UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0895

September Term, 2015

ALBERT GUSTAV GIVENS

v.

STATE OF MARYLAND

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: March 17, 2016

In April 2015, Albert Gustav Givens, appellant, filed motions to correct an illegal sentence. The Circuit Court for Anne Arundel County denied the motions and Givens appealed. The issue is whether Givens' sentence to life without the possibility of parole for first-degree murder was illegal given the State's failure to re-serve its notice of intent to seek that sentence following a mistrial. The requisite notice was timely served before the start of the trial that ended in a mistrial trial; the mistrial was declared on day one of that proceeding. Givens was retried seven months later. Under the particular circumstances of this case, we hold that the sentence imposed was not illegal and, accordingly, we affirm the circuit court's order denying relief.

FACTUAL AND PROCEDURAL BACKGROUND

In August 1992, Givens was charged with first-degree murder, armed robbery, and other offenses following the murder of Marlene Annette Kilpatrick. As summarized in a prior unreported opinion of this Court,[1] the State's case against Givens was based in large part upon the following evidence:

> On January 3, 1992 the victim's body was discovered at her residence by her daughter. The fifty-five year old victim, who suffered from multiple sclerosis, was found in her bedroom. Her body was nude from the waist down, a Sprite bottle had been inserted in her vagina, a knife was embedded in her chest, and she had sustained massive blunt force injuries to the back of her head.
>
> There was no sign of forced entry into the home and [Givens] was a family friend and "handyman." Other evidence submitted at trial included a partially filled bottle of Coca Cola found on the kitchen table; a large wrench with traces of blood on the head; and statements by [Givens] allegedly

[1] *Albert Givens v. State of Maryland*, No. 1730, September Term, 1993 (filed on May 25, 1994).

revealing a knowledge of certain facts concerning the crime that had not been released to the public.

Saliva from the top of the Coca Cola bottle was submitted for DNA comparison using the saliva and blood samples taken from [Givens] and others. The results established that 1.9% of the population, including [Givens], could have been responsible for the saliva on the bottle.[2] All of the wrenches in [Givens'] tool box were covered with a film of oil, except the large wrench had been wiped clean. The clean wrench, however, tested positive for blood stains, and expert testimony indicated that the configuration of the wrench was consistent with the head injuries sustained by the victim.

[Givens] was questioned as to his activities on January 1. He said he was with his girlfriend, who testified that he asked her to tell the police he was with her that night, but she refused to do so. A different witness testified he and [Givens] were drinking together part of the evening in question. During questioning, [Givens] allegedly admitted drinking from the Coca Cola bottle; his explanation was that he met the victim at a Caldor store and she offered to dispose of the bottle for him.[3] He described "shoving a bottle up her," although this fact, according to police testimony, had not been made public. [Givens] attributed this knowledge to the victim's son.

[2] In a subsequent unreported opinion of this Court, we noted that, "[m]ore advanced or complete testing was conducted in 1999, and [an expert in DNA analysis concluded] that 'within a reasonable degree of scientific certainty Albert Givens is the source of the DNA on the swab from the coke bottle." *Albert Gustav Givens v. State of Maryland*, No. 2710, September Term, 2006 (filed February 4, 2010) (slip op. at 6-7).

[3] At his fifth trial, Givens testified that, on the morning of January 2, 1992, he met his friend Jay Kilpatrick, the victim's son, who was accompanied by a man named Matt. Givens claimed that he, Jay, and Matt drove to the victim's home. He remained in the car while Jay and Matt entered the house. Fifteen minutes later, Givens entered the house and saw the victim seated at the kitchen table. She offered him a bottle of Coca Cola. Givens testified that Jay and the victim began to argue and Jay struck his mother on the head. Givens then left. He testified that Jay later admitted to him that he had killed his mother. *Albert Gustav Givens v. State of Maryland*, No. 2710, September Term, 2006 (slip op. at 4).

Prior to trial, the State served on Givens a timely notice of its intent to seek a sentence of imprisonment for life without the possibility of parole if Givens was convicted of first-degree murder. The State was required to serve this notice under Article 27, § 412(b) of the Maryland Code (1992 Repl. Vol.) which provided, in pertinent part, that the penalty for first-degree murder "shall be imprisonment for life unless" the State "notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of imprisonment for life without the possibility of parole[.]"[4] (This statute is currently codified as Section 2-203 of the Criminal Law ("CR") Article of the Maryland Code (2012 Rep. Vol.)).

Following a jury trial that concluded on April 13, 1993, Givens was convicted of first-degree murder and acquitted of the remaining charges. He was subsequently sentenced to life without the possibility of parole. Givens appealed and this Court, in an unreported opinion, affirmed the judgment. *Albert Givens v. State of Maryland*, No. 1730, September Term, 1993 (filed on May 25, 1994).

Givens then pursued post-conviction relief and in 1999 the post-conviction court reversed his conviction and granted him a new trial. We granted the State's application for leave to appeal and affirmed the decision of the post-conviction court. *State of Maryland v. Albert Gustav Givens,* No. 61, September Term, 1999 (filed May 2, 2001).

[4] At that time, the State also had the option of seeking a sentence of death, which also required the State to file a timely notice of that intent. *See former* Art. 27, § 412(b). The State did not seek the death sentence in this case.

On April 3, 2003, prior to the start of the second trial, the State served on Givens a timely notice of intent to seek a life sentence without the possibility of parole upon a conviction for first-degree murder. The second trial began on May 7, 2003, but nine days later, when the jury was unable to reach a unanimous verdict, the court declared a mistrial.

A third trial began on January 21, 2004, and upon its conclusion the jury found Givens guilty of first-degree murder. On February 27, 2004, the court held a sentencing hearing. Defense counsel argued that the court had no authority to impose a sentence of life without parole because the State had not served a new notice of its intent to seek that sentence prior to the start of the third trial. The court rejected that contention, concluding that "for the notice [filed prior to the first and second trials] to cease to be effective it would have to be literally withdrawn or stricken" and "that did not happen." The court then sentenced Givens to life without parole. Givens appealed and this Court reversed the judgment because of an evidentiary error. *Albert Gustav Givens v. State of Maryland*, No. 88, September Term, 2005 (filed April 19, 2005).[5]

On January 27, 2006, prior to the start of the fourth trial, the State served Givens with its notice of intent to seek a life sentence without the possibility of parole.[6] On

[5] Givens raised six issues on appeal, including whether the court erred in imposing a sentence of life without the possibility of parole because the State had failed to re-serve its notice of intent to seek that sentence prior to the third trial. We did not address that issue because we held that the trial court abused its discretion in precluding an expert witness from testifying for the defense and reversed on that ground.

[6] Before the fourth trial, Givens had moved to dismiss the murder charge on double jeopardy grounds. The circuit court denied the motion and Givens appealed. This Court affirmed. *Albert Gustav Givens v. State of Maryland*, No. 1250, September Term, 2005 (filed April 3, 2006).

April 4, 2006, the first day of the fourth trial, the State called the victim's daughter as its first witness. She testified that, at the time of her mother's murder, she had known Givens for a number of years because he had been her brother's friend and "he was considered a family friend." She related that Givens had also worked as a "handy man" for her mother, doing such jobs as house painting and yard work. When asked if she was aware "of any problems" between her mother and Givens, the witness replied: "He made a pass at her once." The defense objected to that answer and requested a mistrial, which the court granted. Hence, the mistrial occurred very early in the proceedings – after less than six pages of transcribed testimony.

Upon granting the mistrial, the court indicated its desire to "select another jury and start again, maybe tomorrow." But the jury commissioner stated that a "whole fresh panel" of jurors would not be available until the following week, and defense counsel thought even a week's delay might cause a scheduling problem for his expert witnesses. The court nonetheless tentatively scheduled the re-start of the trial for the following week. For reasons not clear from the record, however, the next (and final) trial was later scheduled for November 2006.

The fifth trial began on November 27, 2006, less than eight months after the fourth trial abruptly ended in a mistrial, and concluded on December 6, 2006, when the jury returned a verdict of guilty of first-degree murder. The judge who presided over this trial, as well as the two prosecutors who tried the case and the two defense attorneys who represented Givens, were the same individuals involved in the aborted fourth trial. (In fact,

this judge presided over all but the first trial; and the two defense attorneys and one of the two prosecutors were counsel of record in all of the previous trials except the first one.)

A sentencing hearing was held on January 8, 2007. The State reminded the court that Givens had been sentenced twice previously to life without the possibility of parole and asserted that that sentence "has been and always will be the appropriate sentence … for the crime and the heinous murder" that Givens had committed. Defense counsel, however, suggested that the court did not have the authority to impose a life sentence without the possibility of parole as the docket entries reflected that the only notice of the State's intent to seek that sentence was filed in "1992 or 1993" before the first trial. The State responded that it had served a new notice in "2004," but nonetheless maintained that "the old notice was sufficient." (In fact, the most recent notice had been served a year earlier, on January 27, 2006, prior to the start of the aborted fourth trial.)

The court inquired whether "there [was] some basis" to "suggest that the State had indicated an intention to withdraw the notice that was previously filed[.]" Defense counsel responded "no." The court did not address the issue further. And after reviewing the evidence presented at trial, which it found "overwhelming," the court sentenced Givens to life without the possibility of parole.

Givens appealed. He raised nine issues for appellate review, but he did not challenge the State's notice or the court's authority to impose a sentence of life without parole. This Court affirmed the judgment. *Albert Gustav Givens v. State of Maryland*, No. 2710, September Term, 2006 (filed February 4, 2010).

Givens had also filed an application for review of sentence. On May 18, 2007, a three-judge panel of the circuit court affirmed the sentence of life without parole.

In 2010, Givens filed a petition for post-conviction relief. He raised twenty-two allegations of error related to the fifth trial, but he did not challenge his sentence. The circuit court denied relief and this Court denied his application for leave to appeal that decision. *Albert Gustav Givens v. State of Maryland*, No. 2459, September Term, 2011 (filed October 3, 2012).

In April 2015, Givens filed a motion under Md. Rule 4-345(a) seeking to strike his sentence as illegal because the only written notice of the State's intent to seek a life sentence without parole was served, he claimed, in 1992 prior to the first trial.[7] The State opposed the motion, noting that the notice had been re-served in 2006 prior to the fourth trial that ended in a mistrial and asserted that "this notice was sufficient[.]" The circuit court denied the motion to strike the sentence, prompting this appeal.

[7] Maryland Rule 4-345(a) provides that the "court may correct an illegal sentence at any time." The scope of the Rule is limited, however, to sentences that are "inherently illegal," that is, where there was no conviction warranting any sentence, *Chaney v. State*, 397 Md. 460, 466 (2007); where the sentence imposed was not a permitted one, *id.*; or where the sentence imposed exceeded the sentence agreed upon as part of a binding plea agreement. *Matthews v. State,* 424 Md. 503, 514 (2012). Givens raised a cognizable illegal sentence claim because the penalty for first-degree murder is life imprisonment, *unless* the State gives timely notice of its intent to seek a sentence of life without the possibility of parole. *See* CR §§ 2-201(b) & 2-203. *See also Gorge v. State,* 386 Md. 600, 614 (2005) ("the court may *only* sentence a defendant to life without the possibility of parole *if* the State gave timely written notice to the defendant") (emphasis in the original).

DISCUSSION

The legality of Givens' sentence to life without parole turns on whether the State was required to re-serve its notice of intent to seek that sentence before the fifth and final trial that commenced on November 27, 2006. The facts are not in dispute. And because the question before us involves purely a matter of law, our review is *de novo*. *Gorge v. State*, 386 Md. 600, 610 (2005).

At the time of Givens' fourth and fifth trials (as well as today), the statute provided:

> A defendant found guilty of murder in the first degree may be sentenced to imprisonment for life without the possibility of parole only if: (1) at least 30 days before trial, the State gave written notice to the defendant of the State's intention to seek a sentence of imprisonment for life without the possibility of parole[.]

CR § 2-203.

As set forth above, on January 27, 2006, more than 30 days before the start of Givens' fourth trial, the State served Givens with written notice of its intent to seek a life sentence without parole. This was the third such notice the State had served on Givens over the years. The fourth trial, as noted, ended in a mistrial trial on April 4, 2006 – on the very first day of that trial during the testimony of the State's first witness. Thus, the precise issue before us is whether the January 27, 2006, notice survived that mistrial. For the reasons to be discussed, we hold that, under the particular facts of this case, the January 27, 2006 notice remained viable after the mistrial and hence the statute was satisfied.

Our analysis requires a discussion of several prior Maryland appellate decisions, including *Hammersla v. State*, 184 Md. App. 295 (2009) and *Harrod v. State*, 423 Md. 24

(2011) which seem, at first blush, to mandate a contrary result. But we turn first to *Gantt v. State*, 73 Md. App. 701 (1988).

In *Gantt*, we addressed whether the State was required to re-serve a notice of intent to seek an enhanced sentence upon remand for re-sentencing purposes following an appeal. Gantt was convicted of malicious wounding and, because this was his third conviction for a crime of violence, he was sentenced to an enhanced 25-year sentence pursuant to former Art. 27, § 643B(c) of the Maryland Code, currently codified as CR § 2-203. *Id.* at 702. Gantt appealed and we affirmed the conviction, but vacated the sentence because the sentencing court had applied an incorrect standard for determining whether the factual predicate for the enhanced sentence had been satisfied. *Id.* at 702-703. Accordingly, we remanded the case for re-sentencing purposes only. *Id.* at 702. Upon re-sentencing, the court again sentenced Gantt to the enhanced 25-year term of imprisonment. *Id.* at 703. That sentence, however, was permitted only if at least 15 days *before sentencing*, the State's Attorney served the defendant with notice of its intent to seek the enhanced sentence. *Id.* The requisite notice was timely served before the original sentencing, but not re-served after the sentence was vacated and the case remanded for re-sentencing.

Gantt appealed and argued that, due to the State's failure to re-serve the notice, the court had no authority to impose the enhanced sentence. *Id.* We disagreed. Judge Moylan writing for a panel of this Court observed that "the criminal proceeding against" the defendant "consisted, theoretically" of the following "five stages":

> The first was the accusatory stage resulting in the filing of the indictment by the grand jury. The second stage . . . was that at which any pretrial motions could be filed and resolved. The third stage was the actual trial on the merits

> of guilt or innocence. The fourth stage was the filing by the State's Attorney of notice of intention to proceed under the mandatory sentencing procedures … The fifth and final stage was the sentencing hearing itself. [8]

Id. at 704.

We concluded that "the notice timely given before the first sentencing hearing adequately put [Gantt] on alert as to the State's intention." *Id.* at 703-04. Moreover, we stated that the "first sentencing, the successful appeal therefrom, and the resentencing were all one continuing procedural phenomenon." *Id.* at 704. Because the "error" in Gantt's case occurred at the fifth stage (sentencing), we said that "[t]he remand appropriately required that that stage be repeated." *Id.* And because the other stages were "free from error," the original sentencing notice remained effective. *Id.* We explained that, "[w]hen a remand … beams us back to an earlier trial stage, all things are as they were then, including the announced intention to expose the [defendant] to the hazard of enhanced punishment." *Id.* We thus concluded that, where a case is remanded for re-sentencing (stage five), "a notice of intention to seek enhanced punishment remains in force as evidence of that intention unless acted upon by a contraindication." *Id.*

Twenty-two years later, in *Hammersla, supra,* 184 Md. App. 295, we were asked to determine whether the State's notice of intent to seek a life sentence without parole had to be re-served on the defendant prior to a re-trial following a reversal of the conviction on

[8] In this "theoretical" criminal proceeding, the State's notice of its intent to seek an enhanced or mandatory penalty occurs in stage 4, after trial (stage 3) but before sentencing (stage 5). That is because the rule at issue in *Gantt* (Md. Rule 4-245) required the State to serve the notice "at least 15 days before sentencing." In Givens' case, the requisite notice had to be served "at least 30 days before trial" and hence could have been filed anytime between the filing of the indictment and 30 days before trial began.

appeal. Hammersla was convicted by a jury of felony murder (and other offenses) and sentenced to life without parole in accordance with CR § 2-203. *Id.* at 297. The State had timely served its notice of intent to seek that sentence. *Id.* at 309. Hammersla appealed his conviction and this Court reversed the judgment and remanded for a new trial. *Id.*

Following the appeal, but before the re-trial, the State offered to "withdraw its request" for a life sentence without parole and recommend a life sentence if the defendant entered a guilty plea. *Id.* When Hammersla rejected the plea offer, the State served him with a new notice of its intent to seek a life sentence without parole, but the notice was untimely as it was served less than 30 days before the start of the re-trial. *Id.* A jury, again, convicted Hammersla of felony murder. *Id.* at 297. At sentencing, Hammersla argued that the original sentencing notice, which was timely served before the first trial (more than two and one-half years before the second trial began) was "ineffective and should be stricken." *Id.* at 309. The court disagreed and sentenced Hammersla to life without parole. *Id.* Hammersla appealed.This Court (Woodward, J.) concluded that the original notice did not satisfy the notice requirement in CR § 2-203. *Id.* at 310.

Referring to "the five stages of a criminal proceeding articulated in *Gantt*," we concluded that, because Hammersla's conviction was reversed on appeal, "with an order for a new trial," the slate was wiped clean "and the case began anew procedurally." *Id.* at 313. In other words, we said that Hammersla's case "returned to stage (2), 'the stage at which any pretrial motions could be filed and resolved.'" *Id.* at 313-314 (quoting *Gantt,* 73 Md. App. at 704). We therefore held that "a new notice under CR § 2-203 was required if the State wished to seek a life sentence without the possibility of parole" upon re-trial.

Id. at 314. And because the State had failed to timely serve a new notice, we vacated the sentence and remanded for re-sentencing. *Id.*

Givens' case, however, is distinct from *Hammersla* because his fifth trial did not follow a reversal upon appeal which "beamed" the case back to *Gantt's* stage 2 of the criminal proceeding. Rather, Givens' fifth trial followed on the heels of the fourth trial which ended, as we have emphasized, in a mistrial on day one of that proceeding. Thus the mistrial necessarily meant that "the actual trial on the merits of guilt or innocence" (*Gantt's* stage 3) would begin again anew. The State's January 27, 2006 notice of its intent to seek a sentence of life without parole remained viable and satisfied CR § 2-203 because it had no effect on the actual trial – it did not require a ruling by the court or influence the trial proceedings in any way. And it was served on Givens "at least 30 days before trial" as required by the statute. The intervening mistrial was as if the fourth trial had never taken place. *Powers v. State*, 285 Md. 269, 285 (1979) ("In Maryland, a mistrial is the equivalent to no trial at all.") *Accord United States v. Williams*, 59 F.3d 1180, 1185 (11th Cir. 1995) (where the government timely filed the requisite "information" that it intended to seek an enhanced sentence, there was no need to re-file and re-serve it prior to re-trial following a mistrial, as the "[e]stablished purposes of the filing and service" — to allow the defendant to contest the accuracy of the information and to determine whether to plead guilty or go to trial — "are fully met upon the first filing and service, at least where the case involves the same attorneys, the same court, and the same indictment."); *United States v. Cooper,* 461 F.3d 850 (7th Cir. 2006) (same); *United States v. Mayfield*, 418 F.3d 1017 (9th Cir. 2005) (same).

Unlike in *Hammersla*, there was no intervening event in Givens' case that may have voided the notice, such as a conviction and subsequent reversal upon appeal. Nor was there a significant lapse in time between service of the notice and the re-trial – a gap of more than two and one-half years in *Hammersla* compared with less than eight months in Givens' case. And, as noted, the same attorneys represented both the State and Givens in the fifth and several previous trials. Finally, unlike *Hammersla,* in Givens' case there was no plea offer by the State between trials which could have suggested to Givens that the State was amenable to recommending a sentence other than life without parole – a sentence it had sought in all his previous trials.

In essence, Hammersla's trial was a complete "do over," whereas Givens' fifth trial was a "re-start" following a "false start." To require the State to re-serve its sentencing notice in a case like Givens' could lead to the absurd result of precluding a life sentence without the possibility of parole where a judge grants a mistrial early in the proceeding and desires, as here, to "select another jury and start again, maybe tomorrow" (or anytime sooner than 30 days after the mistrial).

Givens relies on the Court of Appeals' decision in *Harrod v. State* for its holding that after a mistrial there is a 'tabula rasa,' a clean slate, and all pre-trial procedures must be repeated. 423 Md. 24, 35 (2011). In that case, following a mistrial, Harrod was convicted at a second trial on the charge of possession with intent to distribute cocaine, where over his objection, the State was permitted to introduce both a chemist report and transcribed testimony of the chemist who had testified at Harrod's first trial. On appeal, Harrod argued that his demand for the chemist to appear at trial was not triggered under

§ 10-1003 of the Courts and Judicial Proceedings ("CJP") Article because the State provided no notice prior to his retrial that it intended to admit the report without calling the chemist. *Harrod*, 423 Md. at 32. The State argued that notice was not necessary because "the chemist report was made available prior to the first trial … and the chemist's testimony was admitted during the first trial." *Id.* at 34. The Court of Appeals held that because the first trial ended in a mistrial "the case 'began anew procedurally'" and therefore that the "mistrial revived the State's obligation" to comply with the statute. Therefore the State had to alert Harrod that it intended to introduce the chemist report at the trial, triggering Harrod to file a new demand to compel the appearance of the chemist.

We think Givens reads too much into the *Harrod* opinion. *Harrod* did not reject, but relied upon, the *Gantt/Hammersla* division of a criminal trial into five stages: "(1) the accusatory stage resulting in the filing of the indictment, (2) the stage at which any pretrial motions could be filed and resolved, (3) the actual trial on the merits of guilt or innocence, (4) the filing of the State's Attorney's notice of intention to proceed under mandatory sentencing procedures, and (5) the sentencing hearing itself." *Gantt*, 73 Md. App. at 704; *Hammersla*, 184 Md. App. at 311. Because the mistrial in *Harrod* occurred at Stage 3 (because of jury impasse), the case was required to begin again at the beginning of Stage 3 (with a notice of intent to admit a chemist's report pursuant to CJP §§ 10-1001, 10-1003). Although the *Harrod* opinion refers to this notice as a "pretrial" procedure, we believe that, as it does not require a pretrial ruling by the court and concerns the admissibility of evidence at trial, it is properly characterized as a Stage 3 event, not a Stage 2 event. This interpretation is confirmed by what actually happened in *Harrod*. The case wasn't sent

back to Stage 1, at which time the State would have been required to file a new indictment. Nor was the case sent back to Stage 2 at which pre-trial motions, like Harrod's motion to suppress, would have been required to be redundantly reargued. Rather, it was sent back for a new trial. In Givens' case, the mistrial occurred on the first day of trial, and thus in Stage 3, and thus, like Harrod, he is returned back to the beginning of Stage 3. There was no need, language of *Harrod* apparently to the contrary notwithstanding, to return to Stage 1 and re-indict Givens nor to Stage 2 at which all pre-trial motions were argued and decided, and notice to seek the enhanced penalty given.

In short, *Harrod* is distinct from Givens' case as the notice requirement in *Harrod* dealt with a quintessential *trial* issue, that is, the admissibility of evidence at trial. In contrast, the State's notice of intent to seek a life sentence without parole upon a conviction for first-degree murder has no bearing on evidentiary issues or the trial proceedings, as it relates solely to sentencing in the event of a conviction for first-degree murder. Consequently, under the facts of the case *sub judice,* there was no need for the State to re-serve Givens with its sentencing notice following the mistrial. Accordingly, his sentence is legal.

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