UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1425

September Term, 2014

CHRISTOPHER M. KELLY

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: December 22, 2015

Christopher M. Kelly, appellant, entered a plea of guilty in the Circuit Court for Howard County to first degree burglary, third degree burglary and possession of a regulated firearm by a prohibited person. The court sentenced appellant to an aggregate sentence of 35 years—20 years in prison, 15 years suspended, with 5 years probation. The circuit court denied appellant's motion to correct an illegal sentence. He appeals from that ruling, raising one question for our review:

> "Did the lower court impose an illegal sentence when it ordered Mr. Kelly to serve an aggregate sentence of 35 years, with 15 years suspended?"

We shall hold that the sentence imposed by the circuit court did not conform to the plea agreement, and hence, we shall reverse.

I.

Christopher M. Kelly was indicted by the Grand Jury for Howard County in Case No. K-13-053230 (Case 1) with one count of burglary in the first degree, conspiracy to commit burglary in the first degree, burglary in the third degree, possession of a regulated firearm by a prohibited person, theft under $1,000, malicious destruction of property over $500, and possession of a controlled dangerous substance other than marijuana. Appellant was indicted by the Grand Jury for Howard County in No. K-13-053231 (Case 2), with one count of burglary in the first degree, conspiracy to commit burglary in the first degree, burglary in the third degree, theft under $1,000, malicious destruction of property over $500, and malicious destruction of property under $500.

Pursuant to a plea agreement, appellant agreed to plead guilty to first degree burglary and possession of a regulated firearm by a prohibited person. In case 2, appellant agreed to plead guilty to third degree burglary. Following a chambers conference, the parties put the plea agreement on the record, in open court. The prosecutor stated:

> "Your Honor, the State's recommending disposition in that case would be a *split sentence* where five years to serve, requesting that it run consecutive to the [other] case. Counsel is free to argue on behalf of Mr. Kelly."

In addition, the State said that it would ask for conditions of probation, no contact, and restitution, with *nolle prosequis* entered to the remaining counts. The parties continued:

> "[PROSECUTOR]: In that particular case [Case 1], Your Honor, the State, during disposition, would be asking for a sentence of 20 years for first degree burglary with 5 years consecutive for possession of a firearm,
>
> [PROSECUTOR]: Your Honor, the State's recommending disposition in that case [Case 2] would be a *split sentence* with five years to serve, requesting that it run *consecutive to the 30* case [Case 1]. Counsel is free to argue on behalf of Mr. Kelly. We have had chamber conversations and Your Honor, I understand, will clarify the record regarding what you have indicated you would *cap yourself* to but that is what the State would be requesting.
>
> The remaining charges, we'll be entering *nolle prosequi* as well as the State will be requesting appropriate conditions of probation via no contact and any restitution that the victims will be requesting. Also, it is our understanding that there's going to be a request for a pre-sentence investigation which will cause disposition to be held on another date. . . .

> [DEFENSE COUNSEL]: Thank you. Your Honor, that is my understanding as well, that we spoke with Your Honor in chambers, discussed these matters and you have indicated and I have relayed to Mr. Kelly that you would *cap* the sentences on both cases total at *20 years incarcerated time* and *there could be unexecuted*, as well, and that we are free to argue.
>
> Mr. Kelly has expressed that he would like me to file some motions on his behalf, a motion for reconsideration and an 8505, which I will do. I have advised him that that was not discussed. That Your Honor can deny that, grant in part and deny in part or grant them and that was entirely up to this Court. That is the plea offer as we understand. Is that correct, Mr. Kelly?
>
> [APPELLANT]: Yes.
>
> THE COURT: All right, so I'm *capping* myself at 20 years of *active* which *means that I can impose whatever sentence I feel is appropriate between 0 and 20*. If I feel that in the end I feel the State's recommended disposition or something more than 20 is appropriate, I'll let you know and you can withdraw your plea as guilty. Do you understand that, sir?
>
> [APPELLANT]: Yes."

Later on during the proceeding, appellant's counsel said the following:

> "Sentence on first degree burglary would be 20 years and the firearm would be 5 years so a sentence of 25 years would be a legal sentence in this case. *The judge has already agreed to cap this at twenty or you can withdraw your plea* . . . . On the third degree burglary, it would be a cap of ten years. That'd the [sic] maximum you could get on that sentence."

The court sentenced appellant to an aggregate of 35 years—20 years in prison, with all but 10 ten years suspended, for the first degree burglary; five years for the illegal firearm possession; and 10 years, with all but five suspended, for the third degree burglary.

Appellant filed a motion to correct an illegal sentence, arguing that when the trial court bound itself to a cap of 20 years as a sentence, any sentence of active and/or suspended incarceration could not exceed twenty years, which the court denied.

This timely appeal followed.

II.

Before this Court, appellant argues that the circuit court imposed an illegal sentence when the court ordered appellant to serve an aggregate sentence of 35 years—20 years in prison, 15 years suspended, with 5 years probation. Appellant argues that the terms of a plea agreement are defined by the understanding of a reasonable lay person in the defendant's position and the sentence imposed by the court violated that agreement. Appellant asserts that his remedy for a violation of his plea agreement is the benefit of the bargain, *i.e.*, to the sentence contemplated in the binding plea agreement, or the withdrawal of his guilty plea.

The State responds that a reasonable lay person in appellant's position would have understood that he was subject to a total sentence of more than 20 years where the trial court bound itself to a 20-year cap on "active" incarceration, the prosecutor stated that she would

recommend more than 20 years of incarceration to include a "split sentence" with probation, and defense counsel stated that he "relayed to Mr. Kelly that [the court] would cap the sentences on both cases total at 20 years incarcerated time and there could be unexecuted [time], as well."

III.

We address first the threshold question of whether appellant's sentence constitutes an illegal sentence. Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." For a sentence to be illegal and subject to correction "the illegality must inhere in the sentence itself, rather than stem from trial court error during the sentencing proceeding." *Matthews v. State*, 424 Md. 503, 513 (2012). When a defendant enters into a plea agreement with the State, and after the plea is accepted by the court, if the court imposes a sentence different from the plea agreement, the sentence is illegal. *Solorzano v. State*, 397 Md. 661, 673 (2007).

Rule 4-243 governs plea agreements and addresses the procedures to be followed when the State and a defendant have entered into a plea agreement. The Rule provides, in pertinent part, as follows:

> "(a) **Conditions for agreement.** (1) Terms. The defendant may enter into an agreement with the State's Attorney for a plea of guilty or nolo contendere on any proper condition, including one or more of the following:

* * *

(F) That the parties will submit a plea agreement proposing a particular sentence, disposition, or other judicial action to a judge for consideration pursuant to section (c) of this Rule.

* * *

(c) **Agreements of sentence, disposition, or other judicial action.**

(1) Presentation to the court. If a plea agreement has been reached pursuant to subsection (a)(1)(F) of this Rule for a plea of guilty or nolo contendere which contemplates a particular sentence, disposition, or other judicial action, the defense counsel and the State's Attorney shall advise the judge of the terms of the agreement when the defendant pleads. The judge may then accept or reject the plea and, if accepted, may approve the agreement or defer decision as to its approval or rejection until after such pre-sentence proceedings and investigation as the judge directs.

(2) Not binding on the court. The agreement of the State's Attorney relating to a particular sentence, disposition, or other judicial action is not binding on the court unless the judge to whom the agreement is presented approves it.

(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."

As is clear in the Rule, the terms of a plea agreement are to be made plain, on the record, and in the presence of the defendant. Rule 2-243(c)(1); *Cuffley v. State*, 416 Md. 568, 579 (2010). The terms must be made "express" and clearly agreed upon before the court accepts the guilty plea. *Id.* A sentence that deviates from a binding plea agreement—either

in excess of that to which a defendant agrees in a binding plea agreement or a sentence below the term of a binding plea agreement, without the State's consent—is inherently illegal. *Bonilla v. State*, 443 Md. 1, 10 (2015). Once a court accepts a guilty plea, the court cannot decline to carry through the bargain that induced the plea. *Banks v. State*, 56 Md. App. 38, 47 (1983). If a court agrees to a "cap" on a sentence, it must be objectively clear; and any ambiguity is resolved in favor of the defendant. *Matthews*, 424 Md. at 524-25.

The parties do not dispute that the sentencing court, the State and appellant were bound in a plea agreement. The issue before us is whether the terms of the plea agreement were clear or ambiguous, and whether the sentence imposed violated the plea agreement. Whether a plea agreement was violated is a question of law, which we review *de novo*. *Tweedy v. State*, 380 Md. 475, 482 (2004).

The terms of a plea agreement are interpreted by an objective test: what would a reasonable lay person in the defendant's position have understood the agreement to mean. *Cuffley*, 416 Md. at 582. If a disputed term of the agreement is ambiguous, the ambiguity must be resolved in favor of the defendant. *Baines v. State*, 416 Md. 604, 615, 7 A.3d 578, 585 (2010).

We hold that under the circumstances presented herein, the terms of the plea agreement and the maximum sentence the court could impose were ambiguous. Three different versions of the agreement were placed on the record, in open court, before

appellant. The court, the State, and the defense counsel all used different terms. Terms such as "cap," "unexecuted time," "split sentences," and "active" were all mentioned. It is easy to see how a lay person could have concluded that he would not have received any more than a 20 year sentence, particularly in light of the court's comment, stating:

> " . . . I'm capping myself at 20 years of active which means that I can impose whatever sentence is appropriate between 0 and 20. If I feel that in the end I feel that the State's recommended disposition or something more than 20 is appropriate, I'll let you know and you can withdraw your plea of guilty."

It is likely that a reasonable lay person would not have understood the plea agreement to permit a sentence of 35 years, with 15 years suspended. The use of the words, "capped," "active," "unexecuted," "20 years incarcerated time," "split sentence," in light of the court's statement that the sentence would be between zero and 20 years, while clear perhaps, to a lawyer or the court, are open to interpretation and potentially ambiguous to a reasonable lay person. No one explained any of these terms on the record, nor did anyone make certain that appellant understood the actual sentence which might be imposed.

The Indiana intermediate appellate court considered a case with facts somewhat similar to the case at bar. The Court of Appeals of Indiana found that when a prosecutor recommended "the sentence to be imposed: Cap of Thirty Five Years (35)," the court imposing an aggregate sentence of 45 years, with 32 years executed, violated the terms of the

plea agreement. *Valenzuela v. State*, 898 N.E.2d 480, 483 (Ind. Ct. App. 2008). The Court of Appeals of Indiana reasoned as follows:

> "'Cap' means just that—it is a cap on the sentence the trial court could impose on Valenzuela. And the cap here was thirty-five years. Having exceeded that cap by imposing a forty-five-year sentence, the trial court improperly exceeded the plain terms of Valenzuela's plea agreement."

Id. at 483.

Appellant is entitled to the benefit of the bargain—to the terms of the agreement as he understood the sentencing agreement—a sentence of no more than an aggregate of 20 years of executed and unexecuted time. He may elect to have the court re-sentence him, with the maximum total aggregate of the sentence to be no more than 20 years, or he may withdraw his guilty plea and proceed to trial. If appellant elects to have the court re-sentence him, the resentencing should be accomplished by a different judge. *Santobello v. New York*, 404 U.S. 257, 263 (1971).

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY VACATED. CASES REMANDED FOR RESENTENCING IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY HOWARD COUNTY.