Circuit Court for Harford County
Case No. 12-K-12-001165

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1263

September Term, 2021

FREDERICK AUGUST DECKER

v.

STATE OF MARYLAND

Berger,
Beachley,
Shaw,

JJ.

Opinion by Shaw, J.

Filed: June 24, 2022

In November 2012, Frederick August Decker, appellant, pleaded guilty in the Circuit Court for Harford County, pursuant to a binding plea agreement, to one count of sexual abuse of a minor. Among other things, the plea agreement provided that appellant "shall register as a sex offender in any State or jurisdiction in which he shall reside" and that he "shall abide by any other terms and conditions of probation as [the circuit court] deems appropriate," but it was silent as to lifetime sexual offender *supervision*. The following April, the court sentenced appellant to 25 years' imprisonment, with all but ten years suspended, to be followed by five years' probation, and it repeated the conditions of probation as outlined in the plea agreement.

Subsequently, in 2019, the State moved to require that appellant be subjected, as a condition of probation, to lifetime sexual offender *supervision*. Ultimately, the circuit court granted that motion. Appellant now contends, in this appeal from the circuit court's order, that it acted illegally in doing so. We shall affirm.

BACKGROUND

In June 2012,[1] "the Harford County Child Advocacy Center received a referral from a therapist concerning a possible child sexual abuse." That referral "stated that [V.][2] had

[1] The Agreed Statement of Facts states that the referral was made on June 17, 2003. That date cannot have been correct, given that the Agreed Statement of Facts further states that the abuse continued until 2011, eight years later. The Agreed Statement of Facts also states that, on June 20, 2012, the victim and her mother were interviewed by a social worker and a police detective. We infer that the date of the referral must have been June 17, 2012.

[2] To protect the victim's privacy, we designate her by an initial that has no connection to her name.

disclosed that her mother's live-in boyfriend [appellant] had been engaging in sex acts with her" during "the time period from 1999-2011" in the family home in Harford County.

Several days later, a social worker from the Harford County Department of Social Services and a detective from the Harford County Sheriff's Office interviewed V. and her mother. V., who was born in 1995, stated that "since she was about 4 or 5 years old her mom's boyfriend, [appellant,] had been engaging in oral sex acts with her." "She stated it started off as touching and graduated by the end to where he would perform cunnilingus on her and have her perform fellatio upon him." Furthermore, V. alleged that appellant "would show pornography to her and rub his erect penis up and down along her vagina."

In July 2012, a five-count indictment was returned, by the Grand Jury for Harford County, charging appellant with a continuing course of sexual abuse of a minor,[3] rape in the second degree, two counts of sexual offense in the second degree (based on cunnilingus and fellatio), and sexual offense in the third degree based on the victim's age and the defendant's age difference. Ultimately, a plea agreement was reached, whereby appellant would plead guilty to the charge of a continuing course of sexual abuse of a minor, in violation of Criminal Law Article ("CL"), § 3-602; he would be sentenced to a term of 25 years' imprisonment, with all but ten years suspended, with a recommendation of five

[3] Count 1 of the indictment alleged that appellant, "on or about January 1, 1999 through and including December 31, 2011, in the County aforesaid, being a household member, unlawfully did cause sexual abuse to [V.] (dob: [redacted]/1995), a minor child, under the age of 18, against the peace, government and dignity of the State," in violation of Criminal Law Article, § 3-602(b)(2).

years' supervised probation; and, in exchange, the State would enter nolle prosequi to the remaining four counts of the indictment.

The circuit court accepted the plea, and in April 2013, the court sentenced appellant to 25 years' imprisonment, with all but ten years suspended, to be followed by five years' supervised probation. The conditions of probation were as follows:

> The defendant shall enroll and participate in, cooperate with, and successfully complete the Harford County Sex Offenders Disorder Group or its designee.
>
> The defendant shall have no contact with [V.] The defendant shall register as a sex offender in any state or jurisdiction in which he shall reside. The defendant shall submit to DNA testing as required by the Division of Parole and Probation.
>
> The defendant shall have no [un]supervised . . . contact with any female under the age of 18. This probation is to be supervised by the Harford County Division of Parole and Probation.

The same day he was sentenced, the circuit court issued to appellant a "NOTICE OF REGISTRATION FOR COURT SUPERVISED REGISTRANTS," informing him that he was required to register as a Tier III Sex Offender. That notice, signed by appellant, further informed him that a Tier III Sex Offender is subject to periodic registration "every 3 months for life with each local law enforcement unit designated by the County/Baltimore City where you reside." Contemporaneously with the registration notice, appellant also was issued (and he signed) a "PROBATION/SUPERVISION ORDER," which informed him that he was required to register as a Tier III Sex Offender, but that document left blank a box beside the field, "Lifetime Sexual Offender **Supervision** by Management Team." (Emphasis added.)

In November 2019, the Division of Parole and Probation sent the court an "Informative Report," stating in relevant part:

> Under Section 11-723 of the Criminal Procedure Article, "a sentence for the following persons shall include a term of lifetime sexual offender supervision:
>
> * * *
>
> (4) a person who has been convicted of a violation of § 3-602 [Sexual Abuse of a Minor] of the Criminal Law Article involving a child under the age of 12 years[.]"
>
> * * *
>
> Our records indicate that the subject of this report was convicted of Sex Abuse of a Minor on 4/10/2013.
>
> Criminal Procedure Article § 11-723(d)(1) notes that "For a sentence that includes a term of lifetime sexual offender supervision, the sentencing court . . . shall impose special conditions of lifetime sexual offender supervision on the person at the time of sentencing, . . . and advise the person of the length, conditions, and consecutive nature of that supervision."
>
> As the Division of Parole and Probation has received no documentation of the imposition of any conditions of lifetime sexual offender supervision in this case, this report is being submitted to seek the guidance of the court as to whether such documentation can be provided, whether a modification hearing will be necessary, or whether some other action will be required.

The following month, in December 2019, the circuit court issued an order mandating that the "condition [of lifetime sexual offender supervision] shall be added to the terms of probation" and that, if appellant failed to "consent and sign off on the added term," the matter would be set for a hearing. Then, in January 2021, the Division of Parole and Probation filed a "Request for Warrant" in the circuit court, alleging that appellant had violated a condition of probation ("VOP") prohibiting him from having any contact with a

child under the age of 18. On January 12, 2021, the circuit court issued a bench warrant "ordering the arrest" of appellant and a "NOTICE OF INTENT TO REVOKE PROBATION."

Two months later, on March 8, 2021, the circuit court issued a show cause order mandating that appellant appear before the circuit court on August 13, 2021 and show cause why his probation should not be revoked. That same day, the circuit court issued a "NOTICE OF SPECIAL CONDITIONS OF LIFETIME SEXUAL OFFENDER SUPERVISION," whereby it ordered that appellant be subject to lifetime sexual offender supervision and set forth special conditions pursuant to that order.

In June 2021, appellant filed a motion to correct an illegal sentence, contending that the circuit court's March 8th order subjecting him to lifetime sexual offender supervision was illegal because he does not qualify for lifetime supervision under Criminal Procedure Article, § 11-723. The matter was set for a hearing on August 13, 2021, the same date as the previously scheduled VOP hearing.

Following that hearing, on October 15, 2021, the circuit court issued a memorandum opinion dismissing appellant's VOP charge because the contact alleged had been supervised by another adult and therefore did not violate the conditions of probation. In that same memorandum opinion, the circuit court determined that appellant was subject to mandatory lifetime sexual offender supervision. The court reasoned as follows:

> [T]he Defendant did not plead guilty to an amended charge that concerned events only after October l, 2010. The plea was to the charge as written and it included events beginning when the victim was under twelve years old. As such the Defendant was subject to lifetime sexual offender supervision under Criminal Procedure Article Section 11-723 (a) (4). This requirement was not

> discretionary for the Court; it was mandatory. See Criminal Procedure Article Section 11-723 (a). However, the Probation Order here included a line for the length of probation which the Court filled in for a period of five years to begin upon release. The box for Lifetime Sexual Offender Supervision by Management Team was not checked. This may explain why the attendant order was not completed. As [My Nguyen v. State, 189 Md. App. 501 (2009),] further instructs, where the Defendant is on active probation, Rule 4-346 (b) provides the Court with the authority to modify or clarify any condition of probation, change its duration or impose additional conditions. Therefore, this Court shall sign the required attendant order related to the statute's requirement for Lifetime Sexual Offender Supervision.

Accordingly, the court rescinded its March 8th order and issued a new order requiring that appellant be subject to lifetime sexual offender supervision.[4] This timely appeal followed.

DISCUSSION

Standard of Review

"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) (citing *Meyer v. State*, 445 Md. 648, 663 (2015)). An illegal condition of probation may be challenged as an illegal sentence under Rule 4-345(a). *Holmes v. State*, 362 Md. 190, 195-96 (2000); *Walczak v. State*, 302 Md. 422, 427 (1985).

[4] The court did not explain in its memorandum opinion why it rescinded the March 8th order but issued a subsequent order, dated October 15, 2021, which mandated, like the March 8th order, that appellant be subject to lifetime sexual offender supervision. It appears that the court may have been concerned that appellant had not received notice prior to the issuance of the March 8th order, given that, beginning in December 2019, several prior notices of the court's intent to impose lifetime sexual offender supervision as a condition of probation had been returned as undeliverable.

"An appellate court reviews without deference a trial court's interpretation of a statute[.]" *Bellard v. State*, 452 Md. 467, 480 (2017) (quoting *Howard v. State*, 440 Md. 427, 434 (2014)). The "cardinal rule" of statutory construction is "to ascertain and effectuate the intent of the General Assembly." *Id.* at 481 (quoting *Wagner v. State*, 445 Md. 404, 417 (2015) (cleaned up)). "We assume that the legislature's intent is expressed in the statutory language and thus our statutory interpretation focuses primarily on the language of the statute to determine the purpose and intent of the General Assembly." *Maddox v. State*, 249 Md. App. 441, 452 (2021) (citation and quotation omitted).

We "look first to the language of the statute, giving it its natural and ordinary meaning." *Bellard*, 452 Md. at 481 (quoting *Wagner*, 445 Md. at 417). "If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to the legislative intent ends ordinarily and we apply the statute as written without resort to other rules of construction." *State v. Bey*, 452 Md. 255, 265 (2017) (quoting *State v. Johnson*, 415 Md. 413, 421 (2010)). Otherwise, if the language of the statute is ambiguous, that is, if it is reasonably susceptible of more than one meaning, we resolve that ambiguity "by searching for legislative intent in other indicia, including the history of the legislation or other relevant sources intrinsic and extrinsic to the legislative process."[5] *Id.* at 266 (quoting *Johnson*, 415 Md. at 422).

[5] Examples of such "other indicia" include "the structure of the statute, how it relates to other laws, its general purpose and relative rationality and legal effect of various competing constructions." *State v. Bey*, 452 Md. 255, 266 (2017) (citations and quotations omitted).

Parties' Contentions

Appellant contends that the order subjecting him to lifetime sexual offender supervision is illegal under Criminal Procedure Article ("CP"), § 11-723, which mandates lifetime sexual offender supervision of "a person who has been convicted of a violation of § 3-602 of the Criminal Law Article involving a child under the age of 12 years," CP § 11-723(a)(4), "for a crime committed on or after October 1, 2010[.]" *Id.* § (c)(1). According to appellant, he cannot be subjected to lifetime sexual offender supervision because V. was born in 1995, and therefore, any abuse he committed against her, on or after October 1, 2010, occurred when she was no longer under the age of 12 years.

The State counters that appellant admitted to sexual abuse of V. throughout a sustained and lengthy time period beginning when she was approximately 4 years old and continuing until she was age 16. According to the State, sexual abuse of a minor, under Criminal Law Article ("CL"), § 3-602, may be (and under the circumstances of this case was) a continuing offense, that the abuse in this case began when the victim was under the age of 12 years, and that it continued after the effective date of the statutory amendment. Therefore, according to the State, appellant was subject to lifetime sexual offender supervision under CP § 11-723, and the circuit court's order was not illegal.[6]

[6] In addition, the State contends that "applying the supervision requirement to [appellant] does not violate *ex post facto* principles," and it then explains the basis for its position in the final three pages of its Brief. Although appellant raised an ex post facto argument during the hearing in the circuit court, he does not raise that argument in his brief before us, and it is therefore abandoned; we thus shall not address it. Md. Rule 8-504(a)(6) (stating that a brief "shall" include "[a]rgument in support of the party's position on each issue"); *Ochoa v. Dep't of Public Safety and Corr. Servs.*, 430 Md. 315, 328 (2013) (continued)

Analysis

An illegal sentence may be corrected "at any time." Md. Rule 4-345(a). What constitutes an "illegal sentence" within the meaning of Rule 4-345(a) is, however, "narrow[ly]" defined. *Chaney v. State*, 397 Md. 460, 466 (2007). Whatever the precise contours of "inherently illegal sentence" may be, it is undisputed that a sentence imposed in violation of a statute falls within this "narrow" category. *Holmes*, 362 Md. at 195-96 (observing that a "sentence that is not permitted by statute is an illegal sentence") (citations omitted); *Pitts v. State*, 250 Md. App. 496, 505 (observing that "[a]nother type of inherently illegal sentence is one where the sanction imposed is one that has not been authorized by statute") (citations omitted), *cert. denied*, 475 Md. 714 (2021). Thus, "[c]ourts do not possess the authority to impose a sentence that does not comport with a legislatively-mandated sentence, and any such sentence must be corrected to remedy the illegality." *Crawley*, 455 Md. at 66 (citing *Cathcart v. State*, 397 Md. 320, 325, 329 (2007)).

(declining to address claim that "the sex-offender registration statute is penal and must be 'strictly construed against the State'" where Ochoa "quotes at length one case in support of this proposition" but "makes no effort in his brief to apply it to his own case or develop it in any meaningful way"); *Darling v. State*, 232 Md. App. 430, 465-66 (declining to address claim of insufficient evidence of premeditation where brief contains a single, perfunctory assertion but "offers no support for [Darling's] position"), *cert. denied*, 454 Md. 655 (2017).

The statute at issue in this appeal is CP § 11-723, which, at the time appellant's sentence originally was imposed,[7] provided:

> (a) Except where a term of natural life without the possibility of parole is imposed, **a sentence for the following persons shall include a term of lifetime sexual offender supervision**:
>
> * * *
>
> (4) **a person who has been convicted of a violation of § 3-602 of the Criminal Law Article involving a child under the age of 12 years**;
>
> * * *
>
> (c)(1) Except as provided in paragraph (2) of this subsection, **the term of lifetime sexual offender supervision imposed on a person for a crime committed on or after October 1, 2010, shall**:
>
> (i) **be a term of life**; and
> (ii) commence on the expiration of the later of any term of imprisonment, probation, parole, or mandatory supervision.
>
> * * *

(Emphasis added.)

As pertinent to appellant's case, the plain language of CP § 11-723 sets forth the following eligibility requirements or conditions before he is subject to lifetime sexual offender supervision:

(1) "convicted of a violation of § 3-602 of the Criminal Law Article";

(2) "involving a child under the age of 12 years"; and

[7] Some minor amendments have been made to the statute since that time, but the quoted portions are identical to those currently in effect. Md. Code (2001, 2018 Repl. Vol.), CP § 11-723(a)(4), (c)(1)(i)-(ii).

(3) the crime must have been "committed on or after October 1, 2010[.]"

It is undisputed that appellant pleaded guilty to and therefore was convicted of a violation of CL § 3-602. "Involve" is defined as "to have within or as part of itself: CONTAIN, INCLUDE." *Webster's Third Int'l Dictionary* 1191 (1976). It is further defined as "[t]o include or affect in its operation" or "[t]o include; to contain, imply." *VIII The Oxford English Dictionary* 57 (2d ed. 1989). The time period covered by the guilty plea included a period when V. was "a child under the age of 12 years" and, therefore, this was a crime "involving a child under the age of 12 years." The third requirement is that the crime must have been "committed on or after October 1, 2010." The time period covered by the plea included a period from October 1, 2010 until December 31, 2011.

Appellant does not dispute that V. was "a child under the age of 12 years" during much of the time period when he committed the crime, nor does he dispute that he committed the crime during a time period that concluded after October 1, 2010. Rather, he insists that, "[f]or purposes of determining whether he was subject to lifetime sexual offender registration, the relevant time period was October 1, 2010, to December 31, 2011," but throughout that time period, V. was older than 12 years, and, accordingly, the lifetime registration requirement "does not apply to" him. In other words, according to appellant, both conditions must have been satisfied simultaneously and because, here, they were not, he is not subject to the lifetime supervision mandate.

In *Cooksey v. State*, 359 Md. 1 (2000), the Court of Appeals held that "sexual child abuse," under former Article 27, § 35C(b), the statutory predecessor to CL § 3-602, is "a crime that can be committed both by a single act and through a continuing course of

conduct consisting of multiple acts." *Cooksey*, 359 Md. at 24; *accord Walker v. State*, 432 Md. 587, 624 (2013) (observing that "[c]hild sexual abuse," under CL § 3-602, "can be part of a continuing course of conduct and need not hinge on a single action"). Here, the indictment and the agreed statement of facts, entered into the record at appellant's plea hearing, both lead us to conclude that the violation at issue here was a continuing course crime.[8]

[8] We note that federal courts observe a distinction between a crime, such as child sexual abuse under CL § 3-602, which may be charged as a continuing course of conduct crime, and what is known as a "continuing offense." This distinction is important in federal courts because generally (unlike in Maryland), prosecution "for any [non-capital] offense" is barred unless an indictment is filed "within five years next after such offense shall have been committed." 18 U.S.C. § 3282. "An offense is committed when it is completed, that is, when each element of that offense has occurred." *United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999) (citations omitted). "An exception has been recognized," however, "for 'continuing offenses.'" *Id.*

What is deemed a "continuing offense" "depends on the nature of the substantive offense, not on the specific characteristics of the conduct in the case at issue." *United States v. Jaynes*, 75 F.3d 1493, 1506 (10th Cir. 1996) (citation and quotation omitted). "Continuing offense" is a term of art "and does not merely mean an offense that continues in a factual sense." *Yashar*, 166 F.3d at 875. "An offense is deemed 'continuing' for statute of limitations purposes only when (a) 'the explicit language of the substantive criminal statute compels such a conclusion,' or (b) 'the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.'" *Id.* (quoting *Toussie v. United States*, 397 U.S. 112, 115 (1970)). "The hallmark of the continuing offense is that it perdures beyond the initial illegal act, and that 'each day brings a renewed threat of the evil Congress sought to prevent' even after the elements necessary to establish the crime have occurred." *Id.* (quoting *Toussie*, 397 U.S. at 122). "For those crimes, the statute of limitations does not begin to run when all elements are first present, but rather begins when the offense expires." *Id.* at 875-76. "The classic example of a continuing offense is a conspiracy, but other offenses such as escape or kidnapping also may fall within those definitions." *Id.* at 875. "Because the continuing offense doctrine extends the statute of limitations," the Supreme Court has "admonished" federal courts "to construe that term narrowly." *Id.* at 876 (citing *Toussie*, 397 U.S. at 115).

(continued)

Count 1 of the indictment alleged that appellant, "on or about January 1, 1999 through and including December 31, 2011, in the County aforesaid, being a household member, unlawfully did cause sexual abuse to [V.] (dob: [redacted]/1995), a minor child, under the age of 18, against the peace, government and dignity of the State," in violation of Criminal Law Article, § 3-602(b)(2). According to the agreed statement of facts, V., during an interview conducted jointly by a social worker and a detective, related that "since she was about 4 or 5 years old her mom's boyfriend, [appellant,] had been engaging in oral sex acts with her." In pleading guilty to Count 1, which alleged that appellant "unlawfully did cause sexual abuse to" V. throughout a thirteen-year period, an allegation supported by the agreed statement of facts, appellant admitted to a continuing course of conduct offense spanning a time period during which V. was "4 or 5 years old"[9] until she was 16.

In *Warren v. State*, 226 Md. App. 596 (2016), we explained, in the double jeopardy context, that child sexual abuse is characterized by an "inherent fluidity" but that, in its essence, it is a single crime:

> [A]n umbrella crime such as Sexual Child Abuse, pursuant to § 3-602, poses especially perplexing problems, because an umbrella crime may appear in

Following *Cooksey*, 359 Md. at 24, which held that child sexual abuse, under what is now CL § 3-602, may be (and, under the circumstances of this case, was) "committed . . . through a continuing course of conduct consisting of multiple acts," we are treating CL § 3-602 as a "continuing offense." In other words, for purposes of CP § 11-723, we deem the offense at issue as having been "committed" throughout the thirteen-year period appellant acknowledged during his plea proceeding, not merely "when each element of that offense . . . occurred," *Yashar*, 166 F.3d at 875, which, in this case, was in 1999.

[9] Even that interpretation gives appellant the benefit of the doubt. The time period covered by Count 1 began on January 1, 1999, when V. was three years old.

> ever changing shapes and sizes. It is an accordion. It may be pressed together so tightly that at times it embraces a single constituent crime. It may actually be compressed even more tightly, embracing only instances of sexually abusive behavior that are not actually criminal. The accordion of Sexual Child Abuse, on the other hand, may at times be opened up so expansively as to embrace dozens, nay hundreds, of constituent criminal acts, charged or uncharged. **Even if embracing a hundred constituent criminal acts, however, the umbrella crime of Sexual Child Abuse itself remains a single and indivisible crime. It does not fragment with the multiplication of its supporting evidence.**

Id. at 615-16 (emphasis added).

In the instant case, as the circuit court concluded, appellant "did not plead guilty to an amended charge that concerned events only after October l, 2010," but rather, to "the charge as written," which "included events beginning when the victim was under twelve years old" and continuing until more than a year after the effective date of the statutory amendment at issue. Therefore, under the plain language of CP § 11-723, appellant was subject to lifetime sexual offender supervision. Moreover, as the circuit court observed, "[t]his requirement was not discretionary for the Court; it was mandatory."

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