UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 759

September Term, 2016

SPENCER ROLAND HILL, JR.

v.

STATE OF MARYLAND

Woodward,
Leahy,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: January 26, 2017

Appellant, Spencer Roland Hill Jr., appeals from a grant, by the Circuit Court for Charles County (Bragunier, J.), of his Motion to Correct Illegal Sentence. On May 3, 2016, the court ordered that appellant's extended five years' probation be corrected to five years' probation, less nine months and thirteen days. Appellant appeals the Order, raising the following question for our review:

Did the court below err in ruling on appellant's Motion to Correct Illegal Sentence?

FACTS AND LEGAL PROCEEDINGS

Appellant was initially charged in the Circuit Court for Charles County by criminal indictments filed in three separate criminal cases.[1] On October 31, 1995**,** appellant entered pleas of guilty to three counts of Distribution of Controlled Dangerous Substances in the aforementioned criminal cases. The original trial judge (Bowling, J.) imposed concurrent sentences of 20 years in prison, with all but 10 years suspended and five years of supervised probation following appellant's release. The special conditions of appellant's probation did not include restitution.

Appellant was paroled on September 1, 1999, at which time his probation commenced. Approximately nine months later, on June 13, 2000, appellant was arrested on federal felony drug charges.[2] On July 15, 2000, a Petition for Violation of Probation was filed in the aforementioned State criminal cases. The basis for the violation of

[1] Case numbers: 08-K-95-000478, 08-K-95-000480 and 08-K-95-000481. The alleged criminal activity occurred on three different dates: March 9, 15 and 16, 1995.

[2] United States District Court Case Number AW-00-0290.

probation included the allegation that appellant had "failed to obey all laws," including the incursion of a federal criminal drug charge. A warrant was issued the same day by the Circuit Court for Charles County for appellant's probation violation. Appellant was convicted of the federal drug charges and remained in federal custody until his release on July 29, 2009. The warrant for violation of probation in the State criminal cases was served upon appellant on July 14, 2009.

At the violation of probation hearing on September 1, 2009, appellant, through counsel, admitted that he was in violation of his probation, but he maintained that the period of probation had "expired" or "terminated." The court (Northrop, J.) sentenced appellant to a term of 20 years' imprisonment, with all but 10 years suspended and extended credit for 10 years that appellant had already served. Appellant consented to the entry of a new order for an extended period of his probation for five years, dating from September 1, 2009, the date of the hearing.

Subsequently, appellant was convicted of two additional drug offenses in Charles County. Appellant pled guilty to the charges and was sentenced to 20 years' imprisonment for each of the drug charges. On April 13, 2010, a second Petition for Violation of Probation was filed and warrants were served on appellant on April 21, 2010. Appellant appeared before the circuit court (Nalley, J.) on September 7, 2010 and admitted that he had violated his probation. Consequently, he was sentenced to serve the remaining terms of 10 years in prison in each case, to be served concurrent with each other and consecutive to any previously imposed sentence, including the two terms of 20 years in prison

commencing in 2009.

Between 2010 and 2015, appellant submitted several *pro se* motions, as well as a Motion to Correct Illegal Sentence, filed by counsel,[3] on September 24, 2015. A Supplement to the Motion was filed on October 20, 2015.

At the October 21, 2015 hearing on the Motion, appellant's counsel argued that the trial judge (Bragunier, J.) had acted without legal authority when she issued a new order for probation on September 1, 2009. The State argued that the original five year period of probation**,** dating back to 1995**,** had not expired; rather, it was tolled as a consequence of appellant's incarceration on the unrelated federal drug charges. The State conceded that appellant was entitled to receive credit for the period between the dates of his release from State custody on September 1, 1999 and his arrest on federal drug charges on June 16, 2000, a period of nine months and 13 days.

In an Order filed on May 3, 2016, the circuit court noted that appellant had served nine months and thirteen days of probation "before being re-incarcerated" and that "it was error to extend [appellant's] probation in excess of five (5) years." The court, citing Section 6–222 of the Criminal Procedure Article of the Maryland Code, noted that "[p]robation may only be extended beyond five (5) years for the purpose of making restitution," and that restitution was not at issue in appellant's situation. The court found that appellant was entitled to a credit for the nine months and thirteen days served on probation, but that he

[3] Counsel from the Office of the Public Defender entered an appearance on August 13, 2015.

was "not entitled to credit during the time that he was incarcerated as his incarceration tolled his probationary period up to an aggregate of five (5) years." Citing *Caitlin v. State*, 81 Md. App. 634 (1990), the court found that appellant, "due to his unlawful acts while on probation, was not, in fact, under probationary supervision from June 13 until July 29, 2009." The court ordered the following:

> ORDERED, that [appellant's] Motion to Correct Illegal Sentence and Supplement filed thereto, is granted, to the extent that the extended five (5) years of probation, entered September 1, 2009, is CORRECTED to five (5) years less nine (9) months, thirteen (13) days, commencing July 29, 2009.

Appellant filed the instant appeal from the court's Order.

DISCUSSION

Appellant contends that the circuit court erred by granting only partial relief for an illegal sentence. Appellant maintains that the probation order, imposed on September 1, 2009, that extended his probation beyond the statutory maximum of five years, was illegal and it was the direct cause of a subsequent violation of probation, resulting in a sentence of "three consecutive terms of 10 years in prison." Appellant further argues that the court's reliance upon *Caitlin* was incorrect because appellant was not serving time for the violation of probation and his term of probation had expired and was not lawfully extended. Accordingly, appellant argues that the court's order of the extended five years' probation, less the nine month and thirteen day credit, is only partial relief and appellant is entitled to have his September 1, 2009 probation order and September 7, 2010 sentence vacated.

The State's response is that appellant "seeks a windfall benefit for an alleged

procedural error that occurred at a sentencing in 2009—a sentencing from which he never appealed." The State maintains that appellant's claim "is not cognizable as an 'illegal sentence' claim" and, even if appellant's claim could proceed as an illegal sentence claim, the circuit court's determination that appellant's incarceration tolled his probation was proper.

Appellant does not assert that he preserved his claim, pursuant to Rule 8–131; his brief solely argues an illegal sentence claim pursuant to Rule 4–345(a). We constrain our review accordingly.

Illegal Sentence Claim under Md. Rule 4–345(a)

As a preliminary matter, we first examine the State's contention that appellant's claim is "not cognizable as an 'illegal sentence' claim" pursuant to Maryland Rule 4–345(a). "An illegal sentence is one not permitted by law." *Meyer v. State*, 445 Md. 648, 682 (2015) (citing *Holmes v. State*, 362 Md. 190, 195–96 (2000)). "It is well settled that challenges to sentencing determinations are generally waived if not raised during the sentencing proceeding." *Bryant v. State*, 436 Md. 653, 660 (2014). *See* MD. RULE 8–131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . .").

However, pursuant to Md. Rule 4–345(a), "[a] court has revisory power to correct an illegal sentence at any time." This ability to correct an illegal sentence at "any time is a narrow exception to the general rule of finality." *Meyers*, 445 Md. 682 (citing *Barnes v. State*, 423 Md. 75, 83 (2011)). Accordingly, "[t]he purpose of Rule 4–345(a) is to provide

a vehicle to correct an illegal sentence where the illegality inheres in the sentence itself, not for re-examination of trial court errors during sentencing." *Id.* (citing *Matthews v. State*, 424 Md. 503, 512 (2012)).

We recently reiterated the Court of Appeals' explanation of this distinction:

> The distinction between those sentences that are 'illegal' in the commonly understood sense, subject to ordinary review and procedural limitations, and those that are 'inherently' illegal, subject to correction 'at any time' under Rule 4–345(a), has been described as the difference between a substantive error in the sentence itself, and a procedural error in the sentencing proceedings.

Erbe v. State, No. 1035 SEPT.TERM 2015, 2016 WL 5373538, at *7 (Md. Ct. Spec. App. Sept. 23, 2016) (quoting *Bryant*, 436 Md. at 663).

Furthermore, "a trial court error during the sentencing proceeding is not ordinarily cognizable under Rule 4–345(a) where the resulting sentence or sanction is itself lawful." *Montgomery v. State*, 405 Md. 67, 74–75 (2008) (quoting *Evans v. State*, 382 Md. 248, 278–279 (2004)). Therefore, "[i]n defining an illegal sentence the focus is not on whether the judge's 'actions' are *per se* illegal but whether the sentence itself is illegal." *State v. Wilkins*, 393 Md. 269, 284 (2006).

Appellant argues that the "illegality inherent in [his] sentence arose on September 1, 2009," when the circuit court imposed a sentence that extended his probation beyond the 5-year statutory maximum. However, as appellant's brief states, the instant appeal concerns the circuit court's Order, filed on May 3, 2016, which found that the extension of appellant's probation beyond the five-year statutory maximum was error and corrected the sentence to account for the statutory maximum and probation served, *i.e.*, nine months and

thirteen days. In fact, appellant does not argue, in his brief, that the sentence in the 2016 Order is "inherently illegal." Instead, appellant asserts that he "asked the court below to vacate the September 1, 2009 order for probation and also to vacate the sentences imposed on September 7, 2010 [because] [t]hose sentences were based on an invalid violation of probation proceeding resulting directly from an unlawful order for probation purporting to extend [his] probation beyond the statutory maximum."

Clearly, appellant's contention, in the instant case, focuses on the trial judge's determinations in the 2016 Order, not the inherent illegality of the sentence imposed. The circuit court imposed a sentence that was permitted by law and, therefore, not inherently illegal. Accordingly, appellant cannot appeal his claim as an illegal sentence under Rule 4–345(a).

Tolling of Probation

Even if appellant's claim were cognizable under Rule 4–345(a) as a claim for an illegal sentence, the circuit court's Order, granting appellant's Motion to Correct Illegal Sentence and Supplement, to the extent that the extended five years of probation, entered September 1, 2009, was corrected to five years of probation, minus nine months thirteen days, commencing July 29, 2009, constituted a legal sentence.

In reviewing whether a sentence imposed by the trial court is illegal and requires correction, we have held:

> Rule 4–345(a) appellate review deals only with legal questions, not factual or procedural questions. Deference as to factfinding or to discretionary decisions is not involved. Once the outer boundary markers for a sentence are objectively

> established, the only question is whether the ultimate sentence itself is or is not inherently illegal. That is quintessentially a question of law calling for *de novo* appellate review.

Carlini v. State, 215 Md. App. 415, 443 (2013).

Maryland Rule 4-346(b) governs the modification of a probation order and provides:

> During the period of probation, on motion of the defendant or of any person charged with supervising the defendant while on probation or on its own initiative, the court, after giving the defendant an opportunity to be heard, may modify, clarify, or terminate any condition of probation, change its duration, or impose additional conditions.

Section 6–222(a)(3)(i)(l) of the Criminal Procedure Article permits a circuit court judge to impose up to five years of probation when a portion of a criminal sentence is suspended. Probation may be extended, but only "[f]or the purpose of making restitution." *Id.* "The legislature has prescribed that the probationary period which an offender may be compelled to undergo cannot exceed a total of five years." *Catlin*, 81 Md. App. at 637 (citations omitted). *See also Kupfer v. State*, 287 Md. 540, 543–44 (1980) ("[T]he legislature placed a definite limit on the maximum period of probation which a defendant may be compelled to undergo. The statute provides for no exceptions or extensions of this period."). Furthermore, "the statutory maximum probationary period may not be enlarged by assent." *Kupfer*, 287 Md. at 544.

Although the law regarding extending a probation term beyond five years is clear, if the accused is incarcerated during his or her term of probation, this intermediate incarceration may have a tolling effect, which pauses the probation until the accused's release, whereupon probation once again commences. We expressly noted**,** in *Christian v.*

State, 62 Md. App. 296, 306 (1985), that the tolling of probation by incarceration "if recognized, may produce a *chronological* period of probation in excess of the statutory maximum." *Id.* at 306, n. 5 (citing *United States v. Workman*, 617 F.2d 48 (4th Cir.1980)). "[T]he legislature did not intend that a term of imprisonment and a term of probation be simultaneously served." *Caitlin*, 81 Md. App. at 642 (citations omitted). The total probation term served, however, still must not exceed the five-year statutory maximum.

In the case *sub judice*, appellant's argument that his term of probation expired is unpersuasive. In his brief, appellant argues that "[i]t is not the case that imprisonment always or automatically tolls a period of probation." Citing *Caitlin, supra*, appellant asserts that his "imprisonment during the relevant time period was not based on his violation of probation in the same case, as it was in [*Caitlin*], but was for an unrelated offense." However, in *Caitlin*, we referenced imprisonment as a non-automatic tolling mechanism for a term of probation in the context of a court's jurisdiction after the expiration of a probation term. 81 Md. App. at 641 (citing *White v. United States*, 654 A. 2d 379 (D.C. Cir. 1989)). Furthermore, in *Caitlin*, we expressly examined the treatment of imprisonment and the tolling of probation in other jurisdictions and articulated the consensus that, ". . . in computing the five year period, courts have excluded the time period during which a probationer is imprisoned on an unrelated offense[.]" *Id.*

In light of the foregoing, we review the timeline of appellant's probationary period and possible tolling events. Appellant was originally sentenced to a five-year probation term on October 31, 1995 and was eligible to begin his probation on September 1, 1999

upon his release from incarceration. Accordingly, appellant's probation would have expired five years from the commencement of his probation or on September 1, 2004. However, appellant's federal drug conviction and imprisonment on June 13, 2000 tolled his probation until his release from federal custody on July 29, 2009. The September 1, 2009 Probation Order, from which appellant sought redress in the circuit court and is the subject of the instant appeal, has not expired; rather, his intervening federal incarceration for unrelated offenses tolled his term of probation. According to our calculations, appellant served his probation from September 1, 1999 to June 13, 2000, a total of nine months and thirteen days. Therefore, the circuit court's May 3, 2016 Order, which reviewed appellant's probationary period imposed on September 1, 2009, properly corrected the imposition of probation from an erroneous extended five years' probation to five years' probation *minus* a credit for the nine months and thirteen days previously served.

Appellant also contends that the illegal imposition of an extended probation on September 1, 2009 directly caused his subsequent violation of probation for which he is now serving a sentence of three concurrent terms of ten years in prison. We disagree. Appellant's probation would have expired five years minus nine months and thirteen days from September 1, 2009. However, only several months after the 2009 probation order, appellant was convicted of State drug charges, clearly a violation of the 2009 Probation Order and within the corrected period of probation which included the nine month, thirteen day credit. A Petition for Violation of Probation was filed on April 13, 2010. Appellant admitted to having violated his probation and was sentenced to serve the remaining terms

of ten years in prison for each case, to be served concurrent with each other and consecutive to any previously imposed sentence, including the two terms of 20 years' imprisonment from his 2009 convictions. Accordingly, the 2009 illegal extension of appellant's probation was not the basis for his current sentence; rather, the basis was his 2010 State drug charges.

Therefore, we hold that, even if appellant's claim were cognizable under Rule 4–345(a) as a claim based on an illegal sentence, the circuit court properly ruled on appellant's Motion to Correct Illegal sentence by correcting appellant's term of probation to five years' probation**,** minus nine months thirteen days**,** but by leaving the probation intact.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.