UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1077

September Term, 2015

JEROME WRIGHT

v.

STATE OF MARYLAND

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

JJ.

Opinion by Thieme, J.
Concurring Opinion by Friedman, J.

Filed: May 17, 2016

A jury in the Circuit Court for Baltimore City convicted Jerome Wright, Appellant, of possession of marijuana. Several years later, Appellant filed a motion to correct an illegal sentence, which was denied. In this appeal, Appellant presents the following question for our review: "Did the lower court err in denying [Appellant's] motion to correct an illegal sentence?"

For the following reasons, we answer Appellant's question in the affirmative, reverse the judgment of the circuit court, and vacate Appellant's conviction and sentence.

BACKGROUND

Appellant was charged with, and pled guilty to, possession of marijuana in the District Court of Maryland for Baltimore City. Appellant appealed his conviction to the Circuit Court, where he was tried before a jury on the same charge. Following deliberations, the jury announced its verdict:

> THE CLERK: Members of the jury, have you agreed upon a verdict?
>
> [THE JURY]: Yes.
>
> THE CLERK: Who shall say for you? Madam Forelady, would you please stand? Okay. As to the case of the State of Maryland versus Jerome Wright, … how do you find [Appellant] on the charge of possession of marijuana, not guilty or guilty?
>
> [FORELADY]: Guilty.
>
> THE CLERK: Okay. Ma'am, you may have a seat. Counsel, would you like the jury polled?
>
> [DEFENSE]: No.
>
> THE COURT: All right.

At this time, the court dismissed the jury, and Appellant was ultimately sentenced to time served.[1] Several years later, Appellant filed a motion to correct an illegal sentence, arguing that his sentence for possession of marijuana was illegal because the jury's verdict was neither polled nor hearkened. The circuit court denied the motion on the grounds that any defect in the jury's verdict was procedural, not substantive. This timely appeal followed.

STANDARD OF REVIEW

Maryland Rule 4-345(a) allows a trial court to "correct an illegal sentence at any time." *Id.* A sentence is considered illegal if the sentence itself is not permitted by law, such as when "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed[.]" *Chaney v. State*, 397 Md. 460, 466 (2007). "Such illegal sentences are subject to open-ended collateral review." *Carlini v. State*, 215 Md. App. 415, 419 (2013). "[W]hether the ultimate sentence itself is or is not inherently illegal…is quintessentially a question of law calling for *de novo* appellate review." *Id.* at 443.

DISCUSSION

"By its Declaration of Rights, common law, and procedural rules, Maryland continues an English tradition dating from the Middle Ages in requiring that criminal jury

[1] Currently, Appellant is serving an eighteen-year sentence for violating his probation in a different case. It is unclear from the record the exact reason Appellant was convicted of violating his probation, although both parties agree that the violation stemmed from the circumstances surrounding the instant conviction (either directly or indirectly).

verdicts be unanimous." *Lattisaw v. State*, 329 Md. 339, 344 (1993). "A jury verdict that is not unanimous is defective and will not stand."[2] *Caldwell v. State*, 164 Md. App. 612, 635 (2005). "A verdict is defective for lack of unanimity when it is unclear whether all of the jurors have agreed to it." *Id.* at 636. "This potential incongruity in the verdict usually results from the conduct, verbal or otherwise, of one of the jurors that signals to the court that some ambiguity exists – *i.e.* there was something short of unanimous agreement among the jurors." *Colvin v. State*, 226 Md. App. 131, 141 (2015).

As part of its unanimity requirement, the Maryland Rules specify that the verdict "shall be returned in open court." *Lattisaw*, 329 Md. at 345 (citation, quotation marks, and footnote omitted). This involves three distinct procedures: (1) the foreman, speaking for the jury, states the verdict on the record; (2) on request by the defendant, the jury is polled, and each juror announces his verdict on the record; and (3) the verdict is hearkened. *Jones v. State*, 384 Md. 669, 682-84 (2005). The primary purpose of the polling and/or hearkening requirement is to ensure "certainty and accuracy, and to enable the jury to correct a verdict, which they have mistaken, or which their foreman has improperly delivered." *Id.* at 684 (citation and quotation marks omitted). Although polling may be waived, "both polling and hearkening may not be waived in the same case." *State v. Santiago*, 412 Md. 28, 32 (2009).

[2] The right to a unanimous verdict may be waived, but "only when [a defendant] 'competently and intelligently' waives that right." *State v. McKay*, 280 Md. 558, 572 (1977) (citation omitted).

In addition to their import in ensuring unanimity, polling and hearkening are essential to "the concept of finality with respect to jury verdicts." *Id.* at 37-38. A verdict is not perfected, and thus is not final, "until after the jury has expressed their assent" through polling or hearkening. *Givens v. State*, 76 Md. 485, 487 (1893). Until this time, "the verdict may be altered or withdrawn by the jurors, or by the dissent or non-concurrence of any one of them." *Smith v. State*, 299 Md. 158, 168 (1984). The *Smith* Court summarized the interplay between the proper return of a verdict and the verdict's finality as follows:

> [T]he jury has control of the verdict until it is final. Absent a demand for a poll, the verdict becomes final upon its acceptance when hearkened. When a poll is demanded, the verdict becomes final only upon its acceptance after the poll.

Id.

It is axiomatic, therefore, that a defendant cannot be sentenced on a verdict that has been neither polled nor hearkened. In short, "a jury verdict, rendered and announced in open court, that is neither polled nor hearkened is not properly recorded and is therefore a nullity." *Santiago*, 412 Md. at 32; *see also Heinze v. State*, 184 Md. 613, 616 (1945) ("It is a fundamental principle that the verdict of a jury in a criminal case has **no effect in law** until is recorded and finally accepted by the court.") (emphasis added).

In the present case, there is little doubt, and the State does not contend otherwise, that the jury was neither polled nor the verdict hearkened. Ordinarily, such a defect would render the verdict null and any sentence imposed illegal. *See e.g. Santiago*, 412 Md. at 42; *Jones*, 384 Md. at 686 ("[B]ecause the jury was not polled and hearkened…, the verdict of

guilt cannot stand and any sentence apportioned thereto must be vacated."); *Colvin*, 226 Md. App. at 138 ("[I]t is clear that when a verdict is not finalized, any sentence based upon such a verdict is illegal.").

The State maintains, however, that such relief is unjustified in the present case because Appellant has fully served his sentence on the underlying conviction. In support of its position, the State relies almost exclusively on the Court of Appeals' decision in *Barnes v. State*, 423 Md. 75 (2011). In that case, the defendant was convicted of third-degree sex offense and directed to register as a sex offender. *Id.* at 78. The defendant was later jailed after he failed to notify local law enforcement of a change in his address, which was required under the sex offender registry statute. *Id.* After his release from prison, the defendant filed a motion to correct an illegal sentence, claiming that the registration requirement, and thus the subsequent incarceration, was illegal. *Id.*

On appeal, the Court of Appeals dismissed as moot the defendant's motion on the grounds that he had already completed his sentence. *Id.* at 88. The Court stated that "[a]s Rule 4-345(a) simply permits a court to revise an illegal sentence, rather than to modify or overturn the underlying conviction, it follows that a court can no longer provide relief under that rule once a defendant has completed his or her sentence." *Id.* at 86. The Court concluded that relief under Rule 4-345(a) was inappropriate because there was no "sentence" for the Court to revise. *Id.* at 88.

The above language notwithstanding, we find the Court's holding in *Barnes* to be inapposite to the case at hand.[3] To begin with, the Court qualified its stance by stating that once a defendant has fully served his sentence, "a court should dismiss [a motion to correct an illegal sentence] as moot **unless special circumstances demand its attention**." *Id.* at 86 (emphasis added). Although the Court did not provide any examples of what constitutes "special circumstances," we conclude that the circumstances of the instant case certainly would qualify as "special," in light of the Courts' jurisprudence regarding juror unanimity and the finality of verdicts, as discussed above. Not only that, but the Court of Appeals has emphasized that sentences based on illegal convictions, such as those stemming from a verdict that was neither polled nor hearkened, are unique because "the trial court, for various reasons, lacked the power or authority to impose the contested sentence." *Johnson v. State*, 427 Md. 356, 370 (2012). Because such claims implicate "the trial court's power

[3] We note that the Court's opinion in *Barnes* was joined by a three-judge plurality and that Judge Greene concurred in the judgment only. In such instances, the holding of the Court is determined by the rule laid down by the Supreme Court in *Marks v. U.S.*, 430 U.S. 188 (1977), which states: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority of judges], 'the holding of the Court may be viewed as that position taken by those [judges] who concurred in the judgments on the narrowest grounds[.]'" *Id.* at 193 (citation omitted). Generally, the "narrowest grounds" would be determined by comparing the rationale of the plurality opinion with that of the concurring opinion. *Id.* at 193-94 (holding determined by the more narrow concurring opinion); *see also O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) (holding determined by the plurality opinion because the concurring justices concurred on broader grounds). Unfortunately, no such concurring opinion was provided in the instant case. Accordingly, we incorporate the holding as discussed by the plurality opinion and as applied under the circumstances outlined therein.

or authority, [they] may be raised '**at any time**' under Rule 4-345(a)." *Id.* at 371 (emphasis added).

What's more, when a sentence has been held to be fundamentally illegal, as is the case here, the Court of Appeals has consistently held that such a claim should be addressed on the merits, even in cases where the defendant's claim is shadowed by certain procedural or substantive defects that would normally result in dismissal. *See e.g. Waker v. State*, 431 Md. 1, 7 (2013) ("It has been settled…that an illegal sentence claim 'under Rule 4-345(a)…is not subject to waiver.'") (citations omitted); *Alston v. State*, 425 Md. 326, 339 (2012) ("Where the trial court imposes a sentence or other sanction upon a criminal defendant, and where no sentence or sanction should have been imposed, the criminal defendant is **entitled to relief** under Rule 4-345(a).") (emphasis added); *Jones*, 384 Md. at 678 ("[W]hen the trial court has allegedly imposed a sentence not permitted by law, the issue should ordinarily be reviewed[.]") (citations and quotation marks omitted); *State v. Griffiths*, 338 Md. 485, 496 (1995) ("Rule 4-345(a)…creates a limited exception to the general rule of finality, and sanctions a method of opening a judgment otherwise final and beyond the reach of the court."). As the Court stated quite succinctly in *Matthews v. State*, 424 Md. 503, 519 (2012): "[W]hether a sentence illegality is cognizable under Rule 4-345(a) depends *solely* on whether the illegality inheres in the sentence itself, and *not* on the timing of the claim of illegality or the procedural posture of the case."

Finally, and perhaps most importantly, the Court of Appeals has expressly held that "[w]hen the illegality of a sentence stems from the illegality of the conviction itself, Rule

4-345(a) **dictates** that both the conviction and the sentence be vacated." *Johnson*, 427 Md. at 378 (emphasis added); *see also Carroll v. State*, 202 Md. App. 487, 519 (2011) (holding that the jury's failure to read a verdict in open court required that "the conviction should be vacated under *Jones*."). This further distinguishes the instant case from *Barnes*, as the Court's dismissal of the defendant's claim in that case was predicated on the presumption that "because [the defendant] served his full sentence, there is no 'sentence' for us to revise, meaning that we can 'no longer fashion an effective remedy.'" *Barnes*, 423 Md. at 88 (quoting *Cottman v. State*, 395 Md. 729, 744 (2006) ("We consider a case moot…when the court can no longer fashion an effective remedy.")). Consequently, the Court's suggestion in *Barnes* that Rule 4-345(a) does not permit a court to overturn a conviction is not applicable in the context of an illegal conviction; instead, the rule requires, under *Johnson*, the vacating of both the illegal sentence and the illegal conviction. [4]

In sum, we hold that the trial court's failure to poll the jury or hearken the verdict rendered the verdict a nullity and any sentence imposed illegal. Moreover, under the unique circumstances of this case, Appellant's claim is not moot despite the fact that he has already completed his sentence. Accordingly, the circuit court erred in denying

[4] We also note that, in *Barnes*, the Court indicated that the defendant was not entitled to relief because he was not "currently subject to any consequences stemming from his convictions, other than the requirement that he register as a sex offender." *Barnes*, 423 Md. at 87. In the present case, however, it appears that Appellant is currently subject to consequences, namely an 18-year prison sentence for violating his probation. Unfortunately, the parties disagree as to whether Appellant's instant conviction was the actual cause of his violation, and the record does not provide much detail to resolve this conflict. Accordingly, we refuse comment on this matter, as it is not dispositive in light of the other factors discussed herein.

Appellant's motion to correct an illegal sentence. We hereby reverse the judgment of the circuit court and vacate Appellant's sentence and conviction.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CONVICTION AND SENTENCE VACATED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

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I concur. I particularly agree that this case presents "special circumstances" of the type contemplated by the plurality Opinion in *Barnes*, wherein we can correct an illegal sentence despite that sentence having been fully served. Slip Op. at 6 (discussing *Barnes v. State*, 423 Md. 75 (2011)). I write separately to register my dissatisfaction with *Barnes*.[51]

When the Court of Appeals fractures, writes multiple separate opinions that don't command a majority of the Court, and doesn't provide a clear rule of decision, it makes things more difficult for the inferior courts, for practitioners, and in these days of increased self-representation, for the public. And while, as a matter of interpretation, I might prefer Judge Eldridge's *Barnes* dissent (what part of "at any time" is unclear?), I will, of course, follow whatever rule commands a majority of the Court.

The irony, of course, is that in *Barnes*, the Court wasn't trying to interpret a constitution (which involves, in part, determining the intentions of the People adopting a constitutional provision), or to interpret a statute (which involves, in part, trying to ascertain the intention of the legislature), but rather, to interpret its own Rule (which involves only trying to ascertain its own mind). Moreover, the Court need not grant certiorari in this case or another to fix the *Barnes* problem, but can do so merely by modifying the language of Rule 4-345 in a way upon which a majority of the Court can agree.

[1] This is my second encounter with *Barnes* in my short tenure on this Court. *Feaster v. State*, Case No. 1967 (Sept. Term 2014) (Dec. 30, 2015) Slip Op. at 4 n.4 (unreported) (Friedman, J.).