Circuit Court for Kent County
Case No. 2958

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 857

September Term, 2018

EARL EDWARD BURKE

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: August 27, 2019

Edward Earl Burke was convicted in 1981 of felony murder and using a handgun in the commission of a crime of violence. His convictions stemmed from his involvement in the armed robbery of a gas station, during which Mr. Burke's accomplice shot an employee four times in the head. Mr. Burke appeals from the denial of his second motion to correct an illegal sentence, which he filed on February 26, 2018. Mr. Burke claims that his life sentence for first-degree felony murder is illegal because the jury did not convict him of either robbery or armed robbery. The Circuit Court for Montgomery County denied his motion without explanation. We hold that a motion to correct an illegal sentence is an improper vehicle for the argument Mr. Burke advances, and we affirm the judgment of the circuit court.

I. BACKGROUND

On December 20, 1981, Mr. Burke took a brief trip to LaPlata to attend a concert with his girlfriend, Crystal Wessell, and their friend, Michael Allen. The trio left to return to their homes in Grasonville the following evening. Mr. Burke was driving. Mr. Burke pulled over near an Exxon station in Gambrills, and Mr. Allen informed his companions that he planned to "take [the] station." Mr. Burke agreed to circle the area and pick Mr. Allen up when he was finished.

Mr. Allen robbed the gas station and shot and killed an employee. When Mr. Burke picked him up as planned, Mr. Allen reported that he had shot someone in the head. Mr. Burke drove away from the gas station and to a nearby liquor store where he and Mr. Allen used the stolen money to purchase whiskey, beer, and cigarettes.

Mr. Burke ultimately confessed to police that he knew that Mr. Allen planned to rob the gas station and that he had agreed to serve as his "wheelman." Mr. Burke claimed that he didn't know Mr. Allen was armed until Mr. Allen informed him after the fact that he had shot someone in the head. Police found the murder weapon at Mr. Burke's grandmother's house, where Mr. Burke had hidden it sometime after the robbery.

Mr. Burke was charged in a ten-count indictment in the Circuit Court for Anne Arundel County. The case was transferred to the Circuit Court for Kent County, where Mr. Burke was tried for murder, armed robbery, robbery, and the use of a handgun in the commission of a felony or crime of violence. The remaining counts were *nolle prossed*.

After the close of evidence, the court gave the jury the following instruction regarding the verdict sheet:

> [Question one] says, "Do you find the Defendant guilty of murder? Yes, or No?" You will either find him guilty of that – yes or no. "If you find the defendant guilty of murder then proceed to Question 4;" well, obviously you will not answer Question 2 and 3. Then if you find him guilty of murder you will go to 4, and 4 is, "Do you find the Defendant guilty of the charges of either use of a handgun in the commission of a felony, or the use of a handgun in the commission of a crime of violence" Yes or no? Now, reading on, up at Question 1, back at the little instruction area, "If you find the Defendant not guilty of murder, proceed to answer the next question." And the next question is Question 2, "Do you find the Defendant guilty of armed robbery?" Yes or no. "If you find the Defendant guilty of armed robbery, return no verdict on the charge of robbery and proceed to Question 4." Then you go to 4. But then that implies, of course, and I mean for you, if you find him not guilty of that then you would go to robbery and decide guilty or not guilty of robbery. Then you would go to

Question 4.

The State also addressed the verdict sheet in its closing argument:

> By [] finding [Mr. Burke] guilty of murder in the first degree you will skip over the crime of armed robbery, and as this verdict sheet tells you, if you find the Defendant guilty of murder then proceed on to Question 4, which pertains to the use of a handgun. The reason for that is this – since the State was relieved from having to show premeditation and deliberation, it used the elements of armed robbery to prove first degree murder. Hence if those elements of the armed robbery have been spent or used in the proof of murder in the first degree, then they can't be used a second time to find the Defendant guilty of armed robbery. . . . [I]f you find the State has proven armed robbery, that the State has proven robbery, and if you find that there was a death, there was a killing and that there was a causal connection between the felony and the killing, then the State has met its burden of proving the Defendant guilty of murder in the first degree. And then you skip over armed robbery, because you have already used the elements of armed robbery in reaching that conclusion. Then you go down to then determine, "Do you find the Defendant guilty of the charge of either use of a handgun in the commission of a felony, or the use of a handgun in the commission of a crime of violence."

The jury found Mr. Burke guilty of first-degree felony murder and the use of a handgun in the commission of a crime of violence. As instructed, the jury did not return a verdict on the robbery or armed robbery counts. Mr. Burke was sentenced to life in prison for the murder and fifteen years for the use of the handgun. This Court affirmed his convictions in an unreported opinion.[1] *Earl Edward Burke v. State of Maryland*, No. 503,

[1] Mr. Burke argued on direct appeal that his confessions to police were involuntary and that there was insufficient evidence to sustain his convictions. This Court disagreed on all counts.

Sept. Term 1983 (filed Jan. 19, 1984) (per curiam).

Over the years, Mr. Burke has mounted multiple collateral attacks on his convictions and sentences. In 1988, he filed his first petition for postconviction relief, which was denied. In 1998, he filed a petition for a writ of *habeas corpus* that included a request for a writ of error *coram nobis*. The court denied his petition and dismissed his request for *coram nobis* relief.

In 2006, Mr. Burke filed his first motion to correct an illegal sentence, arguing that he was improperly sentenced to a natural life sentence for a non-first-degree murder conviction (even though he *was* convicted of first-degree felony murder). His motion was denied, and he appealed to this Court. We affirmed the circuit court's decision, *Earl Edward Burke v. State of Maryland*, No. 2346, Sept. Term 2006 (filed July 11, 2007), and Mr. Burke filed a petition for *certiorari* in the Court of Appeals that was denied. *Burke v. State*, 402 Md. 37 (2007).

In 2013, Mr. Burke filed a second petition for postconviction relief. The circuit court found his petition barred by the 1995 amendments to the Uniform Postconviction Procedure Act ("UPPA"), which limits criminal defendants to a single postconviction petition. Mr. Burke appealed, we affirmed, *Earl Edward Burke v. State of Maryland*, No. 2388, Sept. Term 2014 (filed September 30, 2016), and Mr. Burke filed a petition for writ of *certiorari* in the Court of Appeals that was denied. *Burke v. State*, 450 Md. 423 (2016).

In 2018, Mr. Burke filed a second motion to correct an illegal sentence, the subject

of this appeal. The circuit court denied the motion in a one-sentence order. We supply additional facts below as needed.

II. DISCUSSION

Mr. Burke argues[2] on appeal that the circuit court erred by denying his motion to correct his life sentence for felony murder because "it never should have been imposed." He claims that because he was tried for robbery and armed robbery but convicted of neither, his sentence for felony murder is illegal. The State responds that Mr. Burke's claim does not actually attack the legality of his sentence, as it purports to, but instead challenges the propriety of a jury instruction, the propriety of the State's closing argument at trial, and the sufficiency of evidence to sustain his convictions, none of which can be reviewed via a motion to correct an illegal sentence. We agree with the State and affirm.

Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." In other words, illegal sentences may be corrected even if "(1) no objection was made when the sentence was imposed, (2) the defendant purported to consent to it, or (3) the sentence was not challenged in a timely-filed direct appeal." *Chaney v. State*, 397 Md. 460, 466 (2007). If the circuit court denies a motion to correct an illegal sentence, it can be appealed immediately. *Carlini v. State*, 215 Md. App. 415, 425 (2013).

That all said, the scope of Rule 4-345(a) is narrow. *Chaney*, 397 Md. at 466. It is not the function of Rule 4-345(a) "to re-examine errors occurring at the trial or other

[2] He framed his Question Presented as follows:

> Is Appellant's sentence for felony murder illegal where there was no verdict returned as to either of the predicate felonies?

proceedings prior to the imposition of sentence." *Carlini*, 215 Md. App. at 425. And the Rule does not allow convicted defendants to raise belatedly issues that could and should have been raised on direct appeal or in a petition for postconviction relief. *Carlini*, 215 Md. App. at 425 (*quoting Hill v. U.S.*, 368 U.S. 424 (1962)).

A sentence is illegal within the meaning of Rule 4-345(a) only when "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*, 397 Md. at 466. "There is no simple formula to determine which sentences are 'inherently illegal' within the meaning of Rule 4-345(a)." *Johnson v. State*, 427 Md. 356, 368 (2019).

One type of sentence that has consistently been found illegal under Rule 4-345(a), though, is a sentence "where no sentence or sanction should have been imposed" at all. *Alston v. State* 425 Md. 326, 339 (2012). Mr. Burke seizes upon that language and argues that because he was not convicted of robbery or armed robbery, his felony murder conviction is improper and no sentence should have been imposed. It's far from clear that Mr. Burke's argument holds water on the merits. *See, e.g.*, *Mumford v. State*, 19 Md. App. 640, 643 (1974) ("There is no [] requirement upon the State that it indict and convict upon [the] underlying felony in order to sustain a felony-murder prosecution."). But we don't reach it in any event because the errors he alleges are not illegalities that inhere in his sentence.

In *Carlini v. State*, this Court provided an overview of cases that found sentences illegal under Rule 4-345(a) because they "should never have been imposed in the first place." 215 Md. App. at 433. Several held that sentences never should have been imposed where the defendants had not been convicted of the crimes for which they were sentenced. *Ridgeway v. State*, 369 Md. 165, 171 (2002) (finding that the circuit court properly vacated the defendant's sentences for three first degree assaults when the defendant was acquitted of those charges by a jury); *Johnson*, 427 Md. at 356 (finding that the defendant's sentence for assault with intent to murder should never have been imposed because he was never charged with or convicted of such a crime); *State v. Garnett*, 172 Md. App. 558, 559 (2007) (finding that "a sentence of 'restitution' cannot be imposed on a defendant who has been found 'not criminally responsible by reason of insanity'"). Others involved sentences where the sentencing judge lacked the statutory authority to impose the sentence at all. *See, e.g., Holmes v. State*, 362 Md. 190 (2000) (the court lacked the statutory authority to impose house arrest as a condition of probation). *Carlini* concluded its survey of illegal sentences that never should have been imposed by observing that in all of those cases, "[e]ven if all of the antecedent proceedings had been procedurally impeccable, the illegality of the sentence is facial and self-evident." 215 Md. App. at 438.

Mr. Burke's sentence does not fall into that category. He was convicted of first-degree felony murder and sentenced accordingly. He argues that he shouldn't have been convicted in the first place because of a problematic jury instruction, because of the State's remarks during closing arguments, and because there was insufficient evidence to sustain

his felony murder conviction. But his claims allege trial errors, not facial illegality in his sentence. And "[b]ecause the alleged illegality [does] not inhere in the sentence itself, the motion to correct an illegal sentence is not appropriate." *Pollard v. State*, 394 Md. 40, 42 (2006). Mr. Burke was free to raise those issues on appeal or in postconviction, but Rule 4-345(a) is not "some unlimited 'Reopen, Sesame,' licensing the court to revisit and relitigate issues that have long since been *faits accompli*." *Matthews v. State*, 197 Md. App. 365, 375 (2011), *rev'd on other grounds,* 424 Md. 503 (2012). We affirm the judgement of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR KENT COUNTY AFFIRMED. APPELLANT TO PAY COSTS.