UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 373

September Term, 2016

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JONATHAN BLACK

v.

STATE OF MARYLAND

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Eyler, Deborah S.,
Nazarian,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: February 24, 2017

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Jonathan Barry Black pled guilty in the Circuit Court for Prince George's County to first-degree murder and the use of a handgun in the commission of a crime of violence. As part of his plea agreement, Mr. Black was sentenced to life imprisonment with all but fifty-five years suspended for the murder, and twenty years' imprisonment for the handgun offense, to be served concurrently; over the State's objection, the court elected not to impose a period of post-release probation. On November 20, 2015, the State filed a motion to correct Mr. Black's sentence. The court granted that motion and added a period of five years' post-release probation to Mr. Black's sentence. Mr. Black contends that this revision to his sentence violates the express terms of his plea agreement. We disagree and affirm.

## I. BACKGROUND

On December 3, 2010, Mr. Black pled guilty to murder in the first degree and the use of a handgun in commission of a crime of violence. During his sentencing hearing, the State delineated the terms of the plea agreement, without objection, as follows: "[T]o Count 1, First Degree Murder, live [sic], suspend all but 55 years. *Five years of probation*. Count 2, Use of a Handgun in the Commission of a Crime of Violence, 20 years, the first five years . . . to run concurrent to Court 1 [sic]." (Emphasis added.) The court accepted the plea, but the sentence it entered deviated from the stated agreement in two ways: the court reduced Mr. Black's sentence for time served and omitted probation entirely. At the close of the hearing, the State asked the court to sentence Mr. Black to a period of five years' probation. The court declined to do so, responding "No, he will be on parole when he

leaves the system." The court accepted Mr. Black's plea, sans probation, and sentenced him accordingly.[1]

On November 20, 2015, the State filed a Motion to Correct Illegal Sentence pursuant to Maryland Rule 4-345(a), which provides that "[t]he court may correct an illegal sentence at any time." In that motion, the State requested that the court add a period of probation to Mr. Black's sentence, else the sentence would be (or, more precisely, remain) illegal. The court held a hearing on April 22, 2016 and granted the State's motion, amending the sentencing order so that, upon release, Mr. Black would serve five years of standard probation. Mr. Black's attorney objected to the court's ruling, preserving the issue for review. Mr. Black filed a timely notice of appeal.

## II. DISCUSSION

Mr. Black contends that by correcting his sentence to add five years of supervised probation, the circuit court violated his right to due process. This is because, he says, probation was not among the sentencing terms of his plea agreement, and so when, during sentencing, the court declined to impose probation, he reasonably understood that his sentence would be "life, suspending all but -- 55 years." Mr. Black acknowledges that his formulation of the sentence is, in fact, illegal. But he nevertheless urges us either to order specific performance of the original (and illegal) plea agreement or to allow him to withdraw his guilty plea. In the alternative, Mr. Black contends that the court erred in

[1] The handwritten docket entry crossed out the typewritten lines that normally would indicate a period of probation.

imposing the maximum period of probation permitted by state law. He claims that *Greco v. State*, 427 Md. 477, 513 (2012), requires only that "some period" of probation attach to a split sentence, and that by imposing the maximum, the court impermissibly violated its "obligation to adhere to the reasonable expectations [that] induced [his] plea."

The State counters that because the statutory minimum for first-degree murder is life imprisonment, *see* Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 2-201(b) of the Criminal Law Article, the circuit court erred in imposing a split-sentence without a period of post-release probation, and the error was subject to correction under Rule 4-345(a). The State also disputes that the court erred in imposing the full five-year period of probation. In its view, the record provides no basis for Mr. Black's purported expectation of no probation, the "imposition of probation is 'an act of grace,'" and *Greco* does not require a court to impose only a minimal probationary period.

**A. Mr. Black's Original Sentence Was Illegal.**

We review the (il)legality of sentences *de novo*. *Bonilla v. State*, 443 Md. 1, 6 (2015); *see also* Md. Rule 4-345(a). And we agree with the State that the original sentence was illegal.

A split sentence is one in which the court suspends part of the period of incarceration prescribed by statute. *See Cathcart v. State*, 397 Md. 320, 326 (2007). A court's failure to impose a period of probation does not render that sentence illegal *per se*, but omitting a period of probation results in that sentence "lack[ing] the attributes of a split sentence," as defined by Md. Code (2001, 2008 Repl. Vol., 2016 Supp), § 6-222 of the Criminal

Procedure Article ("CP"). *Greco*, 427 Md. at 507. CP § 6-222(a) authorizes a circuit court to "impose a sentence for a specified time," while allowing the defendant to serve a lesser period in confinement, provided that that court "order[s] probation for a time longer than the sentence," up to a maximum period of five years. Otherwise, "limit[ting] the period of incarceration to the unsuspended part of the sentence," has the legal effect of rendering the unsuspended portion "the effective sentence," *Greco*, 427 Md. at 505, which is lawful only where the unsuspended portion of the sentence falls within statutory limits. So where, as here, the minimum sentence permitted by statute is life imprisonment, CP § 2-201(b)(1), an effective term-of-years sentence is illegal. *Greco*, 427 Md. at 513; *Holmes v. State*, 362 Md. 190, 195–96 (2000).

### B. Mr. Black Is Not Entitled To Specific Performance, And The Court Did Not Err In Adding Probation.

Where Mr. Black and the State diverge is that he urges us to re-impose the terms of his plea agreement, as initially accepted by the court, claiming he relied on those terms when he tendered his guilty plea. This would make sense if there were an otherwise valid plea agreement—normally, where a defendant was induced to plead guilty in reliance on the conditions of that agreement, due process requires that those terms be fulfilled. *Solorzano v. State*, 397 Md. 661, 669–70 (2007). The problem here is that the plea agreement Mr. Black describes is not a valid plea agreement.

A defendant can *only* consent to a valid plea agreement. *Holmes*, 362 Md. at 195–96. In order for a plea agreement to be valid, that agreement must be permitted by statute. *Id*. Further, a "defendant cannot validate an illegal sentence or insulate it from appeal or

collateral attack by consent or waiver." *White v. State*, 322 Md. 738, 749 (1991). But the disconnect here arose not in the formation of the agreement, but in the circuit court's implementation of it.

In challenging the circuit court's addition of probation to his sentence as a means of correcting it, Mr. Black attempts to analogize this case to *Cuffley v. State*, 416 Md. 568 (2010), and *Matthews v. State*, 424 Md. 503 (2012), cases in which the sentencing courts added post-release periods of probation to plea-bargained sentences. In both of those cases, the appellate courts vacated the sentences because the court's decision to add probation deviated from the bargain. *See Matthews*, 424 Md. at 525; *Cuffley*, 416 Md. at 586.

But the analogies fail in two ways. *First*, the terms of the plea agreement that the prosecutor listed to the court—without objection—*included* five years of probation that the circuit court left off when it imposed the sentence, citing the (incorrect) view that probation would be unnecessary since Mr. Black would be on parole. *Second*, the agreed sentences in those cases could be performed both specifically and, more importantly, legally, without probation. That is not true here—even if we were to assume that Mr. Black pled guilty in reliance on a promise that he would receive a suspended life term without probation, that sentence would, as we discussed above, be illegal and unenforceable. This leaves Mr. Black, in our view, in the same position as the defendant in *Greco*, whose illegal term-of-years sentence for first-degree murder was remanded by the Court of Appeals with instructions to resentence the appellant to "the maximum legal sentence that could have

been imposed, with the illegality removed," namely "life imprisonment, all but fifty years suspended, to be followed by some period of probation." 427 Md. at 513.

Our decision in *Rankin v. State*, 174 Md. App. 404 (2007), lends further support. Although not a murder case, we held there that "a probationary period was implicit in the terms of the plea agreement." *Id.* at 410. The defendant had been charged with a range of crimes, and entered into a plea agreement with the State, according to which he would plead guilty to the final count, conspiracy to commit a second-degree sex offense. *Id*. at 406. The State explained that "[t]he only limitation on the sentence is the Court had bound itself to an active cap of no more than three years." *Id*. The agreement was memorialized in a "Plea/Sentence Agreement" that provided that the "Court will [] impose an active cap of no more than 3 years. Court may impose additional suspended time. [] There is no other sentencing limitation except that provided by law." *Id*. at 407. Prior to sentencing, the court warned the defendant that if he violated probation, he risked "doing substantially all of the backup time." *Id*. at 406. When the defendant stated that he understood, the court imposed a sentence of "twenty years, with all but three years suspended, followed by a period of five years probation." *Id*. at 407. After his release from prison, the appellant violated the terms of his probation, and was sentenced to serve ten years of the suspended sentence. *Id*. He then filed a Motion to Correct an Illegal Sentence, claiming that because the plea agreement did not include a period of probation, the court erred in imposing one. *Id*. The court denied that motion, and the appellant appealed.

In holding that a probationary period was implicit in the appellant's plea agreement, we adopted a reasonableness approach. *Id.* at 411. We considered (i) the court's warning to the appellant that a probation violation would result in the appellant's serving "substantially all of [his] back up time," (ii) the appellant's not having objected to the imposition of a probationary period, and (iii) the defense counsel's having said, at the end of the sentencing hearing, "that he would read the order of probation to appellant." *Id.* We found that "a reasonable person in appellant's position would interpret the plea agreement to include probation." *Id.* It was only upon determining that the appellant understood and agreed to the imposition of a probationary period that we turned to the issue of whether a probationary period must be attached to a suspended sentence. *Id.* Only where a defendant knowingly and intelligently agrees to a period of probation is "the right to impose a period of probation . . . included in any plea agreement that provides for a suspended sentence." *Id.* at 411–12.

We read the plea colloquy in this case to recognize in the agreement itself that a split sentence agreement in a murder case must include a period of probation. The State included probation in its discussion of the plea, and Mr. Black didn't object—the probation period fell off only when the court decided not to impose it. As such, a reasonable person in Mr. Black's position *would* (or at least should) interpret his plea agreement as including a period of probation, and we see no error in the court's decision to correct the illegal sentence to conform to the reasonable, and legal, interpretation of the plea agreement.

This leaves Mr. Black's challenge to the length of the probation period. He argues that even if the court acted appropriately in adding probation to his sentence, the court erred in adding the maximum period of probation, without considering a lesser period. Although plea agreements are not contracts, "contract principles should generally guide the determination of the proper remedy of a broken [or unenforceable] plea agreement." *State v. Parker*, 334 Md. 576, 604 (1994). And again, the terms of the agreed sentence as explained by the State at the sentencing hearing included not only a term of probation, but specifically a *five-year* term of probation. Nothing in *Greco* limited the court to a minimal, or to any particular, period of probation. But in any event, the five-year probationary period tracks the stated and unobjected understanding of the parties' agreement described at the beginning of the sentencing hearing, and the corrected sentence tracks that agreement.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. APPELLANT TO PAY COSTS.**