Circuit Court for Baltimore County
Case No. 03-K-12-5605

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1974

September Term, 2016

DERRELL MONTE PAYNE

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 8, 2017

Derrell Monte Payne, appellant, was charged in the Circuit Court for Baltimore County with carjacking, robbery, and other charges. On March 5, 2013, appellant entered an *Alford* plea[1] to the count of robbery, and the State nol prossed the remaining charges. The court sentenced appellant to ten years' imprisonment, all but 18 months suspended, and three years' probation.

On August 5, 2014, the court found appellant to be in violation of his probation. It imposed a sentence of eight and a half years, with credit for time served. On September 2, 2016, appellant filed a Motion to Correct Illegal Sentence, which the circuit court denied.

On appeal, appellant presents one question for our review, which we have rephrased slightly, as follows:

> Did the circuit court err in denying appellant's motion to correct an illegal sentence where the sentence imposed exceeded the maximum sentence authorized by the plea agreement?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

At the March 5, 2013, plea hearing, the prosecutor informed the court that, if appellant pleaded guilty to the robbery charge, it would nol pros the remaining charges and "recommend a sentence within his guidelines which are anywhere from two years to five years." The prosecutor noted that the court had "indicated that [it] would cap [appellant's] sentence to serve at three years, meaning that he wouldn't be incarcerated actively prior to

---

[1] "An *Alford* plea . . . lies somewhere between a plea of guilty and a plea of *nolo contendere*. Drawing its name from *North Carolina v. Alford*, 400 U.S. 25 (1970), such a plea is a guilty plea containing a protestation of innocence." *Bishop v. State*, 417 Md. 1, 19 (2010) (citations and quotation marks omitted).

any probation violations if there were any for more than three years." The court responded: "Okay. All right. I would . . . do that." Defense counsel then stated that he had explained to appellant that, "although this [c]ourt has agreed to a cap, that's only a cap and that I would be able to argue for less." The court then stated:

> Right. Okay, so the, so the offer would be . . . you plead to robbery, the guidelines are two to five years. I would cap any sentence, cap it, it wouldn't go over three years at all, and it could be less because your attorney would have the right to argue for less time. That's sort of what's on the table now.

The court then explained to appellant that he was facing a maximum of 30 years on the carjacking charge and a maximum sentence of 15 years on the robbery charge. The court reiterated that appellant "would not get more than three years," and he "could get less, but you, you'd know the maximum is three years."

The court then took a recess to allow appellant to speak to his attorney and his family. After the recess, the State stated again that the offer was for appellant to enter an *Alford* plea to the robbery charge, and the judge "agreed to cap [him]self at a sentence to serve of three years." The court stated that it agreed to "cap the sentence . . . to serve at three years."

Defense counsel agreed that was the agreement. When defense counsel was asked to qualify appellant, the following colloquy ensued:

> [DEFENSE COUNSEL]: Now His Honor is not going to give you more than a three year sentence and I'm free to argue for something less than that . . .
>
> THE COURT: *Not more than three years to serve*.
>
> [DEFENSE COUNSEL]: More than three years to serve and His Honor has given me the opportunity to argue for less than that.

(emphasis added). Appellant stated that he understood. Defense counsel subsequently described the plea deal as one where the judge would "cap [the sentence], if you're found guilty in this Alford Plea, of three years," and defense counsel was "free to argue for less." Appellant again agreed that he understood. Appellant agreed that he wished to proceed with the *Alford* plea.

The court subsequently accepted the plea based on a factual proffer that appellant and another man approached a woman who was parking her car, the other man struck the woman, pulled her out of the car and got in the driver's seat, appellant got into the passenger seat, and the two drove away. After finding that appellant understood "the nature of the charge against him and the consequences of his plea," the court then sentenced appellant as follows:

> All right, I'm going to impose a split sentence, the majority of, and the sentence well is comprised obviously of two parts, *one is the time to serve and the other part is the suspended time*. I'm going to impose a total of ten years, suspend all but 18 months to be served at the Baltimore County Detention Center, and that will date as of, effective as of September 20th, 2012. I'm going to impose a period of supervised probation upon his release of three years.

(emphasis added). Neither appellant, nor his counsel, objected to the sentence.

On August 5, 2014, appellant again appeared before the court for a violation of probation hearing. At the hearing, appellant admitted to violating his probation based on another conviction. The court noted that appellant was "backing up eight and a half years in this case," and it "impose[d] the balance of the sentence," which was eight and a half years, with credit for time served. Neither appellant nor his counsel objected to the sentence imposed.

On September 2, 2016, appellant filed a Motion to Correct Illegal Sentence, asserting that the sentence imposed during the violation of probation hearing was illegal, because it "exceeded the binding cap agreed upon by the parties." At the hearing on the motion, appellant's counsel argued that the plea agreement placed on the record, in which the court agreed to bind itself to a cap of three years, was ambiguous. Counsel stated that the ambiguity occurred because

> [w]e're talking sometimes about a cap, a maximum of three years, this is the maximum the [c]ourt will impose, you know you are not going to get more than this, and then we talk sometimes about a cap to serve.
>
> So . . . I think that . . . in and of itself indicates that there is ambiguity here. Indicates that it wasn't totally clear because we are saying two different things . . . . [So] the message is not clear to [appellant].

The court asked whether the issue was raised prior to appellant's probation violation, a "couple of years later," and counsel agreed that it had not previously been raised.

Counsel continued to argue, however, that the plea agreement was ambiguous, noting that "there is not, as there are in some of these other cases . . . there's no sort of conversation about executed versus suspended, active versus suspended." Counsel stated:

> We don't have that here. The only thing that we have is time served, which very reasonably could be interpreted by a lay Defendant without a legal education, time to serve means the time I'm gonna get and not the time that this Defendant thought he was going to get was three years. And that was repeatedly told to him throughout [the] proceedings, that it was capped at three years, three years, three years.
>
> So when the [c]ourt imposed the sentence of ten years suspend all but 18 months, that created an illegality that violated the terms of the binding plea agreement as [appellant] understood it. And because it exceeded that – those three years, anything above and beyond that – and, frankly, our position is that the sentence he's currently serving is illegal.

The court asked whether the split sentence, "comprised obviously of two parts," one being the "time to serve and the other part is the suspended time," brought clarity to the issue and "[c]lear[ed] up the ambiguity?" Counsel responded that it did not, as the court's explanation "comes very late in the game," "after the plea has been accepted as knowing and voluntary."

The State argued that the plea agreement was not ambiguous, and "when you look at what happened when you imposed sentence and the fact that there was no objection at the time because nobody thought it was ambiguous." The prosecutor stated that both defense counsel and appellant "were probably thrilled that Your Honor cut in half what you said you would cap incarceration at."

The court ultimately denied appellant's motion. This appeal followed.

DISCUSSION

Appellant contends that the circuit court erred in denying his motion to correct an illegal sentence. He argues that the sentence imposed "of 10 years' incarceration with all but 18 months suspended is illegal because it exceeded the maximum sentence authorized by the agreement between [appellant] and the State." Appellant asserts that a reasonable layperson in his position would have understood his agreement to prohibit a sentence "longer than three years total," and at the very least, the use of the term "sentence to serve" created ambiguity, which must be resolved in his favor.

The State contends that the circuit court properly denied appellant's motion to correct an illegal sentence where the sentence imposed was consistent with the negotiated plea agreement. It asserts that "the terms of his agreement, capping the term of executed

incarceration, or 'sentence to serve,' at three years was repeatedly explained to" appellant. The State argues that the repeated references to the three-year "sentence to serve," "coupled with the advice to [appellant] that the maximum available sentence was 'up to 15 years,' and that, except for any probation violations, he would not be 'incarcerated actively' for more than three years, clearly made known to [appellant] the sentence he was subject to in his negotiated plea."

Md. Rule 4-243 addresses plea agreements in criminal cases. Once the defendant and the State's Attorney agree to a plea, they must submit the plea agreement proposing a particular sentence to the court for consideration. Md. Rule 4-243(a)(1)(F). The court is not required to accept the terms of a plea agreement, Md. Rule 4-243(c)(2), but if the court does approve the plea agreement, the "judge shall embody in the judgment the agreed sentence . . . encompassed in the agreement." Md. Rule 4-243(c)(3). *See Solorzano v. State*, 397 Md. 661, 669-70 (2007) (noting that the court is under no obligation to accept any particular sentence agreed upon, but if the court does approve a plea agreement, it is "required to fulfill the terms of that agreement if the defendant pled guilty in reliance on the court's acceptance"). The determination "[w]hether a trial court has violated the terms of a plea agreement is a question of law which we review *de novo*." *Id.* at 668.

The Court of Appeals recently addressed how a court should address a claim by a defendant that he or she did not receive the sentence for which the defendant believed that he or she bargained. *Ray v. State* ___ Md. ___, No. 81, Sept. Term, 2016, 2017 WL 3205520 (filed July 28, 2017). First, when interpreting a plea agreement, a court must "determine whether the plain language of the agreement is clear and unambiguous as a

matter of law." *Id.* slip op. at 13. If it is, "then further interpretive tools are unnecessary, and [courts] enforce the agreement accordingly." *Id.* "Second, if the plain language of the agreement is ambiguous, [courts] must determine what a reasonable lay person in the defendant's position would understand the agreed-upon sentence to be, based on the record developed at the plea proceeding." *Id.* Third, if, after examining the agreement and plea proceeding record, the court still finds "ambiguity regarding what the defendant reasonably understood to be the terms of the agreement, then the ambiguity should be construed in favor of the defendant." *Id.* at 13-14.

Applying this analysis, we look first to whether the plain language of the agreement was clear and unambiguous. In *Ray*, the Court of Appeals held that an agreement to impose a "[c]ap of four years on any executed incarceration" was clear and unambiguous, agreeing with this Court's conclusion that it meant "four years to be served in jail." *Id.* at 14 (quoting *Ray v. State*, 230 Md. App. 157, 174 (2016)). Here, as the State notes, the court made clear that the sentencing cap was "three years to serve." This indicates even more clearly than executed time that the cap refers to time to be served in jail. As in *Ray*, "it is unreasonable to interpret the plain language of the agreement as prohibiting a *total* sentence beyond the cap specifically imposed on [time served in jail]." *Id.*

Even if the plain language of the agreement here was ambiguous, a reasonable lay person in appellant's position would have understood that the plea involved a cap on the sentence to be served in jail, and it did not prohibit a total sentence beyond the cap. As the State notes, in addition to the repeated references to the cap of three years on the "sentence to serve," appellant was informed that he was facing 15 years on the robbery charge, but

pursuant to the plea he would not be "incarcerated actively prior to any probation violations if there were any for more than three years." Under these circumstances, a reasonable person in appellant's position would have understood that the cap applied to the time he initially would have to serve in jail, absent a probation violation, and that the court could impose an additional period of time as a suspended sentence.

The sentence imposed was consistent with the plea agreement. Accordingly, the circuit court did not err in denying the motion to correct illegal sentence.

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