UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0646

September Term, 2015

RONALD D. AUSTIN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: September 20, 2016

Ronald D. Austin appeals from his conviction in the Circuit Court for Prince George's County of first-degree felony murder, assault in the first degree, use of a handgun in the commission of a felony or crime of violence, conspiracy to commit assault in the first degree, and possession of a firearm after being convicted of a disqualifying crime in Maryland. He raises the following questions for our review:

> "1. If the point is not foreclosed by waiver or the law of the case, was the evidence sufficient to sustain the conviction for conspiracy to commit assault in the first degree?
> 2. If not foreclosed for the same reasons, was the evidence sufficient to sustain the conviction for possession of a regulated firearm by a person convicted of a disqualifying crime?"

We shall not consider appellant's issues because he waived them and they are foreclosed by the law of the case doctrine.[1]

I.

Appellant was convicted by a jury in the Circuit Court for Prince George's County with the offenses of first-degree felony murder, assault in the first degree, use of a handgun in the commission of a felony or crime of violence, conspiracy to commit assault in the first degree, possession of a firearm after being convicted of a disqualifying crime in another jurisdiction, and possession of a firearm after being convicted of a disqualifying crime. The court imposed a term of life imprisonment for murder, a term of 20 years incarceration, all

[1]In light of this resolution, we need not consider the State's motion to dismiss this appeal based on appellant's alleged failure to file a transcript.

but 15 years suspended, consecutive to the life term, for use of a hand gun in the commission of a felony, and a term or incarceration of 25 years, to be served concurrently to the life term, for conspiracy to commit first-degree assault.

Appellant noted an appeal to the Court of Special Appeals. *See Austin v. State,* No. 1172, September Term, 2013, slip op. at 8. (Appeal no. 1). In that appeal, he raised three issues. He argued, on plain error basis, the failure of the trial court to instruct the jury as to the predicate crime of robbery for felony-murder, the sufficiency of the evidence to support felony-murder, and an evidentiary question. He did not raise sufficiency of the evidence of any of the other convictions. The Court of Special Appeals, on December 23, 2014, affirmed the convictions for first-degree assault, use of a handgun in the commission of a crime of violence, conspiracy to commit first-degree assault, possession of a firearm after having been convicted of a crime in another state, and possession of a firearm after having been convicted of a disqualifying crime. *Id*. This Court reversed the felony murder conviction and vacated that sentence. *Id*.

The circuit court initially merged the first-degree assault into the felony-murder conviction at sentencing. Because the Court of Special Appeals vacated the felony-murder conviction, this Court remanded the assault conviction. On April 30, 2015, the circuit court sentenced appellant to the maximum for the previously merged assault conviction, 25 years,

consecutive to the 25 years for conspiracy. Appellant noted this appeal on May 5, 2015. All proceedings in the circuit court are stayed pending resolution of this appeal.

II.

The State has filed a Motion to Dismiss this appeal, arguing that the appeal should be dismissed for two reasons: first, that appellant did not file a transcript of the trial, as required by Maryland Rule 8-413(a), and second, that based on the law of the case doctrine, appellant is rasing sufficiency of the evidence issues in this appeal that he could have raised in his first appeal and failed to do so. Based upon the law of the case doctrine, the State argues that we should dismiss this appeal.

Appellant contends that this appeal is not barred by either waiver or the law of the case doctrine. He explains that he raises in this appeal two issues not raised in Appeal no. 1 and concedes that "[o]rdinarily argument on points not raised in the first appeal but apparent from the record then under consideration would be foreclosed by the waiver component of law of the case doctrine." He suggests that his sentence for conspiracy and felon-in-possession were illegal sentences under Rule 4-345(a) because the evidence was insufficient, and hence, those issues are not waived because the issues of an illegal sentence can be raised at any time and are not waived or barred by the law of the case doctrine for failure to raise them earlier. He relies on the case of *Johnson v. State*, 427 Md. 356 (2012),

maintaining that *Johnson* modified the law of the case of doctrine and that his claims of error are not barred by the law of the case doctrine.

III.

We agree with the State and shall dismiss this appeal because appellant has waived the issue of the sufficiency of the evidence of his convictions for conspiracy and felon-in-possession for failure to raise these issues in Appeal no. 1.[2] He failed to raise these issues in his direct Appeal no. 1, and no reason has been presented to justify his failure to do so. The law of the case doctrine bars raising these issues in this appeal, and *Johnson v. State* provides no safe harbor for appellant.

The law of the case doctrine provides as follows:

> "Quite aside from showing incredible hubris, this remarkable contention ignores the law of the case doctrine. As stated in *Fidelity-Baltimore Nat'l Bank & Trust v. John Hancock Mut. Life Ins. Co.,* 217 Md. 367, 372, (1958): 'Once this court has ruled upon a question properly presented on appeal, or, *if the ruling be contrary to a question that could have been raised and argued in that appeal on the then state of the record*, as

[2]In Maryland, a defendant may move for judgment of acquittal on one or more counts at the close of the State's case and at the close of all the evidence, stating with particularity all reasons why the motion should be granted. Maryland Rule 4-324(a). Unless a defendant makes such a motion, the defendant may not raise the sufficiency of the evidence on appeal. *Tetso v. State*, 205 Md. App. 334, 385 (2012). And no new grounds not raised in the trial court may be asserted on appeal. *Id*. The record indicates that while appellant raised the conspiracy sufficiency below, on the firearm conviction, he merely submitted and presented no argument.

> aforesaid, such a ruling becomes the 'law of the case,' and is binding on the litigants and courts alike, unless changed or modified after re-argument, and neither the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal.'"

Martello v. Blue Cross and Blue Shield of Maryland, Inc., 143 Md. App. 462, 474 (2002). (Emphasis added). The law of the case doctrine precludes appeal of matters that could have been raised previously but were not. *Haskins v. State,* 171 Md. App. 182, 190 (noting that law of the case doctrine prevents the revisiting of not only an issue that has been properly raised on appeal but also a question that could have been raised and argued but has not).

Contrary to the law of the case doctrine, a motion to correct an illegal sentence may be raised at any time, and hence, is not waived by a defendant's failure to raise the issue in a prior proceeding. *See* Rule 4-345(a); *Chaney v. State*, 397 Md. 460, 465-66 (2007). Our case law has developed jurisprudence as to illegal sentence review, mandating that an illegal sentence under Rule 4-345(a) must "inhere in the sentence itself, rather than stem from trial court error during the sentencing proceeding." *Matthews v. State*, 424 Md. 503, 512 (2012); *see also Montgomery v. State*, 405 Md. 67, 74-75 (2008) ("[A trial court] error during the sentencing proceeding is not ordinarily cognizable under Rule 4-345(a) where the resulting sentence or sanction is itself lawful." (quoting *Evans v. State*, 382 Md. 248, 279 (2004), cert denied, 543 U.S. 1150 (2005))). Specifically, a sentence is illegal if:

> "there either has been no conviction warranting any sentence for the particular offense or the sentence is not permitted one for the conviction upon which it

> was imposed and, for either reason, is intrinsically and substantively unlawful."

Chaney, 397 Md. at 466. In other words, a sentence is illegal under Rule 4-345(a) if the trial court lacked the power or authority to impose the contested sentence. *See Alston v. State*, 425 Md. 326, 339-41 (2012).

We have noted that "there is no simple formula to determine which sentences are illegal within the meaning of Rule 4-345(a)." *Johnson*, 427 Md. at 368. Nonetheless, there are several classic examples of illegal sentences under Rule 4-345(a). A sentence that exceeds the maximum statutory sentence is an illegal sentence. *See Carlini v. State*, 215 Md. App. 415, 427 (finding that the "classic illegal sentence for the purposes of Rule 4-345(a) was one that exceeded the legislatively imposed statutory maximum."). A sentence is illegal if it exceeds an agreed upon sentence incorporated in a plea agreement. *See Cuffley v. State*, 416 Md. 568, 586 (2010) (holding that a sentence is illegal under Rule 4-345(a) when a sentence exceeds a plea agreement entered into by the defendant and the State, and then accepted by the trial judge); *Dotson v. State*, 321 Md. 515, 522-23 (1991) (finding that the plea agreement fixed the maximum sentence allowable by law). A sentence which should never been imposed by a court in the first instance is illegal. *See Alston*, 425 Md. at 339 (holding that "where no sentence or sanction should have been imposed, the criminal defendant is entitled to relief under Rule 4-345(a)."); *Ridgeway v State*, 369 Md. 165, 171 (2002) (holding that a sentence is illegal under Rule 4-345 when the court imposes a sentence

for a crime for which the defendant has been acquitted); *Johnson*, 427 Md. at 380 (holding that defendant's sentence was illegal because the defendant had never been or convicted of the underlying crime). A sentence is illegal where a defendant is convicted under an inapplicable statute. *See Moosavi v. State*, 355 Md. 651, 662 (1999) (finding "where a defendant has been charged and convicted under an entirely inapplicable statute...the resulting sentence under the inapplicable statute is an illegal sentence which may be challenged at any time."). A sentence is illegal where the trial court lacked statutory authority to impose the sentence. *See Holmes v. State*, 362 Md. 190, 195-96 (2000) (holding that a sentence of probation with home detention as a condition of probation was illegal because the trial court lacked statutory authority to impose the sentence). In contrast, a sentence is not illegal if it involves a procedural approach *or fact-finding effort* undertaken by a lower court during trial. *See Chaney*, 397 Md. at 467 (holding that a sentence is not illegal based on an argument for a lack of evidentiary foundation); *Randall Book Corp. v. State*, 316 Md. 315, 322-23 (concluding that the argument that a sentencing judge was motivated by immersible considerations does not constitute an illegal sentence within the meaning of Rule 4-345(a)); *Hoile v. State*, 404 Md. 591, 623 (2008) (finding that an argument over a particular proceeding where the sentence or probation was imposed is not an "illegal sentence" under Rule 4-345). *Johnson v. State* does not save appellant's appeal. The trial court sentenced Johnson for assault with intent to murder, even though he had not

been charged with that offense in the indictment. *Johnson*, 427 Md. at 360. Sixteen years later, he filed a motion to correct an illegal sentence. The Court of Appeals holding went to the trial court's lack of "power to render a verdict and impose a sentence on the uncharged offense of assault with intent to murder." *Id*. at 370-71. Simply because *Johnson* came to the appellate court on a motion to correct an illegal sentence, and the case at bar arises via motion to correct an illegal sentence, the law of the case doctrine and waiver is not ameliorated or abrogated.

Finally, *Bryant v. State*, 436 Md. 653, 665-66 (2014) is dispositive of appellant's claim that insufficient evidence supports an argument that a sentence is illegal under Rule 4-345, and thus may be raised at any time. Discussing petitioner's claim, the Court of Appeals rejected a similar argument, stating as follows:

> "Rather, the lack of evidentiary support was a procedural flaw, which does not fall within the category of sentences reviewable under Rule 4-345(a). Similarly, in the present case, Petitioner's complaint relates to the sufficiency of the evidence. Like the imposition of restitution in *Chaney*, the challenge here is to an alleged procedural flaw, subject to the normal preservation rules. Thus, we conclude that there is no 'inherent illegality' within the meaning of Rule 4-345(a)."

Id. at 665-66.

In sum, appellant could have, and should have, raised these sufficiency arguments in his first appeal, and thus this appeal is waived and barred under the law of the case doctrine.

He raises no challenge in this appeal to his re-sentencing proceeding. This appeal will be dismissed.

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.