UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0814

September Term, 2014

GARY ALEXANDER WESLEY, SR.

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: May 1, 2015

Gary Alexander Wesley, Sr., appellant, in proper person, appeals from the denial, by the Circuit Court for Baltimore County, of a motion to correct an illegal sentence imposed for the offenses of second-degree murder and second-degree assault. He presents one question for our review, which we have rephrased as follows:

> Did the circuit court err in denying appellant's motion to correct a sentence appellant alleged was an illegal sentence?[1]

Finding no error, we shall affirm.

I.

To the extent necessary to frame the issue now before us, we need only recite briefly the procedural history of this case.[2] On April 23, 2007, appellant was convicted, following a jury trial in the Circuit Court for Baltimore County, of second-degree murder and second-degree assault. The trial court sentenced appellant as follows:

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[1]In his brief, appellant presents his question for our review as follows:

> "DID JUDGE BOLLINGER SAY: '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 DEPARTMENT OF CORRECTION DATING FROM FEBRUARY THE 2nd, 2006 AND IN COUNT THREE, SECOND DEGREE ASSAULT?"

[2]Because the sole issue on appeal concerns the legality of appellant's sentence, we will dispense with a recitation of the underlying facts.

> "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 Department 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."

Appellant did not object to the court's sentence. Following a timely appeal, this Court affirmed the judgment of the circuit court. *Gary Alexander Wesley, Sr. v. State of Maryland*, Sept. Term 2007, No. 634 (Filed: Aug. 14, 2009).[3]

In December 2013, following an unsuccessful petition for post-conviction relief, appellant filed in the Circuit Court for Baltimore County a "Motion to Correct Sentence/Motion For Appropriate Relief: under Maryland Rules 2-311." He alleged that at his 2007 sentencing hearing, the court gave appellant the same start date for his second-degree murder and second-degree assault convictions, despite stating that the sentences were to run consecutively. Because the sentences started on the same date, appellant argued, the court's ruling created an ambiguity and hence, the sentences should be deemed to run concurrently under the rule of lenity.[4] He requested a hearing on the motion pursuant to Rule 2-311(f).

[3]On direct appeal, appellant did not claim any error as to the sentence.

[4]The rule of lenity provides, in part, that "if doubt exists as to the proper penalty, punishment must be construed to favor a milder penalty." *Wilson v. Simms*, 157 Md. App. 82, 98 (2004).

On June 6, 2014, the trial court denied appellant's "Motion to Clarify Sentence," without a hearing. This timely appeal followed.

II.

Before this Court, appellant contends that the trial court erred by denying his motion to correct an illegal sentence. He posits that at sentencing, the court issued the same start date for appellant's convictions for second-degree murder and second-degree assault, despite stating that the terms of incarceration were to be served consecutive to one another. Because the sentences cannot run both concurrently and consecutively, appellant argues, the court imposed an ambiguous sentence, which should be construed in his favor to run concurrently.

Conversely, the State contends that the trial court denied appellant's motion to correct his sentence properly. In the State's view, the transcript indicates that the court did not state, as appellant avers, that the two sentences were to start on the same date. As such, the State maintains that the trial court irrefutably imposed consecutive sentences, and to the extent there was any ambiguity, it is clear from the entirety of the transcript, the docket entries, and the commitment order that appellant received consecutive sentences.

III.

We turn to appellant's sole contention before this Court: whether the trial court erred by denying his motion to correct his sentence. Because appellant failed to allege an *inherent* illegality in his sentence, we hold that the court denied appellant's motion properly.

Rule 4-345(a) states that a "court may correct an illegal sentence at any time." The Rule provides an avenue for appellate review of a criminal sentence "despite the failure to object at the time of the proceedings." *Bryant v. State*, 436 Md. 653, 662 (2014). It is a limited exception to the contemporaneous objection requirement, which applies to sentences that are "'inherently' illegal." *Id*.; *see Chaney v. State*, 397 Md. 460, 466 (2007) (noting that the "scope of [Rule 4-345(a)], allowing collateral and belated attacks on the sentence and excluding waiver as a bar to relief, is narrow").

In *Bryant*, the Court of Appeals 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.

The error appellant complains of on appeal does not constitute an inherently illegal sentence. Appellant contends that the trial judge imposed an ambiguous sentence when, at sentencing, he ruled that appellant's sentences were to start on the same date, despite stating that they were to be served consecutively. Appellant's allegation hardly constitutes a sentence not permitted by law to come within the purview of Rule 4-345(a). At best, appellant's allegation constitutes a procedural error in the sentencing proceedings, which is subject to ordinary review and procedural impediments. *See Evans v. State*, 382 Md. 248, 278-79 (2004) (noting that "a trial court error during the sentencing proceeding is not ordinarily cognizable under Rule 4-345(a) where the resulting sentence or sanction itself is

itself lawful"). To be preserved for appellate review, appellant was required to object at the sentencing proceeding and raise the issue on direct appeal. *See* Md. Rule 8-131(a) (noting that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court"). Because appellant fails to allege that he received an inherently illegal sentence, his sentence is not subject to correction "at any time." Md. Rule 4-345(a); *see Bryant*, 436 Md. at 662-663. Accordingly, appellant waived his allegation of error and the trial court denied his motion properly. *See Pope v. Board of School Comm'rs of Baltimore City*, 106 Md. App. 578, 591 (1995) (noting that "an appellate court will affirm a circuit court's judgment on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised").

Assuming *arguendo* that appellant alleged sufficiently that he received an inherently illegal sentence, we would hold that there is no ambiguity in the sentence imposed by the trial court.

The sentencing court has a duty to impose a sentence that permits the defendant to "understand clearly what debt he must pay to society for his transgressions." *Robinson v. Lee*, 317 Md. 371, 379-80 (1989). To fulfill its obligation, the court need only "spell out with reasonable specificity the punishment to be imposed." *Id*. at 380. In determining whether the sentencing court intended to impose concurrent or consecutive sentences, the

transcript of the proceedings is of paramount importance. *See Dutton v. State*, 160 Md. App. 180, 191-92 (2004). In the interests of fairness, if the court fails to state whether sentences are to be served consecutively or concurrently, we will render them concurrent. *See Nelson v. State*, 66 Md. App. 304, 312-13 (1986) (holding that the sentencing court's failure to state whether sentences were consecutive or concurrent rendered them concurrent).

In the case *sub judice*, the transcript indicates clearly and unambiguously that the court imposed consecutive sentences for second-degree murder and second-degree assault. At sentencing, the court stated, in pertinent part, as follows:

> "the sentence of the Court is, in count one, second degree murder, thirty years in the Department 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." (Emphasis added).

It is clear from the transcript that the court sentenced appellant to a term of incarceration of thirty years for second-degree murder to begin on February 2, 2006, and a *consecutive* term of incarceration of ten years for second-degree assault. Moreover, the docket entries and the commitment record indicate that the sentences are to run "consecutive" to one another. Contrary to appellant's assertion, the sentences do not begin on the same date.

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