Circuit Court for Baltimore County
Case No. 03-K-07-002978

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1333

September Term, 2016

STEPHEN NIVENS

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 8, 2017

On August 17, 2016, the Circuit Court for Baltimore County denied Stephen Nivens's (appellant) third Motion to Correct An Illegal Sentence (hereinafter "the Motion"). On appeal, appellant presents five questions for review, which we reduce to one – namely, did the court err in denying the Motion? Finding no error, we affirm.

In June 2008, a jury convicted appellant of first-degree sexual offense and first-degree burglary. The court subsequently sentenced him to life in prison, with all but fifty years suspended, for the former conviction and a consecutive twenty years for the latter. Following appellant's direct appeal, this Court reversed these convictions in an unreported opinion, No. 1389, Sept. Term 2008 (filed Feb. 23, 2010).

On September 15, 2011, appellant entered an *Alford* plea to second-degree sexual offense and first-degree burglary.[1] The court sentenced appellant to two consecutive twenty-year terms of imprisonment. Since that time, appellant has filed two motions to correct an illegal sentence and two petitions for post-conviction relief, which have all been denied.

On appeal of the present Motion, appellant contends that his sentence is illegal for any of three reasons: 1) that the Department of Corrections ("the Department") failed to afford him credit for the Good Conduct Credits ("GCC") earned while in prison for the

[1] An *Alford* plea, taking its name from *North Carolina v. Alford*, 400 U.S. 25 (1970), "'is a guilty plea containing a protestation of innocence which lies somewhere between a plea of guilty and a plea of *nolo contendere*[,] where a defendant does not contest or admit guilt.'" *Lopez v. State*, 231 Md. App. 457, 461 n.1 (quoting *Jackson v. State*, 207 Md. App. 336, 361 (2012)), *cert. granted*, 453 Md. 8 (2017).

sentences that were overturned on appeal; 2) that he could not have pled to first-degree burglary because the jury acquitted him of that offense in the first trial; and/or 3) that because the COMAR regulations relating to special project credits ("SPC") were amended after 1987 (the year of his crime), there is a violation of the *Ex Post Facto* Clause.[2] The State maintains that appellant's claims are not cognizable as a motion to correct an illegal sentence, and the court was correct to deny them.

Preliminarily, we note that appellant's argument concerning the post-1987 amendments to COMAR relating to SPC was not presented to the circuit court. Accordingly, it is not preserved for our review. *See* 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[.]"); *Graves v. State*, 215 Md. App. 339, 352 (2013), *appeal dismissed*, 441 Md. 61 (2014). Had appellant presented this argument, it would suffer from a similar defect as his first contention, discussed *infra*.

Turning to the merits of appellant's arguments, Rule 4-345(a) provides that a "court may correct an illegal sentence at any time." The Court of Appeals has held that an illegal sentence, subject to challenge pursuant to the rule, is one that is inherently illegal: "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)). Stated another way, the scope of a motion to correct an illegal sentence is

[2] The Constitution forbids states from enacting *ex post facto* laws. *See* U.S. CONST. art. I, § 10, cl. 1.

"'narrow'" and "'limited to those situations in which the illegality inheres in the sentence itself, *i.e.*, 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 . . . is intrinsically and substantively unlawful.'" *Carlini v. State*, 215 Md. App. 415, 426 (2013) (emphasis omitted) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). Because a motion to correct an illegal sentence involves questions of law, our review is *de novo*. *Id.* at 443.

As to appellant's GCC, this claim of error suffers from two deficiencies. First, such a claim is not cognizable pursuant to a motion to correct an illegal sentence, because the alleged error does not inhere in the sentence itself. Second, appellant has previously raised this issue in a prior motion to correct an illegal sentence. The circuit court denied the motion, and we affirmed in an unreported opinion. *See Nivens v. State*, No. 2008, Sept. Term 2012 (filed May 14, 2014). Accordingly, this argument, having been previously decided by this Court, is barred by the doctrine of *res judicata*. *See Colandrea v. Wilde Lake Cmty. Ass'n, Inc.*, 361 Md. 371, 391 (2000) (noting "the judicial policy that the losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on issues raised, or that should have been raised").

Finally, appellant's contention that his *Alford* plea for first-degree burglary is illegal has no merit. Appellant argues that in the 2008 jury trial, the court submitted two questions of first-degree burglary to the jury, and the jury subsequently convicted him of one count and acquitted him of the other. Appellant contends that these two counts encompassed the

same conduct, and the State was barred by the Double Jeopardy Clause from proceeding against him in a subsequent proceeding for first-degree burglary.[3]

In appellant's first trial, the court posed two questions of first-degree burglary to the jury – one as to burglary with the intent to commit a sex offense, and the other as to burglary with the intent to commit theft. The jury convicted appellant of the former.

Appellant is correct that the Double Jeopardy Clause "protects criminal defendants from successive prosecution for the same offense and cumulative punishment for the same offense." *Scott v. State*, 230 Md. App. 411, 420 (2016), *aff'd*, __ Md. __, No. 91, Sept. Term 2016 (filed July 10, 2017). Appellant pled guilty in the *Alford* proceeding to first-degree burglary, and the State proffered that had the case proceeded to a second trial, the State would have demonstrated that appellant broke into the victim's residence for the purpose of committing a sexual offense. Accordingly, appellant's plea proceeding did not violate the Double Jeopardy Clause, because he had been acquitted of first-degree burglary with the intent to commit theft, which was not the charge to which he pled.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[3] The Double Jeopardy Clause, part of the Fifth Amendment of the United States Constitution, provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]"