UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1507

September Term, 2013

WAYNE A. ROBERTSON

v.

STATE OF MARYLAND

Leahy,
Friedman,
Thieme, Raymond, G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: July 9, 2015

Wayne Robertson, appellant, was convicted, by a jury sitting in the Circuit Court for Baltimore County, of attempted murder in the first degree, robbery with a dangerous weapon, and use of a handgun in the commission of a crime of violence. The court imposed sentences which, on aggregate, amounted to life imprisonment plus twenty years, without the possibility of parole for the first twenty-five years. Subsequently, Robertson filed a motion to correct illegal sentence; the motion was denied. This appeal followed.

Robertson presents the following questions for our review:

I. Whether the circuit court erred in denying appellant's motion to correct an illegal sentence, without a hearing, when the court imposed an additional 25-year (without parole) consecutive sentence not related to any crime for which appellant was convicted?

II. Whether the 25-year without parole statutory enhancement filed by the State repeals by implication the common law sentence for attempted murder?

For the reasons which follow, we shall affirm the judgment of the court.

FACTS AND PROCEEDINGS[1]

On the evening of May 25, 1995, John Johnson was shot and robbed outside of the apartment building in which he resided. Several Baltimore County Police officers were working in the surrounding area at the time of the robbery and heard the related gunshots. Moments later, the officers observed an individual who ran toward a white car and entered

[1]Although, in the instant appeal, Robertson only raises issues related to sentencing, we shall, for context, provide a summary of facts adapted from those set forth in our unreported opinion in *Wayne Robertson v. State*, No. 73, Sept. Term, 1996 (filed Dec. 20, 1996).

it through the passenger-side door; the car then sped away. The vehicle was subsequently involved in an accident at the intersection of Hillen Road and Northern Parkway; police arrested the driver, Robertson. The car's passenger had fled before police had an opportunity to apprehend him; efforts to locate the passenger were unsuccessful.

Robertson told police that he was a "hacker" and that although he had picked up the man who had been his passenger, he did not know him.[2] Later, Robertson admitted that his passenger had asked if he wanted to make some money and directed him to follow a man who had just visited an automated teller machine, *i.e.*, Johnson. Robertson stated that the man then approached Johnson, shot him, and returned to the car and directed Robertson to drive away from the scene. Robertson noted that he knew the man intended to commit a robbery, but was unaware that he intended to accomplish the robbery via a shooting.

Following a jury trial, Robertson was convicted of attempted first-degree murder, robbery with a dangerous weapon, and use of a handgun in the commission of a crime of violence, for his role in the shooting and robbery of Johnson. Prior to sentencing, the State gave the following notice regarding how it intended to proceed:

> . . . The State of Maryland intends to proceed against [Robertson] as a subsequent offender under Maryland Annotated Code, Article 27, § 643(c). [Robertson] has been convicted of at least one offense defined as a crime of

[2]Maryland courts have recognized that "hacking" is the practice of operating an unlicensed cab, *i.e.*, picking up passengers and charging them a fee for a ride to their destination. *See Douglas v. State*, 423 Md. 156, 167 n.4 (2011); *Collins v. State*, 373 Md. 130, 133 n.1 (2003); *Davis v. State*, 104 Md. App. 290, 292 (1995).

> violence pursuant to Maryland Annotated Code, Article 27, Section 643B, not arising out of the same incident. [Robertson] has served at least one term of confinement in [a] correctional institution, as the result of the aforesaid conviction, namely:
>
> 1. On October 14, 1983[,] [Robertson] was convicted . . . of [r]obbery. [Robertson] was sentenced to City Jail Work Release for a period of eighteen (18) months with an additional three (3) years supervised probation.
>
> 2. On June 16, 1989[,] [Robertson] was convicted . . . of [r]obbery with a [d]eadly [w]eapon. [Robertson] was sentenced to the Division of Correction for six (6) years.
>
> [Robertson], if convicted, [in the case at bar], of a crime of violence by law, will receive imprisonment for the term allowed by law, but not less than twenty-five (25) years, none of which may be suspended, and from which [Robertson] may be paroled only in accordance with Article 31B, § 11 and Article 27, § 643B (f) and (g).

At sentencing, the prosecutor presented evidence that Robertson had been previously, and separately, convicted of, and incarcerated for, the offenses referred to in the notice of the State's intent to seek an enhanced sentence under Article 27 § 643B. Ultimately, the court found that "the predicate convictions [were] proven" and announced Robertson's sentence as follows:

> [THE COURT]: . . . It is the judgment and sentence of the Court on the attempted murder that [Robertson] be remanded to the Division of Correction for the rest of his natural life. With regard to the count on dangerous and deadly weapon, it is the judgment of the Court that he serve twenty years, the maximum on that, consecutive to his life sentence. And with regard to the use of the handgun, only because he was not the one that used it, it is the judgment of the Court that he be sentenced to the Division of Correction for a period of twenty years to run concurrent to the consecutive sentence imposed with regard to dangerous and deadly weapon.

> That judgment is to be entered on the Court record and it is to be followed by not less than twenty-five years of which are to be mandatory without parole under the applicable statute.

Thereafter, on March 12, 2013, Robertson filed a motion to correct illegal sentence. In his motion, Robertson contended that his sentence was illegal on three different grounds: (1) subsequent correspondence, between the court and parole commission, regarding his sentence amounted to informal, and illegal, correction of the same, in violation of *Mateen v. Saar*, 376 Md. 385 (2003); (2) "[t]he effect of the 25 years no parole enhancement . . . repeal[ed] by implication the common law sentence of life for attempted murder"; and (3) "under the rule of lenity, his sentence should be 25 years without the possibility of parole for the attempted murder conviction."

Upon consideration of Robertson's motion, the circuit court found that the subject correspondence between the parole commission and the court was simply with respect to clarification, not modification, of Robertson's sentence; that Robertson had two previous convictions for violent crimes and, thus, the enhanced penalty statute, §643B, "stripped the [court] of discretion to impose any lesser sentence"; and that the rule of lenity did not apply to Robertson's case because the enhanced penalty statute in question was not ambiguous. As such, the court denied the motion.

Additional facts will be provided below as our analysis requires.

DISCUSSION

I

Robertson contends that although the sentencing court found that the State met its burden of showing that an enhanced penalty was warranted due to his previous convictions, the court erred in announcing, at sentencing, "'[t]hat judgment is to be entered on the [c]ourt record and it is to be followed by not less than twenty-five years of which are to be mandatory without parole under the applicable statute.'" He asserts that "[t]his ruling effectively added twenty-five years onto the end of [a]ppellant's sentence, thus rendering it illegal."[3] Further, he insists that because the correspondence between the parole commission and the court showed an exchange where the commission sought clarification of Robertson's sentence and the court responded by noting what it "intended," not by reiterating the sentence it had imposed, such was an indication that Robertson's sentence was improperly corrected via an informal procedure. As such, Robertson contends that his sentence was illegal and requests that this Court remand this matter for resentencing.

"The court may correct an illegal sentence at any time." Md. Rule 4-345(a). With respect to what constitutes an illegal sentence, the Court of Appeals, in *Hoile v. State*, 404

[3]Robertson's motion for illegal sentence did not contain argument related to the noted statement by the sentencing court, thus, that issue was not preserved for our review. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court."). Nevertheless, as our analysis shall make clear, Robertson would not have prevailed on that ground even if the issue were properly before this Court.

Md. 591, 621 (2008), explained:

> An illegal sentence is a sentence "not permitted by law." *Walczak v. State*, 302 Md. 422, 427 (1985). An illegal sentence properly is corrected only "where there is some illegality in the sentence itself or where no sentence should have been imposed." *Evans v. State*, 382 Md. 248, 278 (2004).

(Internal parallel citations omitted).

Our authority to correct an illegal sentence extends to instances where an enhanced penalty was improperly imposed. *Williams v. State*, 220 Md. App. 27, 43 (2014) ("'[A]n enhanced penalty imposed improperly is an illegal sentence[.]'") (quoting *Nelson v. State*, 187 Md. App. 1, 11 (2009)), *cert. denied*, 441 Md. 219 (2015).

To begin with, we are not persuaded that the noted statement, at sentencing, by the court, "[t]hat judgment is to be entered on the [c]ourt record and it is to be followed by not less than twenty-five years of which are to be mandatory without parole under the applicable statute[,]" had the effect of adding twenty-five years to Robertson's sentence. Although this statement, when isolated, might have seemed to indicate an addition of twenty-five years' imprisonment to Robertson's sentence, the commitment record in this case makes clear that the sentence imposed did not feature any such addition. Robertson's commitment record shows, unambiguously, that he was sentenced to life imprisonment, without possibility of parole for twenty-five years, for his first-degree attempted murder conviction.[4] The

[4]Specifically, Robertson's commitment record indicates that his sentence for attempted first-degree murder was to be "natural life" and included the following notation: (continued...)

commitment record also notes that the "total time to be served [was] [n]atural [l]ife plus [t]wenty [y]ears[.]"

We are also unpersuaded that the court's correspondence with the parole commission was anything other than a clarification of Robertson's sentence. The court's response to the parole commission's letter was, in pertinent part, as follows:

> 1. Mr. Robertson was convicted of a third offense of a crime of violence as defined in Article 27, Section 643B of the Code.
>
> 2. I sentenced Mr. Robertson to: (a) natural life for the crime of attempted murder, and to (b) twenty years for the crime of robbery with a dangerous and deadly weapon, the second running consecutive to the first.
>
> 3. Article 27, Section 643B(c) provides that when this occurs and a sentence is entered for a third crime of violence the sentence shall be whatever it is, but not less than 25 years without parole. Therefore, I sentenced him to life plus 20 (for conviction of [attempted] murder and robbery with a dangerous and deadly weapon), not less than 25 years of which is to be served without parole. No matter how you figure this, it comes out the same. The commitment could read life, not less than 25 years without parole for attempted murder plus 20 years consecutive for robbery with a dangerous and deadly weapon or natural life plus 20, not less than 25 years of which is to be served without parole.

[4](...continued)
As to Count One (1) Defendant to be imprisoned for not less than twenty five (25) years none of which may be suspended and from which the defendant may be paroled only in accordance with [Article] 31B, [Section] 11 and [Article] 27, [Section] 643B (f) and (g).

Indeed, the record does not include any documentation which would show that Robertson's sentence, as it appears in the commitment record, was substantively modified following the communication in question. Robertson's sentence, therefore, was not "corrected" informally or otherwise. Accordingly, we cannot conclude that the sentence in this case was rendered illegal by the noted statement by the court at sentencing or the subsequent correspondence with the parole commission.

II

With respect to the application of the noted enhanced penalty statute, Robertson asserts:

> [He] was convicted of common law attempted murder and was sentenced pursuant to the common law sentence of life imprisonment. [He argues] that, because [the court's] apparent intent was to apply the 25-year no parole provision of Art. 27 § 643B(c) to the attempted murder, as evidenced in [the correspondence with the parole commission], the statutory sentence of § 643B(c) abrogates and/or repeals by implication the common law sentence of life imprisonment. This makes the new minimum *and* maximum sentence for his conviction 25 years without the possibility of parole.

Further, he contends that:

> [U]nder the rule of lenity, his sentence should be 25 years without the possibility of parole for the attempted murder conviction. The Court of Appeals has previously recognized that "courts will not interpret a . . . criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what the legislature intended." *Gardner v. State*, 421 Md. 1, 16 (2011) (internal quotations omitted) (internal citations omitted). The rule "provides a mechanism for resolving ambiguity when legislative intent cannot be determined to any degree of certainty." *Id*.

Accordingly, Robertson maintains that his sentence is illegal and, therefore, he requests a remand of his case for resentencing.

We shall incorporate by reference the circumstances under which a sentence may be determined to be illegal, and our authority to correct such an illegality, as summarized in section I of this opinion.

The enhanced penalty statute in question, Maryland Code (1957, 1992 Repl. Vol., 1995 Supp.) Article 27, § 643B(c), provides:

> *Third conviction of crime of violence* – Except as provided in subsections (f) and (g) of this section, any person who (1) has been convicted on two separate occasions of a crime of violence where the convictions do not arise from a single incident, and (2) has served at least one term of confinement in a correctional institution as a result of a conviction of a crime of violence, *shall be sentenced, on being convicted a third time of a crime of violence, to imprisonment for the term allowed by law, but, in any event, not less than 25 years.* The court may not suspend all or part of the mandatory 25-year sentence required under this subsection, and the person shall not be eligible for parole except in accordance with the provisions of Article 31B, § 11. A separate occasion shall be considered one in which the second or succeeding offense is committed after there has been a charging document filed for the preceding occasion.

(Emphasis added).

There is no dispute that the State established that the criteria for an enhanced sentence under this statute were met in this case. Nor is there any dispute that life imprisonment was a sentence which was available to be imposed in relation to Robertson's conviction for attempted first-degree murder. *Hardy v. State*, 301 Md. 124, 140 (1984) (maximum penalty for attempted first-degree murder is life imprisonment). We note, however, that Robertson

is incorrect in claiming that a crime of attempt was subject to sentence guidelines provided by common law. In fact, Robertson's brief includes a quote from *Hardy v. State*, 301 Md. at 128, which contradicts that assertion by explaining that "[i]n 1976, however, the legislature enacted § 644A of Article 27, which limited the sentence for attempt to the maximum sentence for the completed crime." *See* Md. Code (1957, 1992 Repl. Vol.) Art. 27, § 644A ("The sentence of a person who is convicted of an attempt to commit a crime may not exceed the maximum sentence for the crime attempted."). That in mind, we see no conflict between the statute limiting the maximum sentence for the crime of attempt, Art. 27 § 644A, and the statute providing for enhanced punishment for individuals thrice-convicted of crimes of violence, Art. 27 § 643B(c). Furthermore, in our view, the sentencing court in this case did not run afoul of either statute when it imposed the sentence in question upon Robertson.

Lastly, where we do not view any ambiguity in Art. 27 § 643B(c), and Robertson does not argue any, we cannot conclude that the rule of lenity is applicable in this case to render Robertson's sentence illegal. Accordingly, we hold that the court did not err in denying Robertson's motion to correct illegal sentence.

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