UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1088

September Term, 2016

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DEMAR ANTHONY BROWN

v.

STATE OF MARYLAND

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Berger,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: July 3, 2017

Demar Anthony Brown filed a motion in the Circuit Court for Montgomery County to correct an illegal sentence. He contended that his sentence for first-degree burglary was illegal because he understood that, under the terms of a binding plea agreement, the sentence was to begin running on the same date (November 9, 2011) as a sentence he was then serving in Virginia had begun, not on the date (May 27, 2014) on which he was sentenced, as the court had ordered. After the circuit court denied the motion, Mr. Brown noted this appeal. We affirm.

## I. BACKGROUND

On November 5, 2011, Mr. Brown burglarized two homes in Montgomery County. Three days later, Mr. Brown was apprehended in Fairfax County, Virginia, when he was caught burglarizing a home there. Mr. Brown was charged and convicted of the Virginia crime and on November 16, 2012, he was sentenced by the Fairfax Circuit Court to a total term of four years' imprisonment. The "start date" of that sentence was November 9, 2011, which apparently reflected pre-trial detention.

While serving the Virginia sentence, Mr. Brown was indicted in the Circuit Court for Montgomery County and charged with two counts of first-degree burglary and two counts of conspiracy to commit first-degree burglary in connection with the 2011 Montgomery County burglaries.[1] On May 27, 2014, the parties informed the court that Mr. Brown would plead guilty to one count of first-degree burglary and, as to sentencing,

[1] A statement of charges had previously been filed in the District Court of Maryland for Montgomery County.

that *"the agreement is five years executed to run concurrent"* with both "side[s] free to allocate with regard to any suspended time[.]" (Emphasis added.)

At the time of the plea, Mr. Brown was thirty years old and had completed high school. In examining him prior to accepting the plea, the court explained its understanding of the agreement:

> And you're pleading guilty here to one count of first-degree burglary. It carries a maximum penalty of 20 years in jail. Now under the terms of this plea agreement, if I accept it, I would be agreeing to impose a *5-year executed sentence, that is time you would actually serve and that would run concurrent with those at the same time as any other sentence that you're now serving*. I could impose up to 15 years of suspended time and place you on probation upon your release, and if you were to violate the terms or conditions of probation, you could wind up serving up to the whole 20 years on this charge[.]

(Emphasis added.)

Mr. Brown indicated that he understood the terms as the judge had stated them. After hearing the statement of facts in support of the plea, the court accepted Mr. Brown's guilty plea and proceeded to sentencing. Defense counsel then noted, for the first time on the record, that Mr. Brown was "currently serving a sentence in Virginia" and that he had "about a year left on that sentence." Defense counsel further noted that "the guidelines on this charge are three to ten years," but reminded the court that "we've agreed to five." Counsel urged the court not to impose any suspended time. The State, however, pointed out that Mr. Brown's criminal history caused him to be "considered a major offender," and it asked the court to impose "20 years, suspend all but five years executed."

The court noted that Mr. Brown had "a horrible record" and had been "a career criminal," but at thirty years of age he stood at a "kind of turning point[.]" After speaking further about choices to be made in life, the court imposed a term of twenty years' imprisonment, with all but five years suspended, with two years of supervised probation upon release. The judge then informed Mr. Brown that it would *"run that five years concurrent with any other sentence that you are currently serving."* (Emphasis added.) The start date of the sentence was not discussed on the record during any portion of the transcribed plea and sentencing proceeding. The commitment record, however, reflected that the sentence would begin on May 27, 2014 – the date Mr. Brown had pleaded guilty and was sentenced. Mr. Brown did not seek leave to appeal.

In 2016, Mr. Brown filed a motion to correct an illegal sentence. He claimed that the court had breached the binding plea agreement by not beginning his Maryland sentence on the same date the ongoing Virginia sentence had begun. The circuit court denied the motion, and Mr. Brown appealed.[2]

[2] Mr. Brown had earlier filed a *pro se* motion to correct an illegal sentence, raising the same contention. The circuit court denied that motion, and Mr. Brown did not appeal. The second motion, the denial of which is the subject of this appeal, was filed with the assistance of counsel. Mr. Brown has also raised the issue he is raising in this appeal in a petition for post-conviction relief. That is pending in the circuit court.

## II. DISCUSSION

### A. Motion to Dismiss Appeal

The State moves to dismiss the appeal on the ground that Mr. Brown's sentence is not "inherently illegal" and, therefore, not cognizable under Rule 4-345(a).[3] But because Mr. Brown alleges that his sentence is illegal because it violated the sentencing term of a binding plea agreement, his challenge was the proper subject of a Rule 4-345(a) motion. *See Matthews v. State,* 424 Md. 503, 506 (2012) ("hold[ing] that Rule 4-345(a) is an appropriate vehicle for challenging a sentence that is imposed in violation of a plea agreement to which the sentencing court bound itself.").

### B. Standard of Review

When we review a claim of sentence illegality based on an alleged violation of a plea agreement, "[a]ll that is relevant, for purposes of identifying the sentencing term of the plea agreement, is what was stated on the record at the time of the plea concerning that term of the agreement and what a reasonable lay person in [the defendant's] position would understand, based on what was stated, the agreed upon sentence to be." *Cuffley v. State,* 416 Md. 568, 584 (2010). "[E]xtrinsic evidence of what the defendant's actual understanding might have been is irrelevant to the inquiry." *Id.* at 582. "If examination

[3] Rule 4-345(a) provides that the "court may correct an illegal sentence at any time." As the Court of Appeals has noted, the "scope of this privilege . . . is narrow, however." *Chaney v. State,* 397 Md. 460, 466-467 (2007). "To constitute an illegal sentence under Rule 4-345(a), 'the illegality must inhere in the sentence itself, rather than stem from trial court error during the sentencing proceeding.'" *Johnson v. State,* 427 Md. 356, 367 (2012) (quoting *Matthews v. State,* 424 Md. 503, 512 (2012)).

of the record leaves ambiguous the sentence agreed upon by the parties, then the ambiguity must be resolved in the defendant's favor." *Id*. at 583.

**C. The Circuit Court Did Not Err In Denying Mr. Brown's Motion**

As he did in the circuit court, Mr. Brown maintains that his sentence breached the terms of the plea agreement because the May 27, 2014 start date did not match the November 9, 2011 start date of his Virginia sentence. Relying on what he characterizes as the "ordinary meaning" of the word "concurrent," "operating or occurring at the same time," he asserts that a "reasonable layperson would have understood that sentences 'occurring at the same time' would have the same start date" and that "no other meaning reasonably suggests itself to the layperson."

The State responds that the court did not breach the plea agreement because the Maryland sentence runs concurrently with Mr. Brown's outstanding (Virginia) sentence. The State further asserts that "a reasonable person in Brown's position would have known that the Maryland sentence would start the day it was imposed, as was memorialized expressly in the commitment order."

Because the plea bargain did not address a specific date the sentence would begin, we agree with the State that the court did not violate the plea agreement by beginning the sentence on the date of sentencing. As the record reflects, the sentencing terms of the plea agreement provided for a "5-year executed sentence," which meant "time you would actually serve," to be "run concurrent with those at the same time as any other sentence" Mr. Brown was then serving. The prospect of starting the sentence on a date before sentencing was not inferred, much less discussed. And the fact that Mr. Brown was

serving a sentence in Virginia was not even mentioned until after the plea was accepted and the court turned to sentencing. During the plea proceeding, the only reference to the Virginia crime was in the State's proffer of facts when the prosecutor noted that Mr. Brown was apprehended in Virginia three days after committing the Montgomery County burglaries, where he had committed yet another burglary.

As the State points out in its brief, when Mr. Brown was sentenced in Maryland he had already served about two and one-half years of his four-year Virginia sentence. Although the Maryland and Virginia crimes may have been part of a single crime spree, they occurred on different dates in different jurisdictions. There was no indication that the plea agreement in the Montgomery County case was tied in any manner to the Virginia case, for which Mr. Brown had been sentenced eighteen months earlier. And there was no discussion of any possible credit toward the Maryland sentence for time served outside the jurisdiction for an unrelated crime.

Given the absence of any indication in the plea negotiations or colloquy suggesting that the Maryland sentence was meant to begin running before the date the sentence was imposed, a reasonable layperson in Mr. Brown's position would have understood that "concurrent" meant that he would begin serving the Maryland sentence immediately, rather than at the conclusion of any other sentence. The circuit court did not, therefore, err in denying Mr. Brown's motion to correct an illegal sentence.

**APPELLEE'S MOTION TO DISMISS APPEAL DENIED. JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**