

Circuit Court for Carroll County  
Case No. 06-K-10-040628

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2177

September Term, 2016

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RAYMOND MICHAEL MYERLY

v.

STATE OF MARYLAND

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Eyler, Deborah S.,  
Berger,  
Fader,

JJ.

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Opinion by Fader, J.

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Filed: February 6, 2018

\* 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.

In this appeal, Raymond Michael Myerly asks us to excuse him from the consequences of violating his probation on the theory that: (1) the circuit court erred in granting Mr. Myerly’s request to release him from prison so that he could pursue life-saving cancer treatment;<sup>1</sup> (2) had the circuit court not granted that humanitarian relief, Mr. Myerly would not have been on probation; and so (3) his sentence for violating a probation he never should have been on is illegal and must be vacated.

The circuit court denied Mr. Myerly’s motion to correct an illegal sentence.<sup>2</sup> We affirm in part and reverse in part. Although the circuit court lacked the authority to suspend the remainder of Mr. Myerly’s sentence when it did, that does not invalidate the period of probation Mr. Myerly was serving or prevent the court from punishing Mr. Myerly’s violation. The court thus did not err in convicting Mr. Myerly of violating his probation. However, we must remand to the circuit court to address an issue that follows from our determination that it lacked authority in 2013 to suspend the sentence that it originally imposed in 2011.

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<sup>1</sup> At oral argument, both parties recognized that the circuit court was placed in a difficult position. In other contexts, Mr. Myerly’s argument that the court erred by giving him what he asked for would be barred by estoppel under the doctrine of “invited error,” as “a defendant who himself invites or creates [an] error cannot obtain a benefit . . . from that error.” *State v. Rich*, 415 Md. 567, 575 (2010) (quoting *Klaunberg v. State*, 355 Md. 528, 544 (1999)). That doctrine, however, does not apply to a motion to correct an illegal sentence. *State v. Crawley*, 455 Md. 52, 66 (2017) (holding that “a defendant cannot consent to an illegal sentence”); *Johnson v. State*, 427 Md. 356, 371-72 (2012) (stating that a claim that a sentence is illegal under Rule 4-345(a) “is not subject to waiver”). An illegal sentence must be corrected. *Crawley*, 455 Md. at 66; *Johnson*, 427 Md. at 371-72.

<sup>2</sup> Mr. Myerly frames his question presented as, “Did the trial court err in denying the motion to correct illegal sentence?”

## BACKGROUND

The Circuit Court for Carroll County convicted Mr. Myerly on two counts of second-degree burglary and one count of theft on July 26, 2011. The court sentenced Mr. Myerly to 15 years in prison on each burglary count, suspending all but ten years on the first (Count 1) and suspending all on the second (Count 5), as well as a concurrent five years on the theft count. The court also sentenced Mr. Myerly to five years' probation to begin upon his release.

During his incarceration, doctors diagnosed Mr. Myerly with cancer. For reasons that are not relevant to this appeal, the cancer went untreated and by early 2013 became life-threatening and untreatable in the Carroll County facilities where he was then being held.

In March of 2013, Mr. Myerly wrote a pro se request for an evaluation for drug addiction treatment under § 8-505(a)(1)(ii) of the Health-General Article of the Maryland Code. The court eventually ordered that an evaluation be conducted by a health professional and, based on the evaluator's recommendation, ordered that Mr. Myerly be committed to what was then the Maryland Department of Health and Mental Hygiene to receive drug addiction treatment pursuant to § 8-507(a)(1) of the Health-General Article.

In filings related to the § 8-505 request, the circuit court became aware of Mr. Myerly's cancer and treatment issues. The court held an emergency hearing at which Mr. Myerly moved, unopposed, to suspend his sentences and impose probation so that he could pursue treatment. The court granted the motion, suspended the remainder of Mr. Myerly's sentences, and "place[d] him on probation as originally entered," with the additional

condition that he obtain treatment for his cancer. Among the conditions of Mr. Myerly's probation was obeying all laws.<sup>3</sup>

Just a few months later, Mr. Myerly was charged with a series of burglaries and other criminal conduct that took place in Baltimore and Carroll counties. Pursuant to a plea agreement, the Circuit Court for Carroll County convicted Mr. Myerly of one count of second-degree burglary and sentenced him to 12 years, all but five suspended, with five years' probation upon release. Based on that conviction, the court also convicted Mr. Myerly of violating his probation and ordered that he serve ten of the years that had previously been suspended. Operating under the belief that more than ten years of his original 15-year sentence on Count 1 remained suspended (the five suspended when the sentence was imposed in 2011 and almost seven more that the court ordered suspended in 2013), the court allocated all ten years to Count 1. The court ordered that the sentences be served concurrently.

Mr. Myerly subsequently filed a motion to correct an illegal sentence under Rule 4-345(a). The circuit court denied his motion and Mr. Myerly noted a timely appeal.

### **DISCUSSION**

Mr. Myerly asserts that the 2013 suspension of his initial sentences and, therefore, the sentence imposed in 2014 for his violation of probation were illegal.<sup>4</sup> First, Mr. Myerly

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<sup>3</sup> In light of the suspension of the remainder of Mr. Myerly's sentence, the court also vacated the § 8-507 order.

<sup>4</sup> Mr. Myerly does not challenge the 2014 sentence entered on his conviction for second-degree burglary.

argues that the circuit court lacked jurisdiction to modify his sentences in 2013, and so its suspension of those sentences was illegal and the probation on which it placed Mr. Myerly at that time was a “nullity.” Second, he contends that he could not lawfully be convicted of a probation that did not exist, and so his sentence for that violation is also illegal and must be vacated. Mr. Myerly also maintained, at oral argument, that the 2014 sentence was illegal for the additional reason that the court impermissibly ordered that all ten years it ordered him to serve be placed on Count 1 of the 2011 sentence, when there were not ten years left suspended on that count.

At oral argument, the State acknowledged that the circuit court may have lacked authority to suspend Mr. Myerly’s sentences in 2013. But, the State argued, Mr. Myerly could still be convicted of a violation of probation because his 2011 sentence, pursuant to which probation was originally imposed, was legal.

“Whether a sentence is an illegal sentence under Maryland Rule 4-345(a) is a question of law that is subject to de novo review.” *Crawley*, 455 Md. at 66. Although we agree with Mr. Myerly that the circuit court had no authority in 2013 to suspend the remainder of the 2011 sentences, we disagree with him as to the implications of that conclusion. The period of probation Mr. Myerly was serving upon his release in 2013 was valid and, therefore, the court did not err in convicting him of violating that probation. However, as explained further below, the circuit court did err in placing all ten years imposed for the violation on Count 1. For that reason, we will remand for re-sentencing.

**I. THE CIRCUIT COURT LACKED AUTHORITY TO SUSPEND MR. MYERLY’S SENTENCES IN 2013.**

As both parties now seem to acknowledge, the circuit court’s suspension of Mr. Myerly’s sentences in 2013 was unauthorized. The court did not identify any authority for its suspension, the parties have not identified any such authority, and we have found none. Neither Rule 4-345(a) or (b) applies,<sup>5</sup> as no party alleges any illegality, fraud, mistake, or irregularity associated with the 2011 sentences. Nor does Rule 4-345(e)(1) apply, as that Rule only permits modification “[u]pon a motion filed within 90 days after imposition of a sentence.” Mr. Myerly’s motion was filed well more than 90 days after his sentence was imposed.

Although the State suggested in its brief that § 6-219(b) of the Criminal Procedure Article of the Maryland Code might apply, it backed away from that assertion at oral argument. For good reason: Consistent with the statutory scheme, § 6-219(b) allows a court to “suspend a sentence generally or for a definite time” when imposing such a sentence, but does not provide blanket authority for a court to suspend a sentence previously imposed. A contrary holding would upend established law providing that Rule 4-345(e) is the “sole authority for modifying a sentence imposed” in the absence of illegality, fraud, mistake, or irregularity. *Tolson v. State*, 201 Md. App. 512, 517 (2011).

It seems apparent from the record that the circuit court was presented with a unique, distressing, and urgent situation in which all parties agreed on what was necessary to “do

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<sup>5</sup> Rule 4-345(a) allows the court to “correct an illegal sentence at any time.” Rule 4-345(b) grants the court “revisory power over a sentence in case of fraud, mistake, or irregularity.”

the right thing.” The law, however, did not authorize the circuit court’s 2013 suspension of the terms of imprisonment that it had imposed in 2011.

**II. THE ORIGINAL 2011 PROBATION REMAINED VALID, AND THEREFORE MR. MYERLY’S 2014 VIOLATION OF PROBATION CONVICTION IS VALID.**

Concluding that the circuit court’s suspension of Mr. Myerly’s sentences in 2013 was unauthorized, however, does not yield the result Mr. Myerly seeks. “[I]n the absence of statutory authority a court does not possess any power, after sentence has been pronounced, to suspend the execution of its judgment so as to relieve an accused, either in whole or in part, from suffering the sentence imposed.” *Crawley*, 455 Md. at 59 (quoting *Cathcart v. State*, 397 Md. 320, 327 (2007)). “[B]ecause the Maryland Constitution has vested in the General Assembly the power to enact legislation providing for the suspension of sentences, . . . courts are not authorized to ignore or act inconsistently with th[e] conditions or limitations” created by such statutes. *Id.* (quoting *Cathcart*, 397 Md. at 328). When a court alters a sentence without the authority to do so, then that alteration is a “nullity” and the original sentence “remains in effect.” *See Tolson*, 201 Md. App. at 518-19 (finding modification of a sentence outside the bounds of Rule 4-345 a nullity and, therefore, that the original sentence “remains in effect”).

The circuit court’s unauthorized 2013 suspension of the remainder of Mr. Myerly’s sentences was thus a nullity. But what is the effect of that conclusion on Mr. Myerly’s 2014 violation of parole conviction? According to Mr. Myerly, the probation he was placed on in 2013 was also a “nullity,” and he therefore could not be convicted of violating that probation. The State maintains that his conviction is valid either because (1) Mr.

Myerly violated the probation imposed by his legal 2011 sentence, which began upon his release from incarceration; or (2) relying on *Matthews v. State*, 304 Md. 281, 293 (1985), *abrogated on other grounds by Savoy v. State*, 336 Md. 355, 362-64 (1994), because the court could properly order that he serve a previously-suspended portion of his original sentence even through the period of probation had not yet begun. We agree with the State.

“Probation should not be allowed to develop into a grant of immunity from punishment,” *Matthews*, 304 Md. at 293, and neither should the premature onset of probation. The original 2011 sentence imposed probation to begin upon Mr. Myerly’s release, and required Mr. Myerly to obey all laws while on probation. That 2011 sentence remained in effect notwithstanding the court’s actions in 2013. *Tolson*, 201 Md. App. at 518-19. Thus, the probation on which Mr. Myerly was placed when he was released from prison in 2013—with the exception of the extra condition that he complete treatment for his cancer—was valid.<sup>6</sup> That the period of probation began earlier than it would have if not for the court’s unauthorized suspension is of no moment to the questions of whether it was a legal period of probation and whether Mr. Myerly violated it. It was; and he did.<sup>7</sup> The circuit court thus did not err in convicting him of that violation.

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<sup>6</sup> In articulating what it was doing in 2013, the circuit court expressly stated that it was placing Mr. Myerly “on probation as originally entered.” In doing so, the court made clear that its intent was not to sentence Mr. Myerly to a new period of probation, but to implement the probation that was originally entered with the 2011 sentence.

<sup>7</sup> Alternatively, we also agree with the State that even if Mr. Myerly technically had not begun serving his period of probation immediately upon his release in 2013, it still would have been appropriate for the circuit court to order him, based on his conduct while released, to serve portions of his 2011 sentence that were originally suspended. A term of probation can be revoked and the original sentence enforced at any time after sentencing,



**IV. ALTHOUGH THE COURT ACTED WITHIN ITS DISCRETION IN DIRECTING EXECUTION OF TEN YEARS OF MR. MYERLY’S ORIGINAL SENTENCE, IT ERRED IN DIRECTING EXECUTION OF TEN YEARS ALL ON COUNT 1.**

Although the circuit court’s conviction of Mr. Myerly for violation of probation in 2014 remains valid, the invalidity of the 2013 suspension does give rise to one problem that must be corrected on remand. When a court provides a sentence for violation of probation, it can only “direct execution of all or part of the previously suspended part of the sentence, but not of any part of the sentence that the court initially directed to be served in prison.” *Benedict v. State*, 377 Md. 1, 12 (2003). “In other words, after a court revokes a probation, the only part of the original sentence which a court may order executed is the suspended portion.” *Tolson*, 201 Md. App. at 520.

When the circuit court convicted Mr. Myerly in 2014, it ordered the execution of ten years of the sentence that had been suspended. During the sentencing proceeding, the court was informed that more than 11 years remained suspended on Count 1. That, however, included, in addition to the five years that had been suspended when the sentence was initially imposed in 2011, the almost seven years that had been suspended in 2013. Based on our holding above, those nearly seven additional years were not actually available, because they had never been validly suspended. Thus, with respect to Count 1,

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even before probation begins. *Matthews*, 304 Md. at 292-93. That is because “[t]he commission of a new crime during the interval between the imposition of sentence and the effective date of probation may furnish proof that a defendant cannot conduct himself in conformity with societal standards and he may rightfully forfeit his freedom as a result.” *Id.* at 293. Thus, the circuit court would have been well within its authority in revoking its original (2011) suspension of a portion of Mr. Myerly’s sentence even if we were to agree with Mr. Myerly that his probation had not yet begun.

only the five years suspended in the original 2011 sentence were available. The ten-year term the circuit court sentenced Mr. Myerly to serve on Count 1 was, therefore, illegal. *Benedict*, 377 Md. at 12; *Tolson*, 201 Md. App. at 519-20. We stress that this illegality relates exclusively to the count to which the court assigned the additional ten years. We perceive no illegality in the violation of probation conviction itself nor in the length of the resulting sentence.

We remand for resentencing pursuant to Rule 8-604(d)(2). In doing so, we note that in imposing the original sentence in 2011, the court not only suspended five years on Count 1, but also suspended the entirety of the 15-year sentence imposed on Count 5. In resentencing Mr. Myerly, the circuit court “may impose any sentence authorized by law to be imposed as punishment for the offense.” *See* Cts. & Jud. Proc. § 12-702(b); *Twigg v. State*, 447 Md. 1, 28 (2016) (indicating that, under § 12-702(b), when a sentence is vacated and remanded, the circuit court “is in the best position to assess the effect” of the vacatur and determine the appropriate sentence, so long as it otherwise conforms to statutory limits and does not exceed the originally imposed sentence); *Benedict*, 377 Md. at 12 (remanding for resentencing in conformance with allowable time); *Tolson*, 201 Md. App. at 519-20 (same). Thus, if the court on remand exercises its discretion to order the execution of the same ten years it initially ordered Mr. Myerly to serve for violation of probation, it may do so by ordering execution of no more than five years previously suspended on Count 1 and the remainder on Count 5, or by ordering execution of all ten years on Count 5. The court

could also exercise its discretion to impose a different sentence, subject to the requirements of § 12-702(b) of the Courts and Judicial Proceedings Article.

**ORDER DENYING MOTION TO CORRECT ILLEGAL SENTENCE AFFIRMED IN PART AND REVERSED IN PART; THE 2013 SUSPENSION OF SENTENCES AND 2014 SENTENCE FOR VIOLATION OF PROBATION ARE VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR CARROLL COUNTY FOR RESENTENCING ON THE 2014 VIOLATION OF PROBATION IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID 75% BY APPELLANT AND 25% BY CARROLL COUNTY.**