Circuit Court for Baltimore County
Case No. 03-K-09-004494

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1042

September Term, 2017

NICHOLAS E. KERPETENOGLU

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: May 10, 2018

A sentence that is "not authorized by law" is an inherently illegal sentence subject to correction under Maryland Rule 4-345(a). *Waker v. State*, 431 Md. 1, 7-9 (2013). Within the taxonomy of inherently illegal sentences is a sentence imposed in violation of the terms of a binding plea agreement. *Matthews v. State*, 424 Md. 503, 519 (2012). Specifically, the Court of Appeals has held that a "sentence is illegal if, **without the permission of both parties to the agreement**, a judge fails to embody in [the] judgment the terms of the binding plea agreement." *Smith v. State*, 453 Md. 561, 575 (2017) (citations omitted) (emphasis added). The instant appeal requires us to examine the converse—whether a sentence is illegal if the judge fails to impose a sentence in accord with the terms of a binding plea agreement but does so with the permission of both parties. It turns out that the answer to that question depends upon whether the departure from the terms of the plea agreement is favorable to the defendant.

Nicholas E. Kerpetenoglu, appellant, previously had pleaded guilty in the Circuit Court for Baltimore County, under a binding plea agreement, to arson in the second degree and burglary in the second degree of a grocery store in Freeland, Maryland. He was sentenced to twenty years' imprisonment, with all but ten years suspended, for second-degree arson, and a consecutive term of fifteen years' imprisonment, all suspended, for second-degree burglary, to be followed by five years' probation. He was further ordered to pay $40,000 in restitution to David Lawson, the owner of Prettyboy Market.

After serving approximately three years of that sentence, Kerpetenoglu was released from confinement and placed on supervised probation. In 2015, however, he

was convicted, in the Circuit Court for Montgomery County, of theft under $1,000, thereby violating the terms of his probation in the Baltimore County case that is the subject of this appeal.[1] Kerpetenoglu thereafter pleaded guilty, in the Circuit Court for Baltimore County, to violating the terms of his probation, and that court ordered him to serve ten years' "back-up" time.

Kerpetenoglu ultimately filed, in the Circuit Court for Baltimore County, a motion to correct an illegal sentence, asserting that the restitution order and his "back-up" time were illegal because neither was permitted under the terms of his plea agreement. The circuit court, however, denied that motion, prompting this appeal. For the reasons that follow, we shall affirm.

BACKGROUND

In June 2009, Kerpetenoglu, with the help of his then-girlfriend, Stephanie Hunt, burglarized Prettyboy Market in northern Baltimore County. (Hunt was an employee of the store and used her key and alarm code to gain entry to the building.) Kerpetenoglu intended to break into the store's safe but was unsuccessful in doing so. He and Hunt ultimately settled, instead, on approximately 60 cartons of cigarettes, worth approximately $3,000. Just before leaving, however, Kerpetenoglu, fearing that the duo had left their fingerprints, decided to set fire to the market in an attempt to cover their tracks. The ensuing fire caused approximately $250,000 in damage.

[1] Kerpetenoglu apparently "made absolutely no payments towards the significant restitution owed," although it appears from the record before us that his violation of probation was based upon the Montgomery County conviction.

Several days later, Hunt, while driving a vehicle in which Kerpetenoglu was a passenger, was detained by a Maryland State Trooper on suspicion of driving under the influence of alcohol. The trooper observed a "slew of cigarette cartons" in the trunk of Hunt's car. That observation, in combination with the fact that investigators had determined that Ms. Hunt's alarm code had been used to gain entry to the building around the time of the fire, led to Kerpetenoglu's arrest for the burglary and arson of Prettyboy Market.

Two months later, an indictment was returned, in the Circuit Court for Baltimore County, charging Kerpetenoglu with arson in the second degree, conspiracy to commit arson in the second degree, burglary in the second degree, conspiracy to commit burglary in the second degree, theft of property with a value of $500 or more, conspiracy to commit theft of property with a value of $500 or more, malicious burning in the first degree, and malicious destruction of property with a value greater than $500.

In April 2010, Kerpetenoglu reached a binding plea agreement with the State. The terms of that agreement provided that the State would enter *nolle prosequi* to all counts of the indictment except second-degree arson and second-degree burglary,[2] that the period of "active incarceration" would be capped at sixteen years, with a possible maximum sentence of thirty-five years,[3] and that trial counsel would be "free to argue for whatever

[2] In addition, the State agreed to enter *nolle prosequi* to all charges in two other pending cases, which were on appeal from the District Court.

[3] The thirty-five-year maximum would have resulted from the imposition of consecutive maximum sentences for both offenses. *See* Md. Code (2002), Criminal Law (continued)

sentence he deems appropriate." During the plea hearing, the State avowed to the court: "There is no restitution." No other express mention of restitution was made during that hearing.

At the outset of the ensuing sentencing hearing, however, Kerpetenoglu's trial counsel volunteered to the court: "I understand there will be a restitution figure, that is the out of pocket loss that was not covered by any insurance coverage." He further vouched that his client, Kerpetenoglu, "not only [was] going to make restitution, but he's going to succeed at life again." Kerpetenoglu then allocuted that he would "pay [to the victim] the consequences for" his behavior. The State thereafter informed the court that Lawson, the victim, had suffered an uninsured loss of $40,000 as a result of the arson of his storehouse.

At the conclusion of the sentencing hearing, the court imposed what it described as a sentence in the "middle of the guidelines": twenty years' imprisonment, with all but ten years suspended, for second-degree arson, and a consecutive term of fifteen years' imprisonment, all suspended, for second-degree burglary, to be followed by five years' probation, as well as $40,000 in restitution. Kerpetenoglu did not seek leave to appeal from the judgments of conviction.

(continued)
Article ("CL"), § 6-103(b) (providing for maximum sentence of twenty years' imprisonment or fine not exceeding $30,000 or both for second-degree arson); *id.* § 6-203(c)(1) (providing for maximum sentence of fifteen years' imprisonment for second-degree burglary committed "with the intent to commit theft, a crime of violence, or arson in the second degree").

In May 2013, three years after entry of the judgments of conviction, Kerpetenoglu was released from confinement and placed on supervised probation. In December 2014, Kerpetenoglu was arrested and charged with theft in Montgomery County, and, consequently, he was charged with violating his probation in the Baltimore County case. Following a hearing, during which Kerpetenoglu acknowledged that he had, by then, been convicted of the Montgomery County theft charge, the Circuit Court for Baltimore County found that he had, indeed, violated the terms of his probation and sentenced him to the "back-up" time of ten years' imprisonment for second-degree arson. The court further re-imposed and re-suspended the fifteen-year sentence for second-degree burglary and imposed a term of three years' probation. Kerpetenoglu thereafter sought review of his sentence by a three-judge panel, but that panel left his sentence unchanged.

Then, in July 2017, Kerpetenoglu filed a motion to correct an illegal sentence. The circuit court denied his motion without a hearing, and Kerpetenoglu noted this appeal.

DISCUSSION

I.

"The court may correct an illegal sentence at any time." Md. Rule 4-345(a). The scope of an illegal sentence claim, however, is "narrow," because an "illegal sentence," under Rule 4-345(a), "is one in which 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.'" *Colvin v. State*, 450 Md. 718,

725 (2016) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). The instant claim falls within the latter category, as the Court of Appeals has explained that, if a court binds itself to a plea agreement, under Maryland Rule 4-243(c)(3),[4] the agreed-upon sentence becomes "'fixed' by that agreement as 'the maximum sentence allowable by law,'" *Ray v. State*, 454 Md. 563, 572 (2017) (quoting *Matthews v. State*, 424 Md. 503, 519 (2012)), and a court, thus bound, may not impose a sentence in excess of that provided under such an agreement. *Matthews*, 424 Md. at 519; *Dotson v. State*, 321 Md. 515, 524 (1991).

Ray set forth a three-step analysis to be followed in construing the terms of a binding plea agreement, a construction that must precede any resolution of an illegal sentence claim predicated upon the violation by the court of the terms of such an agreement. Step one of that analysis requires us to "determine whether the plain language of the agreement is clear and unambiguous as a matter of law." *Ray*, 454 Md. at 577. If it is, "then further interpretive tools are unnecessary, and we enforce the agreement accordingly." *Id.* But if the plain language of the agreement is ambiguous, we proceed to step two, which is to "determine what a reasonable lay person in the defendant's position would understand the agreed-upon sentence to be, based on the record developed at the plea proceeding." *Id.* Finally, if, after the first two steps in the

[4] Maryland Rule 4-243(c) provides in pertinent part:

> **(3) Approval of Plea Agreement.** If the plea agreement is approved, the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.

analysis, "we still find ambiguity regarding what the defendant reasonably understood to be the terms of the agreement," then we proceed to step three, in which case "the ambiguity should be construed in favor of the defendant." *Id.* at 577-78.

II.

We begin by applying the framework of *Ray* to determine the terms of Kerpetenoglu's binding plea agreement. As there was no written agreement, we proceed to step two of the analysis and examine the four corners of the plea hearing transcript.

We first determine whether restitution was permitted under the terms of the binding plea agreement. The only mention of restitution, during that proceeding, was the State's unequivocal assertion: "There is no restitution." The State insists, nonetheless, that Kerpetenoglu "reasonably" knew that the court "could impose a period of probation, and that one of the conditions might be restitution, if requested by the victim." (quoting *Lafontant v. State*, 197 Md. App. 217, 236 (2011)). We disagree.

The State's reliance on *Lafontant* is misplaced. In that case, the binding plea agreement was silent as to whether there would be restitution. *Id.* at 233. Moreover, the defendant "was expressly informed by the court that, if he [pleaded] guilty, he might be sentenced to a period of probation," which could include an order of restitution. *Id.* at 234-35. Here, in contrast, the State expressly disclaimed any restitution. A reasonable defendant, not versed in "the niceties of sentencing law," *Cuffley v. State*, 416 Md. 568, 582 (2010), would not have understood that, by recognizing that he was subject to a term of probation with its attendant conditions, but having just been apprised that there would be "no restitution," he would nonetheless be required to pay restitution as a condition of

probation. At most, the fleeting reference to probation, during the plea hearing, may have created an ambiguity in this regard, although we do not believe so. But such an ambiguity must still be resolved in favor of the defendant, *id.* at 583, and it thus makes no difference in our analysis. We conclude that restitution was not envisaged by the plea agreement.[5]

We next determine the caps on total length of sentence and executed term of incarceration. In that regard, the judge, prior to accepting Kerpetenoglu's guilty plea, declared that he would "bind [himself] to 16 years active incarceration" as the "incarceration cap" and that if he "did like 35, suspend all but 16, that would be in accordance with the binding agreement." Then, the State reiterated its understanding that, "as the Court has agreed to bind itself to a . . . cap of 16 years of active incarceration, certainly the State will be arguing for that, counsel is free to argue for whatever sentence he deems appropriate and the maximum sentence in this case would be a possible 35 year sentence[.]" Finally, during the Rule 4-242(c) colloquy,[6]

[5] Whether the State may unilaterally waive a victim's right to seek restitution as part of a binding plea agreement is a more difficult question. It may well be that the answer to that question is "no," although we need not reach it here, because the answer will not affect the outcome of this appeal.

[6] Maryland Rule 4-242(c) provides:

> **(c) Plea of Guilty.** The court may not accept a plea of guilty, including a conditional plea of guilty, until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that (1) the defendant

(continued)

Kerpetenoglu's trial counsel asked him whether he understood that, "at the time of disposition," the court had agreed that "there will not be in excess of active incarceration of 16 years imposed," which "means that there could be a sentence that's suspended and you're going to be placed on probation." Kerpetenoglu replied that he understood.

In *Ray*, the Court of Appeals held that a "cap of four years on any executed incarceration" unambiguously referred to the actual length of incarceration and not to the total sentence. *Ray*, 454 Md. at 578 (cleaned up). Here, we find no meaningful distinction between the cap on "executed incarceration" in *Ray* and the cap on "active incarceration" in Kerpetenoglu's plea agreement. We conclude that the binding plea agreement unambiguously provided for a total length of sentence up to the statutory maximum of thirty-five years with a cap on executed incarceration of sixteen years.[7]

(continued)

> is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. In addition, before accepting the plea, the court shall comply with section (f) of this Rule. The court may accept the plea of guilty even though the defendant does not admit guilt. Upon refusal to accept a plea of guilty, the court shall enter a plea of not guilty.

[7] We reject Kerpetenoglu's contention that the caps on total length of sentence and executed term of incarceration were ambiguous, notwithstanding his trial counsel's subsequent remark that, "since Judge Finifter has indicated that he would actually agree to a cap of 16 years, that would be within the statutory authority that he has." That lone remark does not negate the consistent statements by judge, prosecutor, and trial counsel, carefully explaining that the sixteen-year cap applied to "active incarceration" and that the only cap on the total length of sentence was that provided by statute. Indeed, Kerpetenoglu's trial counsel explained to him that the judge's agreement to be bound by a sixteen-year cap of "active incarceration" meant that he could receive "a sentence that's

(continued)

III.

A.

Kerpetenoglu contends that the $40,000 restitution award amounts to an illegal sentence because his binding plea agreement called for no restitution. Moreover, he claims, the victim forfeited his right to receive restitution by failing to lodge a request with the circuit court prior to that court's acceptance of the plea agreement. And, in any event, he maintains that a victim may not, at sentencing, "override the State's binding plea agreement with a defendant when that agreement "expressly prohibits restitution."

The State counters that Kerpetenloglu's challenge to the restitution order is unpreserved if not affirmatively waived because of his unprompted and unsolicited offer, at the sentencing hearing, to pay restitution to the victim. In the alternative, the State maintains that restitution was a lawful condition of Kerpetenoglu's probation.

B.

"'Judgment of restitution' means a direct order for payment of restitution or an order for payment of restitution that is a condition of probation in an order of probation." Md. Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP"), § 11-601(g). A court may enter a judgment of restitution ordering a defendant "to make restitution in addition to any other penalty for the commission of a crime," under the following conditions: if, "as a direct result of the crime," property of the victim "was stolen,

(continued)
suspended," thereby clearly indicating to him that he could receive a suspended sentence in addition to as much as sixteen years of active incarceration.

damaged, destroyed, converted, or unlawfully obtained, or its value substantially decreased"; or if, "as a direct result of the crime," the victim suffered "direct out-of-pocket loss [or] loss of earnings[.]" CP § 11-603(a)(1), (2)(ii)-(iii). An order to pay restitution, whether entered "as part of a sentence" or "as condition of probation," is "a criminal sanction, not a civil remedy." *State v. Stachowski*, 440 Md. 504, 512 (2014) (citation omitted). As such, an illegal restitution order may be challenged as an illegal sentence. *Goff v. State*, 387 Md. 327, 340 (2005); *Walczak v. State*, 302 Md. 422, 426 n.1 (1985); *Carter v. State*, 193 Md. App. 193, 209 (2010).

C.

"The classic illegal sentence for purposes of Rule 4-345(a)" is one that exceeds "the legislatively imposed statutory maximum." *Carlini v. State*, 215 Md. App. 415, 427 (2013). The more recently minted variant at issue in this appeal is a sentence that either "exceeds the maximum ceiling set by" a binding plea agreement or "falls below the minimum floor set by the plea agreement." *Smith v. State*, *supra*, 453 Md. at 575 (citing *Bonilla v. State*, 443 Md. 1, 3 (2015)).

There is an important distinction between the classic illegal sentence and its more recent cousin. Whereas a sentencing court may never impose a sentence greater than the statutory maximum, and a defendant "cannot consent" to such a sentence, *Holmes v. State*, 361 Md. 190, 196 (2000), a narrow exception applies where the sentencing range is determined by a binding plea agreement. In that case, although a judge is "required under the dictate of Rule 4-243(c)(3) to embody in the judgment the agreed sentence," *Dotson v. State*, *supra*, 321 Md. at 523, he may, with "the permission of both parties to

the agreement," *Smith*, 453 Md. at 575, grant "a disposition more favorable to the defendant than that provided for in the agreement."[8] Md. Rule 4-243(c)(3). The question before us is whether a judge, having bound himself to a plea agreement, may grant a disposition less favorable to the defendant, provided that both parties have given their permission to do so, as occurred at the sentencing hearing in this case.

Maryland Rule 4-243(c)(3) governs binding plea agreements. It provides:

> **(3) Approval of Plea Agreement.** If the plea agreement is approved, the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.

We think the plain language of Rule 4-243(c)(3) precludes a judge, who has approved a plea agreement, from granting a disposition less favorable to the defendant than that provided for in the agreement, even if both parties have given their permission to do so. Although the Court of Appeals has advised that the doctrine of *expressio unius est exclusio alterius*, "under which statutory lists are often interpreted as exclusive, so that a court will draw the negative inference that no other items may be added," should be "applied with extreme caution," *Potomac Abatement, Inc. v. Sanchez*, 424 Md. 701, 712-13 (quoting *Breslin v. Powell*, 421 Md. 266, 294 (2011)), we think that doctrine nonetheless applies here. In the context of Rule 4-243(c)(3), the "statutory list" is

[8] In a related vein, the Court of Appeals has also held that, where a prosecutor, as part of a plea agreement, exercises his discretion not to file a notice of intent to seek a mandatory enhanced sentence, a court is not required to impose what would otherwise be a mandatory sentence. *Beverly v. State*, 349 Md. 106, 108 (1998).

unitary—its only member is "a disposition more favorable to the defendant than that provided for in the agreement." The only other possible unenumerated member of this list is "a disposition less favorable to the defendant than that provided for in the plea agreement." Were such a disposition permitted under Rule 4-243(c)(3), we are convinced that the Court of Appeals would have expressly said so. But it did not. We conclude that the order of restitution in this case, a disposition less favorable to the defendant than that provided for in the binding plea agreement, was not allowed under Rule 4-243(c)(3) and was therefore illegal under Rule 4-345(a).

That does not, however, end our analysis. We cannot ignore the fact that Kerpetenoglu himself, without prompting by either the State, the victim, or the court, literally volunteered, at his sentencing hearing, to pay restitution, and he further relied upon that unsolicited offer as a basis for leniency in the sentence to be imposed. Moreover, the benefit he thereby obtained was more than merely theoretical, as the court imposed a term of ten years of active incarceration, well below the sixteen-year cap permitted under the plea agreement.

"The doctrine of invited error is based on reliance interests similar to those that support the doctrines of equitable and promissory estoppel." *United States v. Morrison*, 771 F.3d 687, 694 (10th Cir. 2014) (citation omitted) (cleaned up). "Having induced the court to rely on a particular erroneous proposition of law or fact, a party may not at a later stage use the error to set aside the immediate consequences of the error." *Id.* In *State v. Rich*, 415 Md. 567 (2010), the Court of Appeals applied the doctrine of invited error to deny appellate relief to a defendant who, on appeal, had raised an argument that was "in

direct conflict with the argument actually asserted by his trial counsel." *Id.* at 574. Under the "invited error" doctrine, "a defendant who himself invites or creates error cannot obtain a benefit—mistrial or reversal—from that error." *Id.* at 575 (quoting *Klauenberg v. State*, 355 Md. 528, 544 (1999)).

Thus, although we are unaware of any Maryland case in which the invited error doctrine has been applied to a claim of an illegal sentence, we believe that this is an appropriate case in which to do so. To hold otherwise would be to countenance a grave injustice and would encourage future litigants to engage in gamesmanship, secure in the knowledge that their solemn word, when given at a sentencing hearing, is of no legal consequence. We therefore hold that Kerpetenoglu invited the sentencing court to breach the plea agreement by including restitution, even though restitution was precluded under that agreement. Because he invited that error, he may not "later cry foul on appeal." *Rich*, 415 Md. at 575 (quoting *United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009)).

IV.

Kerpetenoglu contends that the ten-year sentence imposed upon his acknowledged violation of probation was illegal because it, in combination with the ten-year term he had already served, exceeded the sixteen-year cap of his binding plea agreement. This contention is without merit.

As previously noted, the plea hearing transcript reveals that the caps on the total sentence and the active period of incarceration were, respectively, thirty-five years and sixteen years, and the sentence originally imposed was, in aggregate, thirty-five years,

with all but ten years suspended. But when Kerpetenoglu violated his probation, he became eligible to serve all the "back-up" time. The sentence imposed for his violation of probation was less than the twenty-five years for which he was eligible and was a legal sentence.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.