UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0080

September Term, 2015

PRESTON LEWIS WHALEY, JR.,

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Raker, Irma S.
(Senior Judge, specially assigned),

JJ.

Opinion by Raker, J.

Filed: January 13, 2017

Preston Lewis Whaley, Jr., appellant, was convicted on December 11, 2007, in the Circuit Court for Worcester County, of first degree rape and related charges. This appeal is a collateral attack on his conviction and is an appeal from the circuit court's denial of his motion to correct an illegal sentence. He raises one question for our review:

> "Did the Circuit Court err in denying the motion to correct an illegal sentence where the jury was not polled and its verdict was not hearkened?"

We shall hold that, based upon *Colvin v. State*, No. 8, Sept. Term, 2016, 2016 WL 7242736 (Md. Dec. 15, 2016), that this matter does not fall within Maryland Rule 4-345(a) and is not cognizable as an illegal sentence. Hence, we shall dismiss this appeal.

I.

Appellant was charged with first-degree rape, first-degree assault, second-degree assault and failure to comply with a peace order in the Circuit Court for Worcester County. A jury convicted him as charged on December 11, 2007. The court imposed a term of imprisonment of 40 years. In an unreported opinion, on direct appeal, this Court affirmed. *Preston Lewis Whaley, Jr., v. State*, No. 2699, Sept. Term, 2007 (July 21, 2009). The circuit court denied appellant's petition for post-conviction relief on November 24, 2010, and on July 24, 2012, this Court denied his application for leave to appeal. *Preston Lewis Whaley, Jr., v. State*, No. 2444, Sept. Term, 2010 (July 24, 2012).

On October 27, 2014, appellant filed in the circuit court a motion to correct an illegal sentence, alleging that his sentence was illegal because the jury was not polled and was not

hearkened. The State responded initially that appellant was not alleging a cognizable motion to correct an illegal sentence, but at the hearing before the court, abandoned that position and argued that although "the form . . . that's typically used was not followed, . . . the opportunity was given to the jurors to express their assent and dissent."

The following facts related to the return of the jury verdict.

> "THE COURT: You say you have a verdict?
>
> [THE BAILIFF]: Yes, Your Honor.
>
> THE COURT: All right. Ask them to come in, please.
>
> THE COURT: [Madame Forelady], you say you have a verdict?
>
> [FOREPERSON]: Yes, Sir, we do.
>
> THE COURT: All right. Can you call over the jury and take the verdict, please?
>
> [THE CLERK]: Yes, Your Honor. Please answer to your name as it's called."

The clerk then called the roll and each juror responded as present. The clerk then proceeded to inquire of the jury as follows:

> "[THE CLERK]: Ladies and gentlemen, have you reached a verdict?
>
> [THE JURY]: Yes, we have.
>
> [THE CLERK]: Who shall say for you?
>
> [THE JURY]: Our foreman.

> [THE CLERK]: Madam Foreperson, please stand. Do you find the Defendant, Preston Whaley, guilty or not guilty of the charge of first degree rape?
>
> [FOREPERSON]: Guilty.
>
> [THE CLERK]: Do you find the Defendant guilty or not guilty of the charge of first degree assault?
>
> [FOREPERSON]: Guilty.
>
> [THE CLERK]: Do you find the Defendant guilty or not guilty of the charge of second degree assault?
>
> [FOREPERSON]: Guilty.
>
> [THE CLERK]: Do you find the Defendant guilty or not guilty of the charge of failure to comply with a peace order?
>
> [FOREPERSON]: Guilty.
>
> [THE CLERK]: *And so say you all*?
>
> [THE JURY]: Yes.
>
> THE COURT: You can be seated. Now, ladies and gentlemen of the jury, thank you very much, it's been a long day and I'm sure you're tired and wish to get home, thank you for your attendance and your attention. . . ."

Ruling upon appellant's Motion to Correct an Illegal Sentence, the hearing court denied the motion, reasoning as follows:

> "The inquiry, quote, unquote, 'And so say you all,' directed as it clearly was to the jury panel, it seems to me plainly called upon each of them, each of the jurors to announce his or her agreement or disagreement with the verdict that was announced only seconds before by the jury foreperson. And again, that verdict was not only announced only seconds before, but it was – the counts were addressed, as they're required, individually, one after the other after the other after

> the other, and they were all guilty, so there was no complexity to what the – to the verdict announced by the foreperson.
>
> It's clear to the Court that the jurors understood the question, that is, they understood its import and the intent of the question because, again, according to the transcript, all of the jurors answered, they answered responsively, and their answer was in the affirmative."

Following the court's denial of appellant's motion to correct an illegal sentence, this appeal followed.[1]

II.

Appellant argues that hearing court erred in denying the motion to correct an illegal sentence because the jury was not polled and the verdict was not hearkened. His primary complaint is that a necessary element of hearkening the verdict is that each juror assent to the decision as a whole, that is, as to each and every count. Appellant's brief at 7. Because here, the clerk did not repeat the verdict as to each count, as announced by the foreperson, and that the clerk only asked the jury whether each juror was in agreement with the foreperson's pronouncement as to the final charge of failing to comply with a peace order, the verdict was not hearkened nor polled and is therefore, a nullity.

The State argues that the verdict was not a nullity as the jury was hearkened and thus, the verdict was unanimous, and the sentence was lawful. The State maintains, as did

[1] Inasmuch as the issue presented in this appeal was pending before the Court of Appeals in *Colvin v. State*, this Court entered a stay pending the decision. Now that that case has been resolved, we lift the stay and address the issue.

the hearing judge, that no reasonable juror would have assumed that the clerk was asking for a declaration of unanimity as to the last count only. The State concludes that the clerk's question was sufficient to insure that the jury's verdict was unanimous, and as such, the jury was hearkened.

III.

Now that the Court of Appeals has published its opinion in *Colvin v. State*, we lift the stay and address the issue. Maryland Rule 4-327 addresses the trial court's return of a jury verdict. Rule 4-327(a) provides that the jury verdict shall be "unanimous and shall be returned in open court." Rule 4-327(e) describes the procedure for polling the jury as follows:

> "On request of a party or on the court's own initiative, the jury shall be polled after it has returned a verdict and before it is discharged. If the sworn jurors do not unanimously concur in the verdict, the court may direct the jury to retire for further deliberation, or may discharge the jury if satisfied that a unanimous verdict cannot be reached."

Summarizing cases interpreting the Rule, a final, valid verdict in a criminal case must be announced orally, and, if requested, polled or, if no party requested a poll, then hearkened. *State v. Santiago*, 412 Md. 28, 38 (2009); *Jones v. State*, 384 Md. 669, 685-86 (2005). What constitutes proper hearkening is not so clear. Although the issue of whether a sentence is illegal is best reviewed on direct appeal, even if no objection was lodged in the trial court, under Rule 4-345(a), the issue may be raised at any time. Rule 4-345(a); *Ridgeway v. State*, 369 Md. 165, 171 (2002). The Rule's scope, however, is very narrow,

and applies only to claims sounding in substantive law, not procedural law. *Colvin*, 2016 WL 7242736, at *1, 10.

In *Colvin*, the Court of Appeals held that Colvin's claim that the trial court did not conduct a proper polling process was not cognizable under Rule 4-345(a), in that it "[did] not make a substantive allegation of lack of jury unanimity without more: the additional lack of a proper hearkening of the jury to the verdict." *Id.* at *9. The Court held the relief is narrow, that the defect presented was an objection to the form of the polling, not a substantive challenge, and that "procedural challenges to a verdict ought be done by contemporaneous objection and, if not corrected, presented through the direct appeal process." *Id.* at *1,9 (stating that "[w]e hold that the procedural error alleged in the present case does not come within the narrow meaning of Rule 4-345(a) and therefore is not a cognizable claim under that rule."). *Colvin* did not address the proper form of polling or hearkening.

We address the complaint raised by appellant: Was the verdict a nullity because the procedure employed by the trial court in not having the jury respond specifically and affirmatively to each of the four counts when the clerk said: "and so say you all." We shall hold that the verdict was not a nullity and is not cognizable on a motion to correct an illegal sentence. In the instant case, when the jury foreperson informed the judge in open court in the presence of the entire jury, and in response to the clerk's inquiry whether it had reached a verdict, the foreperson responded, "Yes, we have." The clerk asked the jury "[w]ho shall say for you?" and the jury responded in unison, "[o]ur fore[person]." After

the foreperson delivered the verdict, the clerk inquired "[a]nd so say you all?" to which the entire jury responded "[y]es." As in *Colvin*, the claim appellant presents is not cognizable under Rule 4-345(a). Although the clerk's saying "and so you all say," is not the perfect or preferred form of hearkening a verdict, the defect is in form and not procedure. Appellant objects to the *procedure* employed by the trial court. As in *Colvin*, appellant foregoes any claim that the sentence is illegal, as that term is defined for purposes of the Rule. That is to say, appellant does not argue that "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 and, for either reason, is intrinsically and substantively unlawful." *Id.* at *5. As Colvin argued, appellant so too argues, in essence, that an alleged flaw in the procedure by which the guilty verdict was received and finalized renders the sentence illegal. Not so. *Id.* at *8-9.

We hold that any error, if any exists, was procedural only and not substantive. It is not cognizable under Rule 4-345(a).

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.