Circuit Court for Wicomico County
Case No. 22-K-11-000070

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2074

September Term, 2016

EDWARD N. GRAHAM

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: January 2, 2018

On August 10, 2011, Edward Graham, appellant, pled guilty in the Circuit Court for Wicomico County to a violation of Maryland Code (2002, 2009 Suppl.), Criminal Law Article ("C.L."), § 5-612 – the "volume dealer" statute – and illegal possession of a regulated firearm.[1] The circuit court imposed a prison sentence of twenty years, with all but ten years suspended, for the volume dealer offense, and a consecutive five years for the firearm. Since that time, appellant has filed numerous post-conviction petitions and motions, none of which were successful.

On May 3, 2016, appellant filed a motion to correct an illegal sentence, which the court denied. Appellant appealed and asserts that the court erred in denying his motion because he claims that C.L. § 5-612 had been repealed at the time of his plea proceeding, and, therefore, the circuit court lacked jurisdiction to convict him of this offense. He also maintains that the trial court exceeded the maximum sentence in sentencing him to twenty years for violating that statute. Appellant's claims have no merit.

The Court of Appeals has defined an illegal sentence as "one 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, for either reason, is intrinsically and substantively unlawful.'" *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Chaney v. State*, 397 Md.

[1] C.L. § 5-612(a)(5)-(6) provided: "A person may not manufacture, distribute, dispense, or possess[,]" among other things, "28 grams or more of morphine or opium or any derivative, salt, isomer, or salt of an isomer of morphine or opium" or 28 grams or more of any mixture of morphine, opium, or any derivatives thereof.

460, 466 (2007)). Whether a sentence is illegal is a question of law which we review *de novo*. *State v. Crawley*, 455 Md. 52, 66 (2017).

Appellant first contends that C.L. § 5-612 had been repealed by act of the General Assembly in 2005. Although the legislature amended the statute in 2005, it did not repeal it. When appellant pled guilty in 2011, C.L. § 5-612(a) provided: "A person may not manufacture, distribute, dispense, or possess: . . . (5) 28 grams or more of morphine or opium or any derivative, salt, isomer, or salt of an isomer of morphine or opium[.]"[2]

Appellant asserts that the indictment charging a violation of C.L. § 5-612 included a notation that appellant possessed more than 28 grams of heroin "to indicate an intent to distribute[.]" He, therefore, claims that his indictment was flawed because an intent to distribute was not an element of the offense. The inclusion of "to indicate an intent to distribute" in appellant's indictment is not fatal to his plea to a violation of C.L. § 5-612 because that language was mere surplusage. *See Vines v. State*, 40 Md. App. 658, 661-62 (1978) (classifying inclusion of incorrect section number in indictment as "non-essential and mere surplusage"), *aff'd*, 285 Md. 369 (1979); *Smith v. State*, 35 Md. App. 49, 53 (1977) (noting that inclusion of unnecessary words when indictment fully informed defendant of the charged crime was "surplusage").

Appellant also contends that the court imposed an illegal sentence by imposing a sentence of more than five years, which he believes is the statutory maximum. Appellant has made this argument before, and we rejected it in an unreported opinion. *See Graham*

[2] Subsection (a)(6) included 28 grams or more of "any mixture . . . of morphine or opium or any derivative, salt, isomer, or salt of an isomer of morphine or opium[.]"

v. State, No. 1873, Sept. Term 2011, at slip op. 2 (filed Dec. 17, 2013) ("He first claims that his sentence for possession of a controlled dangerous substance with intent to distribute is illegal, because the offense 'carries a maximum penalty of 5 years.' We disagree."). Accordingly, this issue has previously been ruled upon and is the law of the case. *See Balt. Cnty. v. Fraternal Order of Police, Balt. Cnty. Lodge No. 4*, 449 Md. 713, 729 (2016) ("'[O]nce an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case.'" (quoting *Scott v. State*, 379 Md. 170, 183 (2004))).

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