UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2829

September Term, 2014

DAVID W. STARKEY

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Arthur,

JJ.

Opinion by Nazarian, J.

Filed: August 26, 2016

A jury in the Circuit Court for Kent County convicted David Starkey of first-degree murder and two counts of attempted murder, and we affirmed his conviction in an unreported opinion filed in February 2000. After unsuccessfully pursuing post-conviction relief, Mr. Starkey filed a Motion to Correct an Illegal Sentence, in which he took issue with the length of his sentence, and also argued that the circuit court erred by ordering him to pay restitution. The circuit court denied the motion. We affirm most of that decision. But because Mr. Starkey failed to provide us with transcripts of his sentencing hearing, we dismiss his claims of error as they relate to the order to pay restitution.

I. BACKGROUND

Mr. Starkey and his brother Daniel were both charged with first-degree murder and related offenses as a result of an incident that took place on the country roads connecting Dover, Delaware with Georgetown, Maryland:

> On December 4, 1999, Meriam Spriggs, her cousin, Germaine Clarkston, and Germaine's daughter, Michele Wilson, went shopping in Dover, Delaware, in an automobile owned by Germaine Clarkston. They left Dover at approximately 5:15 p.m. Ms. Wilson was driving and Ms. Clarkston occupied the front passenger seat. Meriam Spriggs was seated in the rear of the automobile. They took Route 13 to 291 back to Kent County. They elected to drive through Millington, because they were interested in a banquet that was being held in the Millington Fire House. They left Millington and proceeded toward Chestertown. They came upon a bypass and a couple of traffic circles. A short distance after the second circle, they noticed a black pickup truck behind them flashing its lights and blowing its horn. When they got to Bay Shore Road they noticed a truck behind them with its headlights on bright. They then turned left onto Georgetown Road. The truck behind them then came up beside them and shots were fired. Ms. Clarkston

> was shot and died two days later. Ms. Wilson was injured in her thigh and hand.
>
> [Mr. Starkey]'s explanation was that, after a day of hunting, he and Daniel were riding in Daniel's black pickup truck driven by Daniel. A small dark colored car in front of them braked suddenly, causing Daniel to apply his brakes sharply. This irritated them, and they followed the car. It appeared to them that the driver of the car was intoxicated. They tried to pass but the car purposely prevented them from doing so. [Mr. Starkey] said that the shooting was accidental. He pointed the shotgun to scare the occupants, but the truck hit a bump and the gun went off.
>
> Prior to the shooting, at 6:07 p.m., a caller made a 911 call to report a possible drunk driver. The caller identified himself as David Starkey.

Starkey v. State, No. 1662, Sept. Term 2000, slip op. at 2-3 (filed Feb. 8, 2000).

Mr. Starkey was convicted of the first-degree murder of Ms. Clarkston, the attempted first-degree murder of Ms. Wilson, and the attempted first-degree murder of Ms. Spriggs. He received a term of life imprisonment for the first-degree murder conviction, a concurrent fifteen-year term of incarceration for the attempted first-degree murder of Ms. Wilson, and a consecutive fifteen-year term for the attempted first-degree murder of Ms. Spriggs.

Mr. Starkey appealed, and we affirmed his conviction in an unreported opinion in February 2000. Mr. Starkey pursued post-conviction relief, and when that failed, filed two separate motions aimed at modifying or reducing his sentence. When those, too, were unsuccessful, Mr. Starkey filed a Motion to Correct an Illegal Sentence. The circuit court denied the motion on October 8, 2014, and Mr. Starkey appeals that decision. Mr. Starkey

did not provide us with transcripts from his trial or sentencing hearing, however, and accompanying its brief, the State moved to dismiss the appeal for failure to conform with Md. Rule 8-602(a)(6) (providing for dismissal when the contents of the record do not include the relevant transcripts). We issued an order requiring Mr. Starkey to show cause why the appeal should not be dismissed. Mr. Starkey's response indicated that he could not pay the fees, and that he believed the transcripts were already on record with this Court.[1]

II. DISCUSSION

On appeal, Mr. Starkey asserts that the circuit court was obligated to hold a hearing before deciding his Motion to Correct an Illegal Sentence, argues that the court erred by ordering him to pay restitution to Linwood Clarkston, the son of one of the victims, and attacks various aspects of his sentence.[2] We can dispose easily with his contention that a

[1] Over sixteen years have passed since we heard his appeal on the merits, so the circuit court record was long has long since been returned to the circuit court.

[2] Mr. Starkey phrases the questions for the court as follows:

1. Did the lower Court err by not correcting or amending the Trial Court[']s decision to sentence Appellant to a consecutive fifteen year sentence?

2. Did the lower Court err in judgment when it did not overturn the order of restitution to someone who was not a named victim in this case?

3. Did the lower Court err by not amending the fifteen year sentence f[or] attempted first degree murder, when intent for that victim was transferred to another victim to make the case for first degree murder?

(continued…)

hearing was required: the Maryland Rules don't require one. Mr. Starkey's motion to correct an illegal sentence was filed under Md. Rule 4-345, which requires a court to hold a hearing only if it modifies, reduces, corrects, or vacates a sentence. *Id.* (f). Since the court made no changes to the sentence, no hearing was required.

Moreover, we must dismiss Mr. Starkey's claim regarding the restitution order because the absence of any transcripts renders us unable to evaluate it. Mr. Starkey argues that since Mr. Clarkston was not a victim in this case, he isn't owed restitution, but he cannot avoid paying restitution merely because the victim is no longer alive to accept it. By that theory, no defendant convicted of murder would ever pay restitution. Rather, the law permits payments to be made to the victim of the defendant's crime, or, "if the person is deceased, the personal representative of the[ir] estate." Md. Code (2001, 2008 Repl. Vol.), § 11-601 of the Criminal Procedure Article. Without a record of Mr. Starkey's trial or sentencing hearing, however, we are unable to review whether Mr. Clarkston was or was not a proper recipient of such payments.

4. Did the lower Court err in not correcting or amending Appellant's sentence of life plus fifteen years, when the Trial Court sentenced Appellant's co-defendant to three concurrent twenty-five year sentences?

5. Did the lower Court err by not ordering the Appellant to receive a belated Modification Hearing?

We could dismiss the remainder of the appeal on the same grounds as well. But because the docket entries provide us enough information to evaluate his remaining claims, we will address them.

Mr. Starkey claims that his sentence is illegal in three respects. He argues *first* that the consecutive fifteen-year sentence he received for the attempted murder of Ms. Spriggs is illegal, and that he should not have been sentenced separately for each count of attempted first-degree murder because the charges against him stemmed from a single event. In reality, though, an intentional crime of violence perpetrated against multiple victims supports a like number of charges and sentences. *Albrecht v. State*, 105 Md. App. 45, 59-60 (1995) ("With intentional crimes of violence, it is clear that the unit of prosecution is each separate victim. To explode a bomb on an airplane containing 300 passengers and crew constitutes 300 murders, not one." (quoting *Albrecht*, 97 Md. App. at 685-86 n.4)). Although Mr. Starkey only killed Ms. Clarkston, Ms. Wilson and Ms. Spriggs were victims of his crime just the same, and separate charges and sentences were appropriate.

Second, Mr. Starkey claims that he should not have been convicted of the attempted first-degree murder of Ms. Wilson (the driver and his intended victim) because he was convicted of the first-degree murder of Ms. Clarkston under the theory of transferred intent. If his intent to kill Ms. Wilson was transferred to Ms. Clarkston, he argues, his intent was "used up" and cannot be reassigned to Ms. Wilson to support the attempt charge. But Mr. Starkey misunderstands the doctrine of transferred intent, a legal fiction intended to insure that a defendant who accidentally shoots a bystander rather than the intended victim doesn't

escape punishment for murder because of their "lucky" mistake. *Henry v. State*, 419 Md. 588, 595 (2011). "Contrary to what its name implies, the transferred intent doctrine does not refer to any actual intent that is capable of being 'used up'. . . ." *Id.* at 600 (citation omitted). Rather, transferred intent applies "to impose criminal liability for the murder of the unintended victim *in addition to the attempted murder of the intended victim*." *Poe v. State*, 341 Md. 523, 530 (1996) (emphasis added). When Mr. Starkey aimed his shotgun into the car, he intended to kill Ms. Wilson; the fact that he ended up killing Ms. Clarkston instead doesn't negate his original intent to kill Ms. Wilson.

Third, Mr. Starkey claims that his sentence is illegal because it is longer than that given to his co-defendant. Although a court is "vested with virtually boundless discretion" to fashion a sentence based on the facts and circumstances of the crime and the background of the defendant, this broad discretion does not permit the court to impose a sentence that is unconstitutional or that exceeds statutory limitations. *Cruz-Quintanilla v. State*, 228 Md. App. 64, 68 (2016) (quoting *Jennings v. State*, 339 Md. 675, 683 (1995)). Such a sentence would be illegal, and can be corrected at any time. Md. Rule 4-345(a); *see also State v. Wilkins*, 393 Md. 269, 273 (2006). Mr. Starkey claims that Maryland law prohibits a trial court from sentencing one co-defendant to more time than the other. On this point, he is wrong. A court *may* take into consideration a co-defendant's sentence as a mitigating factor, but there is no statutory requirement that it do so. *Bryant v. State*, 374 Md. 585, 615 (2003) (citing *Johnson v. State*, 303 Md. 487, 519 (1985)). The fact that Mr. Starkey's sentence is longer than his co-defendant's does not make his sentence illegal, and to the

extent that this argument is more properly characterized as one that the circuit court abused its discretion in setting the length of Mr. Starkey's sentence, that question is not before us on a Rule 4-345 motion to correct an illegal sentence. *See, e.g.*, *Tshiwala v. State*, 424 Md. 612, 618 (2012) (explaining that "a Rule 4–345(a) motion to correct an illegal sentence is not appropriate where the alleged illegality did not inhere in the defendant's sentence") (internal quotations and citations omitted).

APPEAL DISMISSED AS TO PORTION OF THE JUDGMENT OF THE CIRCUIT COURT FOR KENT COUNTY RELATING TO RESTITUTION; JUDGMENT AFFIRMED IN ALL OTHER RESPECTS. COSTS TO BE PAID BY APPELLANT.