

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1628

September Term, 2014

BENJIE T. RUSSELL

v.

STATE OF MARYLAND

Meredith,
Hotten,
Nazarian,

JJ.

Opinion by Meredith, J.

Filed: December 17, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Benjie T. Russell, appellant, filed an untimely notice of appeal from the denial of a motion to correct an allegedly illegal sentence. Because the notice of appeal was not filed within 30 days after the Circuit Court for Montgomery County filed its judgment, we must dismiss the appeal.

BACKGROUND

In October 2007, a grand jury in the Circuit Court for Montgomery County issued a multi-count indictment charging Benjie T. Russell, appellant, with crimes related to a home invasion and robbery that took place in September of that same year in Wheaton, Maryland. In March 2008, pursuant to a binding plea agreement, Russell pleaded guilty to two of the counts of the indictment; namely, robbery and assault in the first degree. Under that plea agreement, Russell agreed to testify against Javelle Sims, a co-defendant in another case; in exchange, a nolle prosequi was entered as to each of the other six charges against Russell, and the State (and the circuit court) further agreed that Russell's sentence would be capped at no more than sixteen years of executed time, with both sides "free to allocute in terms of back up time and length and conditions of probation."

In September 2008, the circuit court imposed a sentence of twenty-five years' imprisonment, with all but sixteen years suspended, for robbery, and a concurrent sentence of fifteen years' imprisonment for first-degree assault, to be followed by five years' supervised probation. In December 2012, upon the grant of an ensuing motion for modification of sentence, the circuit court imposed a sentence of twenty-five years'

imprisonment, with all but fourteen years suspended, for robbery, and a concurrent sentence of fifteen years' imprisonment, with all but fourteen years suspended, for first-degree assault, once again to be followed by five years' supervised probation.

In December 2013, the circuit court granted yet another motion for modification of sentence and imposed a sentence of twenty-five years' imprisonment, with all but twelve years suspended, for robbery, and a concurrent sentence of fifteen years' imprisonment, with all but twelve years suspended, for first-degree assault, to be followed by five years' supervised probation.

Still dissatisfied with his sentence, in April 2014, Russell filed a motion to correct an illegal sentence, alleging that his modified sentence was prohibited by *Matthews v. State*, 424 Md. 503, 519 (2012), which held that a sentence imposed in excess of a “cap” in a binding plea agreement is an illegal sentence. *See Matthews*, 424 Md. at 519 (“[A] sentence imposed in violation of the maximum sentence identified in a binding plea agreement and thereby ‘fixed’ by that agreement as ‘the maximum sentence allowable by law,’ is, as we held in *Dotson [v. State]*, an inherently illegal sentence. 321 Md. at 524, 583 A.2d at 714.”). On May 27, 2014, the circuit court denied that motion and issued an order to that effect, which was docketed on May 29, 2014.

Forty-eight days later, on July 16, 2014, Russell filed a motion seeking an extension of time for filing a notice of appeal. As grounds, he asserted that he was incarcerated, and,

by the time he had received a copy of the circuit court’s order denying his illegal sentence motion, “[i]t was too late” to file a timely notice of appeal. On August 12, 2014, the circuit court “granted” that motion, and then, on September 11, 2014, — *i.e.*, 105 days after the entry of judgment — Russell noted the instant appeal.

DISCUSSION

The State moved to dismiss this appeal, and contends that this Court is without jurisdiction because the notice of appeal was filed more than thirty days after May 29, 2014, the date when the circuit court’s order denying Russell’s motion to correct illegal sentence was docketed. *See* Md. Rule 8-202(a) (providing that notice of appeal “shall be filed within 30 days after entry of the judgment or order from which the appeal is taken”). According to the State, when the circuit court purported to “grant” Russell’s motion for an extension of time for noting an appeal, that court exceeded its authority under Maryland Rule 1-204(a) (which governs motions to shorten or extend time requirements). Because a timely notice of appeal is a jurisdictional requirement for review by this Court, we agree with the State’s contention that we must dismiss this appeal.

Maryland Rule 1-204(a) provides expressly that a circuit court “may not shorten or extend the time for filing . . . a notice of appeal[.]” Consequently, the circuit court’s order, purporting to “grant” Russell’s motion for an extension of time for noting the appeal in this case, was *ultra vires* and could not extend the time limit for noting an appeal which had

already expired on June 30, 2014 (given that 30 days after May 29, 2014, fell on a Saturday, *see* Md. Rule 1-203(a)(1)). Because an untimely notice of appeal does not confer appellate jurisdiction on this Court, we must dismiss the appeal. *Griffin v. Lindsey*, 444 Md. 278, 285 (2015); *Houghton v. County Comm'rs of Kent County*, 305 Md. 407, 413 (1986).

**APPEAL DISMISSED. COSTS TO BE
PAID BY MONTGOMERY COUNTY.**