Circuit Court for Anne Arundel County
Case Nos. C-02-CR-16-002351, C-02-CR-17-000654

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2063

September Term, 2019

EVERETT VAN CARR, JR.

v.

STATE OF MARYLAND

Reed,
Freidman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: December 11, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Everett Van Carr, Jr., appellant, contends that the Circuit Court for Anne Arundel County imposed an illegal sentence after he entered an *Alford*[1] plea to second-degree assault, influencing a witness, and suborning perjury. The circuit court rejected that claim and, for reasons we shall explain, so shall we.

BACKGROUND

In November 2016, Carr was charged, in Case Number C-02-CR-16-002351, with first- and second-degree assault, as well as reckless endangerment, of Shelly Ann Spriggs. While charges in that case were pending, Carr attempted to coerce Ms. Spriggs into recanting her allegations against him, leading to an ensuing twenty-count indictment, in Case Number C-02-CR-17-000654, alleging, among other things, influencing a witness, obstruction of justice, subornation of perjury, and, on multiple occasions, violation of a protective order.

Ultimately, in May 2017, the State and Carr reached a plea agreement, whereby Carr would enter *Alford* pleas to Count 2 of the indictment in Case Number 2351 (second-degree assault), and Counts 1 and 3 of the indictment in Case Number 654 (influencing a witness and subornation of perjury). In exchange, the State would enter

[1] An *Alford* plea is named after *North Carolina v. Alford*, 400 U.S. 25 (1970), which held that a plea, in which a defendant denies his guilt but knowingly and voluntarily consents to the entry of judgment and imposition of sentence, is not constitutionally infirm. The Court of Appeals has characterized an *Alford* plea as "'a guilty plea containing a protestation of innocence.'" *Bishop v. State*, 417 Md. 1, 19 (2010) (quoting *Marshall v. State*, 346 Md. 186, 189 n.2 (1997)).

nolle prosequi to all other counts of the indictments and recommend a sentence of no more than 25 years of active incarceration, with the defense free to argue for less.

During the ensuing plea colloquy, defense counsel explained to Carr the terms of the plea agreement, and the following occurred:

> [DEFENSE COUNSEL]: . . . But under the terms of the plea agreement the -- the -- under the terms of the plea agreement the cap is 25 years. Meaning that if the sentence goes beyond 25 years, you can either get a chance to withdraw your plea or **I believe the Court has indicated it is not going to go above 25 years** or --
>
> THE COURT: **Pardon?**
>
> [DEFENSE COUNSEL]: **The Court has indicated it is not going to go above 25 years for --**
>
> THE COURT: **I indicated, Counsel, in Chambers, that if that was the recommended -- recommendation of the State I would not exceed the --**
>
> [DEFENSE COUNSEL]: Not exceed that --
>
> THE COURT: **-- the 25 years.**
>
> [DEFENSE COUNSEL]: -- recommendation.
>
> THE COURT: **If I heard something that would change my mind on that I would allow you to withdraw the plea.**

(Emphasis added.)

Defense counsel briefly conferred with Carr off the record, and then the examination resumed:

> [DEFENSE COUNSEL]: **So, we have gone through the terms of the plea agreement. And the Court just indicated that if it went above 25 years the Court would give you an opportunity to withdraw your plea, but <u>none of this stuff is binding on the Court</u>. <u>The Court can</u>**

> <u>**decide whichever sentence the Court deems as fair and appropriate**</u>**. Do you understand all that?**
>
> THE DEFENDANT: **Yeah.**

(Emphasis added.)

After defense counsel concluded the examination, and the prosecutor gave a factual basis for the plea, the court accepted the plea and deferred sentencing pending the completion of a presentence investigation. As the proceedings concluded, the court issued Carr a stern warning:

> THE COURT: All right. So, Mr. Carr, there is a No Contact Order. Clearly by what I just heard that No Contact Order hasn't been abided by you. **It is within my discretion to sentence you and I can tell you that it will not go very well for you should I find out that you have been contacting Ms. Spriggs. Do you understand that?**
>
> THE DEFENDANT: **Yes.**
>
> THE COURT: All right. So, the Court order continues no contact with the victim.

(Emphasis added.)

Sentencing took place in July 2017. During the time period between the plea hearing and sentencing, Carr repeatedly violated the No Contact Order. At the outset of the sentencing hearing, Carr, anticipating an unfavorable outcome, moved to withdraw his plea, averring that he had entered his plea under duress and because the victim had "begged him" to do so. The prosecutor countered that there had been a "valid qualification" of Carr's plea and informed the court of his violation of the No Contact Order, and she expressed her "vehement[]" opposition to the motion to withdraw. The

court, voicing its concerns that Carr was "attempt[ing] to manipulate the process," denied the motion.

The victim then gave a victim impact statement, the parties presented argument, and Carr allocuted. Finally, the court, noting Carr's criminal record (which included convictions for armed robbery and domestic assault) and his repeated violations of the No Contact Order, sentenced him to the maximum sentence on each count and ran those sentences consecutively, for a total of 40 years' imprisonment. Carr responded with an obscene outburst, which punctuated the recitation of post-trial rights,[2] and then the hearing concluded.

After sentence was rendered, Carr did not move to withdraw his plea, nor did he make a motion to do so at any time thereafter. He did, however, file a pro se application for leave to appeal, but his application was dismissed as untimely because it was filed 32 days after sentencing, in violation of Maryland Rule 8-204(b)(2)(A). *Carr v. State*, Application No. 1184, Sept. Term, 2017 (filed Oct. 31, 2017) (per curiam).[3] His ensuing motions for modification and for sentence review by a three-judge panel were denied.

In June 2019, Carr filed a pro se motion to correct an illegal sentence, which subsequently was supplemented by a motion filed with the assistance of appointed

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[2] Defense counsel recited the post-trial rights while Carr was cursing and acting disruptively. Although the court asked, "Did you get them all out, [Defense Counsel]?", to which counsel responded affirmatively, the record does not indicate that any mention was made of the right to file a motion to withdraw the plea.

[3] Carr's counsel filed a notice of appeal that was timely but did not comply with the content requirements of Maryland Rule 8-204(b)(3). *Carr v. State*, Application No. 1184, Sept. Term, 2017, slip op. at 2 n.1 (filed Oct. 31, 2017) (per curiam).

counsel. In December 2019, the circuit court held a hearing on that motion. It concluded that the record unambiguously indicated that there had not been a binding plea agreement. As a fallback position, the court ruled that any possible ambiguity was resolved by defense counsel's unequivocal statement to Carr, on the record in open court, prior to the acceptance of the plea, that "none of this stuff [was] binding" on the court and that it could "decide whichever sentence" it "deems as fair and appropriate." Accordingly, the circuit court denied the motion to correct an illegal sentence, and this timely appeal followed.

DISCUSSION

Carr contends that his sentence was illegal because it violated the terms of a binding plea agreement. Invoking the trilogy of *Cuffley v. State*, 416 Md. 568 (2010), *Baines v. State*, 416 Md. 604 (2010), and *Matthews v. State*, 424 Md. 503 (2012), he asserts that the circuit court bound itself to a cap of 25 years of active incarceration unless it became aware, during the time period between the plea hearing and sentencing, of information unfavorable to him; but that, if the court then elected to impose a sentence above the conditional cap of 25 years, it would provide him an opportunity to withdraw his plea. Because the circuit court ultimately imposed a sentence greater than 25 years, but, according to Carr, did not "explicitly give him notice and an opportunity to withdraw [his guilty plea] before" doing so, the court thereby allegedly breached a binding plea agreement. For reasons we shall explain, we hold that there was no binding plea agreement in this case, and, therefore, the *Cuffley-Baines-Matthews* trilogy is inapplicable.

Illegal Sentence Claims Based Upon the Breach of a Binding Plea Agreement

A sentencing court "may correct an illegal sentence at any time." Md. Rule 4-345(a). An "illegal sentence," within the meaning of Rule 4-345(a), is, however, narrowly construed: it encompasses only those sentences that are "intrinsically," *Chaney v. State*, 397 Md. 460, 466 (2007), or "inherently" illegal. *Matthews*, 424 Md. at 519.

There are three types of "intrinsically" or "inherently" illegal sentences within the meaning of Rule 4-345(a): a sentence that exceeds that maximum provided by statute, *Carlini v. State*, 215 Md. App. 415, 427 (2013); a sentence imposed "where no sentence or sanction should have been imposed," *Johnson v. State*, 427 Md. 356, 368 (2012) (quoting *Alston v. State*, 425 Md. 326, 339 (2012)); and "a sentence imposed in violation of the maximum sentence identified in a binding plea agreement and thereby 'fixed' by that agreement as 'the maximum sentence allowable by law[.]'" *Matthews*, 424 Md. at 519 (quoting *Dotson v. State*, 321 Md. 515, 524 (1991)). The instant appeal concerns the third variety of illegal sentence, which presupposes the existence of a binding plea agreement.

In *Ray v. State*, 454 Md. 563 (2017), the Court of Appeals clarified the analysis a reviewing court should apply in interpreting the terms of a binding plea agreement. First, we must look to the written agreement, if any, *Hughes v. State*, 243 Md. App. 187, 200 (2019), and determine whether its language "is clear and unambiguous as a matter of law." *Ray*, 454 Md. at 577. If so, the unambiguous written language controls. *Id.* Otherwise, we turn to the record adduced at the plea hearing and "determine what a reasonable lay person in the defendant's position would understand the agreed-upon

sentence to be," *id.*, based "*solely*" upon that record. *Cuffley*, 416 Md. at 582. If, having performed the first two stages of the analysis, "we still find ambiguity regarding what the defendant reasonably understood to be the terms of the agreement," then we proceed to the third and final stage and resolve any residual ambiguity "in favor of the defendant." *Ray*, 454 Md. at 577-78.[4]

An Antecedent Question: Determining Whether a Court Has Approved a Plea Agreement

Thus far, everything we have discussed applies to binding plea agreements. A circuit court's decision whether to approve a plea agreement (as opposed to merely accepting a guilty plea) is governed by Maryland Rule 4-243(c), which provides:

> **(c) Agreements of Sentence, Disposition, or Other Judicial Action.**
>
> (1) *Presentation to the Court.* If a plea agreement has been reached pursuant to subsection (a)(1)(F) of this Rule for a plea of guilty or nolo contendere which contemplates a particular sentence, disposition, or other judicial action, the defense counsel and the State's Attorney shall advise the judge of the terms of the agreement when the defendant pleads. **The judge may then accept or reject the plea and, if accepted, may approve the agreement or defer decision as to its approval or rejection until after such pre-sentence proceedings and investigation as the judge directs.**
>
> (2) *Not Binding on the Court.* **The agreement of the State's Attorney relating to a particular sentence, disposition, or other judicial action is**

[4] It is not altogether clear that the "reasonable defendant" standard, articulated in *Cuffley*, 416 Md. at 582, and applied to the second and third stages of the analysis in *Ray*, applies to the first stage of the analysis. By way of comparison, in ordinary contract law, a reviewing court begins its analysis by construing the written agreement, if any, through the lens of "what a reasonable person in the position of the parties would have understood the language to mean[.]" *Credible Behavioral Health, Inc. v. Johnson*, 466 Md. 380, 393 (2019). We need not decide this question to resolve the matter before us and therefore shall not further address it.

> **not binding on the court unless the judge to whom the agreement is presented approves it.**
>
> (3) *Approval of Plea Agreement.* If the plea agreement is approved, the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.
>
> (4) *Rejection of Plea Agreement.* **If the plea agreement is rejected, the judge shall inform the parties of this fact and advise the defendant (A) that the court is not bound by the plea agreement; (B) that the defendant may withdraw the plea; and (C) that if the defendant persists in the plea of guilty, conditional plea of guilty, or a plea of nolo contendere, the sentence or other disposition of the action may be less favorable than the plea agreement.** If the defendant persists in the plea, the court may accept the plea of guilty only pursuant to Rule 4-242 (c) and the plea of nolo contendere only pursuant to Rule 4-242 (e).
>
> (5) *Withdrawal of Plea.* If the defendant withdraws the plea and pleads not guilty, then upon the objection of the defendant or the State made at that time, the judge to whom the agreement was presented may not preside at a subsequent court trial of the defendant on any charges involved in the rejected plea agreement.

(Emphasis added.)

Thus, under Rule 4-243(c)(1), a court, when asked whether to approve a plea agreement, has three choices: to approve it, reject it, or defer a decision pending further information or the fulfilment of additional conditions. But in any event, those choices ultimately boil down to two—to approve or reject. If a court chooses the latter course, it must comply with Rule 4-243(c)(4), which, among other things, requires that the defendant be permitted to withdraw his plea.

> To determine whether there actually is an agreement between the State and a defendant, further to determine precisely what the terms of that agreement mean, to determine whether the trial judge signed on to that

> agreement, and finally to determine whether the agreement was breached are questions of law for the appellate court to decide de novo.

State v. Smith, 230 Md. App. 214, 226 (2016) ("*Smith I*") (citations omitted), *aff'd*, 453 Md. 561 (2017) ("*Smith II*"). In most of the published decisions, the dispute centers on the terms of a binding plea agreement, not on whether the court approved the plea agreement and thereby bound itself to its terms. *Smith* is one of the few cases[5] where there was a bona fide dispute over whether the circuit court had approved a plea agreement. Judge Moylan, writing for this Court, addressed the specific question before us, how to determine whether a trial court has bound itself to a plea agreement:

> There would be no guilty pleas based on plea bargains if judges did not first, effectively speaking, agree to be bound by the terms of the plea agreements. There would be no realistic incentive for the defendant to accept the deal. Any suggestion that a guilty plea would be offered before the plea bargain has been at least conditionally accepted is an absurdity. Such an anticipatory acceptance of the deal by the judge is not, to be sure, an absolute or binding acceptance. It is a conditional acceptance. There is invariably the inevitable hedge, "It sounds reasonable to me, but first I must hear the facts," or, "If I am not surprised by some unexpected revelation, I will accept the terms of the plea agreement." In the vast majority of cases, there are no unexpected revelations and, in a subtle little two-step worthy of a Gene Kelly or a Fred Astaire, the conditional acceptance ripens into an absolute acceptance. Generally speaking, moreover, that subtle transition will not be announced to the audience by trumpets or kettle drums. . . .
>
> If the condition hedging the conditional acceptance is satisfied, the condition simply evanesces and the conditional acceptance has ripened into an absolute one. No magic words are required. When the judge, after

[5] See also *State v. Poole*, 321 Md. 482 (1991), in which the trial court had conducted off-the-record discussions regarding its approval of a sealed plea agreement that it subsequently rejected in open court, but only after the defendant had detrimentally relied upon the court's apparent approval of the agreement. In that case, the Court of Appeals looked, in detail, at "the conduct of the parties," *id.* at 493, to determine whether the court had bound itself to the agreement and held that it did. *Id.* at 495.

> hearing the statement of supporting facts, starts talking in the language of the plea bargain, the plea bargain has self-evidently been accepted. There is a symbiosis between the two acceptances [that is, the acceptance of the guilty plea and the acceptance of the plea agreement] and it is impossible to say which, if either, came first. This transition should be discernible by the defense, even without kettle drums.

Smith I, 230 Md. App. at 227 (internal citation omitted).

What was left unsaid, in both *Smith I*, 230 Md. App. at 227-30, and *Smith II*, 453 Md. at 578-79, was whether, in conducting de novo review, an appellate court must view the matter through the lens of the "reasonable defendant" standard of *Cuffley*. Both parties before us tacitly assume that the "reasonable defendant" standard applies in resolving this question.

We agree and hold accordingly. Given Judge Moylan's observation that "[t]here would be no guilty pleas based on plea bargains if judges did not first, effectively speaking, agree to be bound by the terms of the plea agreements" because, otherwise, "[t]here would be no realistic incentive for the defendant to accept the deal," *Smith I*, 230 Md. App. at 227, and furthermore, given that, generally, a trial court's approval of a plea agreement is a critical inducement to a defendant's decision to plead guilty, we conclude that where there is a dispute as to whether a trial court has agreed, under Rule 4-243, to bind itself to a plea agreement, the *Cuffley* "reasonable defendant" standard should apply.

We further take this opportunity to tie up an additional loose end. Whereas *Cuffley* and its progeny held that, in applying the "reasonable defendant" standard to determine the terms of an oral binding plea agreement, a reviewing court is limited to considering "*solely*" the record adduced at the plea hearing, *Cuffley*, 416 Md. at 582, it is

necessary to recognize an exception to that rule in determining whether a court has agreed, in the first instance, to be bound to such an agreement. Thus, if, as in the instant case, a trial court defers its decision whether to approve a plea agreement, pending a condition that cannot be fulfilled until a later time (such as, in this case, whether Carr would abide by the No Contact Order during the time period between plea and sentencing), then we may, out of necessity, also consider the record of the sentencing hearing in determining whether the court has approved the agreement.[6] *See* Md. Rule 4-243(c)(1).

Analysis

In the instant case, during the defense's examination of Carr prior to the court's acceptance of his *Alford* plea, the court stated that it would not exceed the State's recommendation of 25 years unless it "heard something" that would lead it to "change [its] mind," in which case it "would allow [Carr] to withdraw the plea." Immediately afterward, following an off-the-record consultation with his client, defense counsel declared to him in open court that "none of this stuff is binding on the Court." Carr indicated that he understood. Up to that point, a reasonable defendant in Carr's position would have understood that the court had not unconditionally approved the plea agreement. (Indeed, it is clear that the court was deferring its decision, under Rule 4-243(c)(1).)

[6] The transcript of the sentencing hearing generally may not, however, be used to determine the terms of a binding plea agreement. (We can envision an exception to that rule, applicable if the parties declare their intention, in open court, during the sentencing hearing, to amend a plea agreement. But that is not the situation before us.)

Thereafter, upon the conclusion of the examination and the State's presentation of a factual basis for the plea, the court accepted the plea and ordered a presentence investigation. The court then reiterated to Carr that it retained "discretion to sentence" him and that "it [would] not go very well for" him were the court to learn that he continued to contact the victim. Carr again indicated that he understood. After counsel for both parties agreed upon a date for sentencing, the proceedings concluded. We readily conclude that nothing in the plea hearing record would have led a reasonable defendant in Carr's position to believe that the court had approved the plea agreement.

At the sentencing hearing, it became clear that the circuit court had decided to reject the plea agreement because Carr had disobeyed its order to have no contact with the victim. Prior to imposition of sentence, Carr, in anticipation of an unfavorable disposition, moved to withdraw his *Alford* plea, but the court denied his motion. Thereafter, the circuit court imposed the maximum possible sentence for each count and ran those sentences consecutively, resulting in a 40-year term of incarceration. Carr responded with an obscene outburst, but neither he nor his counsel then moved to withdraw his plea, as was his right under Rule 4-243(c)(4), in light of the court's rejection of the plea agreement. Nor did Carr file a motion to withdraw his plea, under Rule 4-242(h), within ten days of sentencing.

Because the circuit court rejected the plea agreement, it was required to "inform the parties of this fact and advise the defendant (A) that the court is not bound by the plea agreement; (B) that the defendant may withdraw the plea; and (C) that if the defendant persists in the plea of guilty, conditional plea of guilty, or a plea of nolo contendere, the

sentence or other disposition of the action may be less favorable than the plea agreement." Md. Rule 4-243(c)(4). Clearly, the court violated that rule, because, at the pronouncement of sentence, it did not advise Carr that he could withdraw his plea. (Indeed, its prior rejection of his presentence motion to withdraw may well have had a chilling effect on the exercise of his right to withdraw following the court's rejection of the plea agreement.) That does not, however, mean that the sentence imposed was illegal within the meaning of Rule 4-345(a). The expansion of Rule 4-345(a) to encompass illegal sentence claims of the *Cuffley-Baines-Matthews* variety presupposes the existence of a binding plea agreement. In this case, our review of the record indicates that the circuit court never bound itself to the plea agreement and that no reasonable defendant could have thought otherwise.

Thus, Carr's claim, reduced to its essence, is an unpreserved claim of a procedural error. Such a claim is not grist for the Rule 4-345(a) mill, and it is not properly before us. See *Bailey v. State*, 464 Md. 685, 696-97 (2019), and cases there cited. We therefore affirm the circuit court's order, denying Carr's motion to correct an illegal sentence.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.