Circuit Court for Dorchester County
Case No. 09-K-14-015444

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1134

September Term, 2017

ALTON ANTHONY BANKS

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: May 8, 2018

Appellant, Alton Anthony Banks, was tried and convicted by the Circuit Court for Dorchester County (Wilson, J. presiding), pursuant to a court trial, of possession with intent to distribute cocaine and marijuana, possession of cocaine and marijuana, driving without a license, and fleeing and eluding a police officer. The trial judge imposed the following sentences:

Ct. 1	PWID cocaine	30 years from 10/7/14
Ct. 2	PWID marijuana	2 yrs. 6 mos. consec. to Ct. 1
Ct. 3	poss. Marijuana	merged with Ct. 2
Ct. 4	poss. Cocaine	merged with Ct. 1
Ct. 7	dr. w/o license	no sentence imposed
Ct. 8	fl./elude on foot	1 year local det., consec. w/ Ct. 1
Ct. 9	fl./elude in veh.	Merged with Ct. 8
Ct. 10	reckless dr.	no sentence imposed

The trial court imposed a separate, consecutive, sentence of 18 years' imprisonment for a violation of probation in case number 09-K-09-01346L.

On July 20, 2017, Appellant, through counsel, filed a "Motion to Correct an Illegal Sentence." It was denied without a hearing on August 9, 2017. Appellant's notice of appeal from this ruling was filed on August 11, 2017. Appellant filed the instant appeal, wherein he asks the following question for our review:

> Did the court below err by denying Appellant's Motion to Correct an Illegal Sentence?

FACTS AND LEGAL PROCEEDINGS

On April 22, 2015, after the trial judge announced the guilty verdicts, he inquired of the parties: "All right. What are we going to do about sentencing, folks?" The following

exchange then took place:

> [PROSECUTOR]: Your Honor, the State does not intend to proceed as a subsequent offender for the possession with intent to distribute. Admittedly, I served notice on the defendant—defense counsel on April 15th. Unless defense counsel waives the 15 day notice, I don't know if we can proceed right now.
>
> We also have Mr. Banks scheduled for a Violation of Probation hearing on the 21st of May.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: I am not objecting to doing everything today if we can. If not, I would, I would just—
>
> THE COURT: All right.
>
> [DEFENSE COUNSEL]: —rather do everything on one day if we push it to the 21st.
>
> THE COURT: What's your pleasure, Mr. [Defense Counsel]?
>
> [DEFENSE COUNSEL]: Your Honor, it's, it'll be—based on speaking with my client, Mr. Banks, he respectfully—if at all possible if we could do the Violation of Probation in that—included in this case.
>
> THE COURT: But is your client waiving the right to receive a notice of enhanced sentencing? He's got a right to have 15 days.
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: And he's waiving that? And that's in what, what, count, sir?
>
> [PROSECUTOR]: Count One, Your Honor.
>
> THE COURT: Count One, possession with intent to distribute is a prior?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: And qualif[ing]—

[PROSECUTOR]: Yes, sir.

THE COURT: Do you have a copy of that—

[PROSECUTOR]: Yes, sir.

THE COURT: —conviction? Has Mr. [Defense Counsel] seen that, sir?

[DEFENSE COUNSEL]: Yes, sir, he's shown me. And also he did give, "he" being Mr. [Prosecutor], gave me the notice to seek enhanced punishment.

THE COURT: Does Mr. Banks want to proceed with sentencing today on both or do you want me to delay?

[DEFENSE COUNSEL]: Yes, sir, on both.

The court took a recess to obtain the file for the separate case in which a violation of probation was alleged. After the recess, Appellant's counsel advised the trial judge:

Your Honor, if it please the court, I did have an opportunity to look at the guidelines, as well as look at it with my client. And as previously noted, Mr. [Prosecutor] did provide me a copy of the notice to seek enhancement under subsequent offender. And in speaking with my client, we know he's going to have that extra time period; however, he'd wish to waive it, sir, and proceed today.

THE COURT: Okay.

[DEFENSE COUNSEL]: Is that correct, Mr. Banks?

THE DEFENDANT: Yes, sir.

The trial court conducted an inquiry of Appellant on the record regarding the waiver of his right to plead not guilty and stand trial on the charge of violation of probation. The court determined Appellant to be in violation of probation based on a violation of Rule 4, obey all laws, resulting from the conviction in the present case, No. 09-K-14-015444.

In the Motion to Correct an Illegal Sentence ("Motion") filed on July 20, 2017,

Appellant's counsel argued that the trial judge erred in imposing the 30-year sentence on Count 1 in case number 09-K-14-015444 because the court applied the repeat offender statute, Section 5–905(a)(l) of the Criminal Law Article, rather than the ordinary sentencing provision applicable to drug crimes, Section 5–608 of the Criminal Law Article. The notice provision applicable to the repeat offender statute (as opposed to the mandatory sentences set forth in Section 5–608) requires that notice of the prior conviction be provided at least 15 days before trial as opposed to before sentencing in the circuit court. Appellant's counsel argued that this required notice of additional penalties cannot be waived. The lower court denied relief, ruling: "DENIED. The defendant clearly waived the 15 day subsequent offender notice provision on the record. A notice was filed seven days before the plea."

DISCUSSION

Appellant's sole contention on appeal is that the trial court erred by denying his motion to correct an illegal sentence. According to Appellant, although the State served a "Notice of Intent to Seek Increased Penalty" seeking sentencing under Md. Code Ann., Crim. Law ("C.L.") § 5–608, the court sentenced Appellant according to the repeat offender statute found under C.L. § 5–905. Appellant maintains that § 5–905 permits additional penalties, but is not a mandatory sentence provision. Therefore, pursuant to Md. Rule 4–245(b), there was no waiver provision and Appellant's prior waiver of the 15-day required notice was ineffective. Appellant argues that "[r]eversal of the ruling denying the motion to correct an illegal sentence is required."

Appellant also argues that there was an inherent illegality in the sentence because he was a "second time offender" under § 608(b) not a "repeat offender" under § 5–905. According to Appellant, his sentence of 30 years' imprisonment for Count 1 is greater that the statutory maximum provided under § 5–608(b), *i.e*. 20 years' imprisonment.

The State responds that the circuit court correctly denied Appellant's Motion to Correct an Illegal Sentence. According to the State, the failure to comply with a procedural rule, *i.e.*, the failure to file notice of intention to seek an enhanced penalty within 15 days of trial, did not violate Md. Rule 4–345(a). The State does not respond to Appellant's contentions that he was sentenced under C.L. § 5–905 or that the statute is not a mandatory sentence provision. However, the State maintains that, "because Banks had been convicted of a prior drug offense, he was subject, under § 5–905(a), to a potential sentence of up to 40 years' [imprisonment]."

Typically, review of a sentence where no objection was made is limited, but Rule 4–345(a)[1] is "[o]ne such avenue for review[.]" *Bryant v. State*, 436 Md. 653, 662 (2014). Md. Rule 4–345(a) provides that a "court may correct an illegal sentence at any time." "This exception is a limited one, and only applies to sentences that are 'inherently' illegal." *Bryant*, 436 Md. at 662.

The Court of Appeals has

> consistently defined this category of "illegal sentence" as limited to those situations in which the illegality inheres in the sentence itself; *i.e.*, there either has been no

[1] Current version of the Rule was amended by 2018 MARYLAND COURT ORDER 0002 (C.O. 0002).

> 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 (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)).

> The distinction between those sentences that are "illegal" in the commonly understood sense, subject to ordinary review and procedural limitations, and those that are "inherently" illegal, subject to correction "at any time" under Rule 4–345(a), has been described as the difference between a substantive error in the sentence itself, and a procedural error in the sentencing proceedings.

Id. at 663.

> Moreover, 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 purposes of Rule 4–345(a). A sentence does not become "an illegal sentence because of some arguable procedural flaw in the sentencing procedure." These principles, delineating the narrow scope of a Rule 4–345(a) motion to correct an illegal sentence, have been recognized and applied in a multitude of [the] Court's opinions.

Tshiwala v. State, 424 Md. 612, 619 (2012).

> There are countless illegal sentences in the simple sense. They are sentences that may readily be reversed, vacated, corrected or modified on direct appeal, or even on limited post-conviction review, for a wide variety of procedural glitches and missteps in the sentencing process. Challenges to such venial illegalities, however, are vulnerable to such common pleading infirmities as non-preservation and limitations. There is a point, after all, beyond which we decline to revisit modest infractions. There are, by contrast, illegal sentences in the pluperfect sense. Such illegal sentences are subject to open-ended collateral review. Although both phenomena may casually be referred to as illegal sentences, there is a critically dispositive difference between a procedurally illegal sentencing process and an inherently illegal sentence itself. It is only the later that is grist for the mill of Maryland Rule 4–345(a)[.]

Carlini v. State, 215 Md. App. 415, 419–20 (2013).

> "Whether a sentence is an illegal sentence under Maryland Rule 4–345(a) is a

question of law that is subject to *de novo* review." *State v. Crawley*, 455 Md. 52, 66 (2017), *reconsideration denied* (Aug. 23, 2017) (citing *Meyer v. State*, 445 Md. 648, 663 (2015)).

Md. Rule 4–245 governs subsequent offenders and subparts (b) and (c) provide as follows:

> (b) Required Notice of Additional Penalties. When the law permits but does not mandate additional penalties because of a specified previous conviction, the court shall not sentence the defendant as a subsequent offender unless the State's Attorney serves notice of the alleged prior conviction on the defendant or counsel before the acceptance of a plea of guilty or *nolo contendere* or at least 15 days before trial in circuit court or five days before trial in District Court, whichever is earlier.
>
> (c) Required Notice of Mandatory Penalties. When the law prescribes a mandatory sentence because of a specified previous conviction, the State's Attorney shall serve a notice of the alleged prior conviction on the defendant or counsel at least 15 days before sentencing in circuit court or five days before sentencing in District Court. If the State's Attorney fails to give timely notice, the court shall postpone sentencing at least 15 days unless the defendant waives the notice requirement.

In the instant case, regardless of whether the sentence was pursuant to C.L. § 5–608 or § 5–905, or whether § 5–905 is a mandatory sentencing provision or the contrary, both parties argue the error hinges on a violation of a procedural rule of notice. Pursuant to case law, cited *supra*, a procedural flaw in the sentencing process does not constitute an "inherently" illegal sentence under Rule 4–345(a) and, therefore, is not able to circumvent preservation rules based on the State's failure to provide the 15 days-notice.

We now examine Appellant's contention that there was an inherent illegality in the sentence itself.

In his reply brief, Appellant argues that the imposition of a sentence 10 years longer than the maximum allowable sentence under C.L. § 5–608(b) is inherently illegal. We note

that, in his Motion to Correct an Illegal Sentence, filed on July 20, 2017, Appellant did not make this argument; rather, he invoked the procedural 15-day pre-trial notice allegation. Regardless, Appellant's assertion that his sentence is inherently illegal is based upon a reading of the statutory language for § 5–608(b)[2], which governs the penalties for narcotics crimes of second-time offenders, provides that

> (b)(1) A person who is convicted under subsection (a) of this section or of conspiracy to commit a crime included in subsection (a) of this section shall be sentenced to imprisonment for *not less than 10 years and is subject to a fine not exceeding $100,000* if the person previously has been convicted once:
>
> (i) under subsection (a) of this section or § 5–609 of this subtitle;
>
> (ii) of conspiracy to commit a crime included in subsection (a) of this section or § 5–609 of this subtitle; or
>
> (iii) of a crime under the laws of another state or the United States that would be a crime included in subsection (a) of this section or § 5–609 of this subtitle if committed in this State.

(Emphasis supplied).

Subpart (a), which governs the penalties for narcotics crimes, generally, provides that "a person who violates a provision of §§ 5–602 through 5–606 of this subtitle with respect to a Schedule I or Schedule II narcotic drug is guilty of a felony and on conviction is subject to imprisonment not exceeding 20 years or a fine not exceeding $25,000 or both."

It is our reading of the statute that an individual who is convicted under subpart (a)

[2] The current version of the statute is effective Oct. 1, 2017. The version applicable at the time the crime was committed and Appellant was sentenced was effective Oct. 1, 2010. However, the statutory language is identical.

is separate from an individual convicted as a second-time offender under subpart (b). Subpart (a) includes the statutory limit of "imprisonment not exceeding 20 years." Subpart (b) does not; rather, subpart (b) provides that a second-time offender shall be sentenced to "imprisonment for not less than 10 years." Accordingly, Appellant's sentence of 30 years' imprisonment, pursuant to C.L. § 5–905,[3] which governs repeat offenders, did not violate subpart (b) of § 5–608.

Therefore, we hold that Appellant's sentence of 30 years' imprisonment was not inherently illegal in relation to §§ 5–608 and 5–905 and the circuit court properly denied Appellant's Motion to Correct an Illegal Sentence.

[3] The current version of the statute was effective Oct. 1, 2017, which was after Appellant's commission of the offense and sentencing. In the opinion, we cite the previous version of the statute, effective Oct. 1, 2002.

§ 5–905 provides, in part:

> (a) A person convicted of a subsequent crime under this title is subject to:
>
> (1) a term of imprisonment twice that otherwise authorized;
>
> (2) twice the fine otherwise authorized; or
>
> (3) both.
>
> (b) For purposes of this section, a crime is considered a subsequent crime, if, before the conviction for the crime, the offender has ever been convicted of a crime under this title or under any law of the United States or of this or another state relating to other controlled dangerous substances.

JUDGMENT OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.