ *Jones v. State*, 303 Md. 323, 336, 493 A.2d 1062, 1069 (1985), in order, among other things, to ‘protect[] the accused from a future prosecution for the same offense.’ *Williams v. State*, 302 Md. 787, 791, 490 A.2d 1277,

1279 (1985). *See also State v. Morton*, 295 Md. 487, 490-91, 456 A.2d 909, 911 (1983) and cases cited there.

One may never know, unless a transcript is prepared, what evidence was presented, and one could never be certain in any event what evidence a trier of fact (or the court on motion) credited in reaching its verdict. The Supreme Court, for Constitutional purposes, and we, as a matter of common law, have rejected an ‘actual evidence’ test to determine sameness in law, and we see no profit, absent special circumstances not present here, in adopting that test to determine sameness in fact. In most cases, the only sensible and workable criterion for determining the nature and scope of the prior offense is the effective charging document. That states the offense for which the defendant was tried.”

Id. at 40-141

To prevent appellant from being re-tried for prohibited person in possession of a firearm on June 3, 2007, at 100 E. 20th Street with victim Johnny Neal, the indictment would need to identify the incident with enough specificity that a court would be able to determine later that appellant had been prosecuted previously for this incident. *See Malkins*, 6 Md. App. at 470 (noting that the change between “Eilie Scott” and “Isabelle Scott” as the owner of the property broken into was not sufficient to render a court unable to identify the incident for which the defendant had been prosecuted). We find it highly unlikely that a court looking at an indictment for an incident on June 10, 2007, at 2406 St. Paul Street, with victim Falina Loran would surmise that appellant had, in fact, been prosecuted for an incident on June 3, 2007, at 100 E. 20th Street, with victim Johnny Neal. This indictment did not protect appellant from repeat prosecution for the crime of which he was convicted.

Appellant was indicted with being a felon in possession of a firearm during the June 10 incident with victim Falina Loran. He was convicted of being a felon in possession of a firearm during the June 3 incident with victim Johny Neal. He was convicted of a crime with which he was not charged.

As in *Johnson*, we shall vacate both the sentence and the conviction.

IV.

We next turn to appellant’s three arguments that his remaining sentences should be vacated because of the alleged improper conduct of the trial judge. We first address whether a motion to correct an illegal sentence is the appropriate vehicle to pursue these claims. Appellant’s claim (applicable to his three remaining arguments) that we can vacate a sentence motivated by “ill will, prejudice, or other considerations” is based on *Johnson v. State*, 213 Md. App. 582, 585 (2013). That case, notably, defines the scope of illegal sentences that can be challenged on *direct appeal* and does not apply here. *Id.*

This Court has held that the class of cases that can be addressed, not on direct appeal, but based upon Rule 4-345(a) is far narrower. *Carlini*, 215 Md. App. at 419-20. On motions to correct illegal sentences, the court does not review allegations of illegality that stem from “trial court error during the sentencing proceeding.” *Id.* at 426. We have rejected the argument that appellate courts should review claims that the trial court was motivated by illegal considerations on motions to correct an illegal sentence under Rule 4-345. *Randall Book Corp. v. State*, 316 Md. 315, 322-23 (1989).

Appellant’s motion to correct an illegal sentence is not the correct vehicle to attack the alleged impropriety in the procedure of his sentencing proceeding. Appellant’s claims that the trial court relied on improper considerations and was motivated by the prejudice of an allegedly undisclosed conflict do not allege an inherent illegality in the sentence. We will not consider whether the trial judge relied on improper considerations or was motivated by an allegedly undisclosed conflict.

**CASE REMANDED TO THE
CIRCUIT COURT FOR
BALTIMORE CITY WITH
INSTRUCTIONS TO VACATE THE
CONVICTION AND SENTENCE ON
COUNT 1 OF INDICTMENT
107198046. ALL OTHER
JUDGMENTS AFFIRMED. COSTS
TO BE PAID 2/3 BY APPELLANT
AND 1/3 BY THE MAYOR AND
CITY COUNCIL OF BALTIMORE.**