Circuit Court for Worcester County
Case No.: 23-K-16-427

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 970

September Term, 2017

STEPHEN RORKE

v.

STATE OF MARYLAND

Berger,
Fader,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: July 6, 2018

Stephen Rorke, appellant, was charged with stealing merchandise from Walmart on sixteen dates in February, March, and April of 2016. He was charged by criminal information with eight counts of theft of property with a value of less than $100, representing alleged thefts on February 2; March 9, 16, 18; April 4, 12, 16, and 27 (counts 1, 7, 9, 10, 13, 14, 15, and 16, respectively); and eight counts of theft with a value of less than $1000, representing alleged thefts on February 3, 9, 11, 16, and March 1, 8, 14, 30 (counts 2, 3, 4, 5, 6, 8, 11, and 12, respectively).[1]

Following a bench trial, the Circuit Court for Worcester County found Rorke guilty of sixteen counts of theft with a value of less than $100. The court imposed a sentence of ninety days on each count, with thirty days to be served on count one and all remaining time suspended, to be followed by 18 months of supervised probation.[2]

On appeal, Rorke challenges his convictions on counts 2, 3, 4, 5, 6, 8, 11, and 12. He contends that the court was "precluded from treating theft under $100 as a lesser included offense of theft under $1000" and that, in so doing, the court convicted him of "crimes that were not charged." He asserts that the sentences imposed on those eight counts were therefore illegal. We agree.

[1] Rorke was also charged with one count of theft with a value of at least $1000 and less than $10,000 (Count 17). The court granted Rorke's motion for judgment of acquittal on that count, and the parties do not challenge that ruling on appeal.

[2] Rorke was also ordered to perform 200 hours of community service and to pay $500 in restitution to Walmart.

Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." A motion to correct an illegal sentence is not waived "even if 'no objection was made when the sentence was imposed' or 'the defendant purported to consent to it[.]'" *Johnson v. State*, 427 Md. 356, 371 (2012) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). Whether a sentence is illegal is a question of law that we consider *de novo*. *Bonilla v. State*, 443 Md. 1, 6 (2015).

"[A] defendant may not be found guilty of a crime of which he was not charged[,]" *Johnson*, 427 Md. at 375, except that "'a defendant charged with a greater offense can be convicted of an uncharged lesser included offense as well as the charged offense.'" *Bass v. State*, 206 Md. App. 1, 9 (2012) (quoting *State v. Bowers*, 349 Md. 710, 718 (1998)). "'Where the trial court imposes a sentence or other sanction upon a criminal defendant, and where **no sentence or sanction should have been imposed**, the criminal defendant is entitled to relief under Rule 4-345(a).'" *Johnson*, 427 Md. at 368 (quoting *Alston v. State*, 425 Md. 326, 339 (2012)) (emphasis in original).

The applicable provisions of the theft statute in effect at the time of Rorke's convictions are Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CR"), § 7-104(g)(2) and (3), which provide as follows:

> (2) Except as provided in paragraphs (3) and (4) of this subsection, a person convicted of theft of property or services with a value of less than $1,000, is guilty of a misdemeanor and:
>
> (i) is subject to imprisonment not exceeding 18 months or a fine not exceeding $500 or both; and
>
> (ii) shall restore the property taken to the owner or pay the owner the value of the property or services.

> (3) A person convicted of theft of property or services with a value of less than $100 is guilty of a misdemeanor and:
>
> (i) is subject to imprisonment not exceeding 90 days or a fine not exceeding $500 or both; and
>
> (ii) shall restore the property taken to the owner or pay the owner the value of the property or services.[3]

(Emphasis added). Pursuant to CR § 7-108(d), "[u]nless specifically charged by the State, theft of property or services with a value of less than $100 as provided under § 7-104(g)(3) of this subtitle may not be considered a lesser included crime of any other crime."

In moving for judgment of acquittal, defense counsel cited CR § 7-103(e)(2), which provides that "[f]or the purposes of determining whether a theft violation subject to either § 7-104(g)(2) or (3) of this subtitle has been committed, when it cannot be determined whether the value of the property or service is more or less than $100 under the standards of this section, the value is deemed to be less than $100." Counsel argued that, based on the evidence presented, it was "impossible to determine the value [of the stolen items], and the lesser included offenses have to be the only offenses that we go forward with."

The court, finding that the State had not proven the value of the merchandise stolen beyond a reasonable doubt, "denied generally" the motion as to counts 2, 3, 4, 5, 6, 8, 11, and 12, and reduced each of those counts to theft of property with a value of less

[3] Effective October 2017, the theft statute was amended to raise the misdemeanor theft threshold from $1000 to $1500, and to provide for one misdemeanor offense for theft under $100, and one misdemeanor offense for theft between $100 and $1500. Md. Code (2002, 2012 Repl. Vol., 2017 Supp.), CL § 7-104(g)(2), (3).

than $100.[4] In announcing its verdict on Counts 3, 8, 11 and 12, the court stated that it found Rorke guilty of "theft under $100." On Counts 2, 4, 5, and 6, the court stated that it found Rorke guilty of "theft under."[5]

As the Court of Appeals has observed, the offense of theft under $100 was created by the General Assembly "'in an attempt to keep some relatively minor theft-related cases before the District Court.'" *Stubbs v. State*, 406 Md. 34, 36 (2008) (quoting the Senate Floor Report for Senate Bill 513 of the 2004 Legislative Session). The Court noted that it was clear that the General Assembly "intended that, unless this new offense was *specifically charged by the State*, the offense of theft under $100 would *not* be a lesser included offense of" theft under $1000. *Id.* at 37 (emphasis in original). Accordingly, "pursuant to § 7-108 …unless a defendant charged with theft under [$1000] is also specifically charged with theft under $100, the trial court is prohibited from entering a judgment of conviction for theft under $100."[6] *Id.* at 47.

[4] In its ruling on the motion for judgment of acquittal, the court stated that it would "proceed at less than $100" as to counts 2, 4, 5, 6, 11, and 12; that it would "proceed on the lesser included" as to count 3, and that count 8 was "reduced to less than $100."

[5] Based on the court's comments when it ruled on the motion for judgment of acquittal, we understand that, by "theft under," the court meant theft under $100.

[6] At the time *Stubbs* was decided the felony threshold for theft was $500. Effective October 1, 2009, CR § 7-104(g)(2) was amended to provide for a felony threshold of $1000. The statute was amended again, effective October 1, 2017, to increase the felony threshold to $1500. Md. Code (2012, 2017 Repl. Vol.), Criminal Law Article ("CR"), § 7-104(g)(2).

Counts 2, 3, 4, 5, 6, 8, 11, and 12 charged Rorke only with theft of property valued at under $1000, and the charging document was never properly amended to specifically charge Rorke with theft under $100 on those counts.[7] Therefore, under *Stubbs*, the circuit court was prohibited from entering a judgment of conviction for theft under $100 on counts 2, 3, 4, 5, 6, 8, 11, and 12. As those convictions were therefore invalid, the sentences imposed on those counts were illegal, and both the convictions and sentences must be vacated. *See Johnson*, 427 Md. at 378 ("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.")[8]

JUDGMENTS OF THE CIRCUIT COURT FOR WORCESTER COUNTY ON COUNTS 2, 3, 4, 5, 6, 8, 11, AND 12 REVERSED. CASE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO VACATE THE CONVICTIONS AND SENTENCES ON COUNTS 2, 3, 4, 5, 6, 8, 11, AND 12. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID BY WORCESTER COUNTY.

[7] *See* Md. Rule 4-204.

[8] Premised on the trial court's statement that the motion for acquittal was "denied generally," the State argues that the theft under $1000 counts remained in effect, and, because "there was no statutory minimum amount for theft under $1000, a finding of guilt for theft under $100 would necessarily be sufficient to support a finding of guilt of theft under $1000." The State urges that therefore, "the verdict should be construed as finding Rorke guilty of theft under $1000." Viewed in the context of the applicable statutory scheme and the facts of this case, we do not find the State's arguments and its stated authority persuasive.