Circuit Court for Prince George's County
Case No. CT150741X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2456

September Term, 2016

CONWAY WILSON

v.

STATE OF MARYLAND

Graeff,
Shaw Geter,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: August 3, 2018

Appellant, Conway Wilson, was indicted in the Circuit Court for Prince George's County, Maryland, and charged with first and second degree rape, first and second degree assault, first, second and fourth degree sex offense, and use of a firearm in the commission of a crime of violence. Appellant pleaded guilty to second degree rape (Count 2) and use of a firearm during the commission of a crime of violence (Count 8). After appellant's subsequent request to withdraw his guilty plea was denied, appellant was sentenced to twenty (20) years with all but ten (10) years suspended for the second-degree rape conviction, and a consecutive twenty (20) years with all but five (5) years mandatory suspended for the use of a firearm conviction, to be followed by five (5) years supervised probation and the condition that appellant register as a sex offender.[1] This Court granted appellant's application for leave to appeal and appellant now raises the following issues for our review:

> 1. Did the circuit court err in accepting Appellant's plea to use of a firearm where the factual basis proffered by the State did not support a conviction for that offense?
>
> 2. Did the circuit court sentence Appellant in violation of the plea agreement when it imposed a sentence of 20 years for use of a firearm?

For the following reasons, we hold that the court did not err in finding a factual basis to support the use of a firearm conviction but did impose an illegal sentence for that offense.

[1] The court originally sentenced appellant to the five years mandatory on the firearm offense to be followed by a consecutive sentence on the rape offense. The court subsequently switched the order of the sentences to be served, without a hearing. Also of note, although the court clerk's docket sheet inaccurately reflects the court's sentence, the commitment included with the record appears to accurately reflect the circuit court's final disposition, as summarized above.

Thus, we shall vacate appellant's sentence for the use of a firearm conviction and remand this case for a hearing on re-sentencing consistent with this opinion.

BACKGROUND

Prior to trial, appellant pled guilty to two counts of the indictment. The terms of the agreement were set forth in the following exchange:

> [DEFENSE COUNSEL]: Your Honor, in this case, Mr. Wilson has agreed to accept the State's plea offer, which is plead guilty to one count of second degree rape and to one count of use of a firearm during a crime of violence.
>
> We've agree[d] that his guidelines for the second degree rape are five to ten years. What the State is going to be asking for is that, for the handgun offense, which would carry a mandatory five, that that run consecutive. So, in essence, Your Honor, the range of the sentence would be five to ten years on the second degree rape and a five-year consecutive mandatory period of time on the handgun offense.
>
> We're going to ask for a long-form PSI. At the time of the sentencing, all other counts in the indictment will be dismissed.
>
> [PROSECUTOR]: That's correct. Count 2 would be a sentence of 20 years suspending all but a period of incarceration within the sentencing guidelines, which we've agreed to are five to ten. The defense can argue and the State can argue within those guidelines.
>
> Then Count 8, it's agreed to five years mandatory, consecutive to whatever is Count 2.
>
> THE COURT: Second degree is which count?
>
> [PROSECUTOR]: Count 2, second degree, and Count 8 is the handgun in the commission.
>
> THE COURT: And that's everything?
>
> [DEFENSE COUNSEL]: Yes, Your Honor. He has to registered [sic] as a sex offender.

THE COURT: And the gun registration.

[DEFENSE COUNSEL]: That's correct.

[PROSECUTOR]: And five years of supervised probation to follow whatever term of imprisonment. A special condition is to have no contact with Erica Spears. That's E-R-I-C-A. The last name is S-P-E-A-R-S. And submit to a mental health evaluation as directed by parole and probation.

[DEFENSE COUNSEL]: If needed.

[PROSECUTOR]: As directed. If needed, as directed.

THE COURT: That's everything?

[PROSECUTOR]: Yes.

[DEFENSE COUNSEL]: Yes, Your Honor.

The court then asked appellant questions about his age, education, physical and mental condition. The following ensued:

THE COURT: It's my understanding you wish to plead guilty to Count 2, second degree rape, which carries a maximum of 20 years, you said?

[PROSECUTOR]: I believe so, yes.

THE COURT: And Count 8, use of a firearm, which also carries a maximum of 20 years, but five of those are mandatory without parole.

The elements of second degree rape are that you had vaginal intercourse with a person without their consent by force. And the use of a firearm in a crime of violence is that you used that firearm in the commission of that vaginal intercourse. Do you understand that?

THE DEFENDANT: Yes, ma' am.

The court informed appellant of his right to a jury trial, the rights he would have had available to him during a trial, and his appellate rights following a trial. The court also indicated that a guilty plea could affect his immigration status, and that, by proceeding in this fashion, appellant could not challenge any searches or seizures, including any pretrial

statements, conducted or obtained by the police prior to trial. After appellant indicated that he understood that he was waiving all these rights, the court heard the following statement of facts in support of the guilty plea:

> [PROSECUTOR]: Thank you, Your Honor. Had the matter proceeded to trial, the State would have presented witnesses that would have testified that on June 2nd, 2015, at 2324 hours, Erica Spears responded to the District III Prince George's County Police Station and disclosed that she was sexually assaulted by her child's father.
>
> Further investigation revealed that on June 2nd, 2015, at about 1830 hours, that Erica Spears went over to the home of Conway Wilson, Jr., who is seated to my right in the orange jumpsuit. She went over there to visit with her daughter. They have a child in common.
>
> While inside of the apartment, the victim and the defendant became engaged in an argument about the status of their relationship. During the argument, the defendant retrieved an unknown make and model handgun from underneath a pile of clothes and pointed the handgun at the victim's head and threatened to kill her.
>
> The victim was eventually able to calm the defendant down and he placed the handgun away. A short time later, the defendant and the victim began to argue again, and the defendant demanded the victim to submit to vaginal intercourse. When the victim refused, the defendant hit her in the head, threw her to the ground, and removed her clothes forcefully. The defendant them [sic] removed his penis from his pants and forced the victim to submit to vaginal and anal intercourse against her will.
>
> After the assault, the victim left the residence and notified the police. The defendant was arrested a short time later and had a loaded handgun in his pocket, which was recovered by the police.
>
> The victim was taken to the sexual assault center. She was given a SAC examine. There was an abrasion to the right side of the victim's head, as well as bruising on her face, and vaginal and anal tears.
>
> All events did occur in Prince George's County, Maryland. That would be the State's case.
>
> [DEFENSE COUNSEL]: Your Honor, we agree that they would be able to put on that evidence during the course of the trial.

After further inquiry of appellant, including that he was pleading guilty because he was guilty and for no other reason, the court found both a factual basis for the plea and that the plea was given "freely, voluntarily, intelligently, and knowingly[.]" The court then accepted appellant's guilty pleas to Count 2, Second Degree Rape, and Count 8, Use of a Firearm in the Commission of a Crime of Violence. The parties agreed to conduct sentencing at a later date.[2]

Prior to sentencing, the court granted a request by appellant's first defense counsel to withdraw from the case. Represented by new counsel, appellant then asked to withdraw his guilty plea. Appellant contended that he did not know that the plea could affect his probationary status in another case, that he was not satisfied with the services of the attorney who represented him at the plea hearing, and that he was equivocal about whether he was pleading guilty because he was guilty "and for no other reason." Noting that appellant pled guilty to the lesser charge of second degree rape as opposed to first degree rape, the court denied the request, stating that "I found that he had given his plea intelligently, I always say these words, voluntarily, intelligently, knowingly and accept his plea. And I am not going to allow him to withdraw it today, so it's denied."

This case then proceeded to sentencing. At the beginning of that hearing, the prosecutor asked that the sentencing guidelines listed in the pre-sentence investigation be

[2] The appellate record includes a "Waiver of Rights/Guilty Plea – Sex Offenses" form that was filed with the clerk of court the same day as the plea hearing. This form, apparently signed by appellant, includes, *inter alia*, an acknowledgement that appellant understood the nature and the elements, as well as the maximum penalty, i.e., twenty (20) years, for the second degree rape charge. There is no mention of the use of the firearm charge.

modified from "twelve to twenty" to "five to ten based on the way the facts were, that the gun wasn't used during the rape." The prosecutor then generally recounted the pertinent facts for the court, including that appellant placed a gun to the victim's head and threatened her while they were in the bedroom. After appellant calmed down and put the gun down, the victim went into the living room. Appellant followed her there and eventually engaged in forced vaginal and anal intercourse with the victim on the kitchen floor. There are no facts indicating that appellant had the gun with him in the kitchen. The prosecutor maintained that appellant "punched her in the face, knocked her head into the refrigerator and slammed her on the floor." Appellant was arrested the day after this incident, and he had a loaded 9 millimeter semiautomatic handgun in his possession.

After the court heard from the victim, the State asked the court to "sentence the Defendant on Count 2, second degree rape, to twenty years, suspend all but ten; that on Count 8, the Defendant be sentenced to five years mandatory and that that count run consecutive to Count 2." Upon inquiry by the court, the State further stated that "[t]he agreement was that Count 2 would be, both parties free to allocute within the guidelines. Count 8, five years mandatory consecutive. That was agreed. The Count 2 was, both parties free to allocute within the guidelines for the jail time." Defense counsel agreed this was the substance of the plea agreement.

After hearing from defense counsel, family members, and friends, defense counsel asked the court to sentence appellant on Count 8 first and then to run the sentence on Count 2 consecutive. After the parties disagreed about whether the agreement called for a specific order to the sentences to which the court would be bound, the following ensued:

[DEFENSE COUNSEL]: Then if Your Honor believes that it is up to you, I would ask that Count 8 run first and then Count 2 consecutive.

And I would ask for twenty, suspend all but five in accordance with the agreement. If Your Honor does not believe that it's up to you, then I'm bound by the way it was written.

THE COURT: Actually, it's not an ABA plea.[3] I can do anything I want. That's your plea.

[DEFENSE COUNSEL]: Thank you, Your Honor.

THE COURT: But I usually listen to the plea. Don't get me wrong, I go by plea in like 99.9 percent unless something happens that's unusual.

The court then sentenced appellant as follows:

THE COURT: . . . It was a plea to two counts, second degree rape and use of a handgun in the commission of a crime of violence. That means that he used the gun during the course of the rape which makes this a sentence of violence and a guideline of five years to ten years on the rape charge.

Let me say this: There is objective proof whether people want to believe it or not that there was violence that occurred because there is a hospital record for Ms. Spears that has bruising on her face and a knot and tearing in her vaginal and anal area.

And as someone who used to prosecute sexual assault cases, I know what that means. That's a sign of violence. You don't have tearing in consensual sexual acts. You just don't.

Now, I'm not saying Mr. Wilson is a bad man or that everyone who knows him is not correct in their interaction with him and how he is perceived, but on that day and time, he became a different person.

And as a result of becoming a different person Mr. Wilson, that's why you're here today facing these serious charges.

And while others might not believe Ms. Spears, I'm going to have to say that I take what she says to be totally true from the beginning to end.

[3] An "ABA plea" refers to a binding plea agreement under Maryland Rule 4-243. *See State v. Chertkov*, 95 Md. App. 104, 107 n.1 (1993).

And the problem is also, one reason is that, I also heard as objective proof, Mr. Wilson, that at the time of your arrest, found on your person was a loaded 9 millimeter handgun.

So all of these wonderful things said about you, how in the world could you have on your person a 9 millimeter handgun that's loaded and be this terrific, loving father when you had the child with you as well at the time.

Isn't it true that he had a gun at the time of the arrest?

[PROSECUTOR]: Mm-hmm.

THE COURT: I mean, I'm not understanding this. I'm not getting this. So the only concession I'm going to give you, to be honest with you is, I'll sentence you first on Count 8.

I don't have a problem with that, but the sentence is mandatory without parole. I have no choice. It's twenty years, suspend all but five years mandatory without parole. Credit for 324 days. Upon release, you're placed on five years of supervised probation.

You can have no contact with the victim. And the only way that you'll ever have contact with your daughter is through a legal process only. That is the only way.

With respect to Count 2, second degree rape, the sentence is twenty years. And because of the nature of this crime, it is at the top of the guidelines. Suspend all but ten years consecutive to Count 8.

DISCUSSION

I.

Appellant first contends that the court erred in accepting his plea to use of a firearm in the commission of a crime of violence because the factual basis for the plea did not establish that he used a gun during the rape. The State responds that the predicate crime

of violence included the charge of first degree assault and that the factual basis of the plea included that appellant used a gun when he assaulted the victim in this case. In reply, appellant raises an argument that he was never advised of the elements of first degree assault. Appellant maintains that the factual basis of his plea was inadequate because there was no dispute that the gun was not used in the rape.

Maryland Rule 4-242(a) provides that a defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*, and not criminally responsible by reason of insanity. Subsection (c) of the Rule states what the court is required to do before it may accept a plea of guilty, in pertinent part as follows:

> (c) Plea of guilty. The court may not accept a plea of guilty, including a conditional plea of guilty, until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. . . .

In *State v. Daughtry*, 419 Md. 35 (2011), the Court of Appeals reiterated that, "in determining whether a guilty plea" was entered with an understanding of the nature of the offense, we apply the "totality of the circumstances" test. *Id*. at 71. In doing so, we may consider, among other factors, "'the complexity of the charge, the personal characteristics of the accused, and the factual basis proffered to support the court's acceptance of the plea.'" *Id*. at 72 (quoting *State v. Priet*, 289 Md. 267, 277 (1981)). With regard to the complexity of the charge, the Court observed that the "'nature of some crimes is readily understandable from the crime itself.'" *Id*. (quoting *Priet* at 277).

"[T]he primary purpose of the factual basis requirement of Maryland Rule 4-242(c) is to ensure that the accused is not convicted of a crime that he or she did not commit." *Rivera v. State*, 409 Md. 176, 194 (2009); *accord Metheny v. State*, 359 Md. 576, 602 (2000). "[U]nder Maryland Rule 4-242(c), when facts are admitted by the defendant and are not in dispute," as occurred at the plea hearing below, "the judge need only apply the facts to the legal elements of the crime charged to determine if an adequate factual basis exists." *Metheny*, 359 Md. at 603. In other words, "[b]y pleading guilty to the charges, [a]ppellant waived several fundamental rights including the one advanced here, namely 'the right to insist that the prosecution's proof at trial establish guilt beyond a reasonable doubt.'" *Metheny*, 359 Md. at 598 (footnote omitted). Ultimately, "[t]here must be some statement as to the underlying facts which constitute the offense and which the defendant moreover admits." *Parren v. State*, 89 Md. App. 645, 650 (1991).

Criminal Law Section 4-204(b) provides that "[a] person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime." Md. Code (2002, 2012 Repl. Vol.), § 4-204(b) of the Criminal Law ("Crim. Law") Article; *see also Hallowell v. State*, 235 Md. App. 484, 507 (2018) ("The elements of that offense are (1) that a firearm was used by the defendant, and (2) that he used it in the commission of a felony or crime of violence") (citing *Hoffert v. State*, 319 Md. 377, 379-80 (1990)). Section 4-204 is a multi-purpose criminal statute, "embracing different matters in the disjunctive," and a court, in applying the required evidence test, "must examine the alternative elements

relevant to the case at hand." *Hallowell*, 235 Md. App. at 508 (quoting *State v. Ferrell*, 313 Md. 291, 298 (1988)).

The list of crimes of violence in Section 5-101 of the Public Safety Article includes first and second degree assault, as well as first and second degree rape. *See* Md. Code (2003, 2011 Repl. Vol.), § 5-101(c) of the Public Safety Article. Although we tend to agree with appellant that he did not "use" a firearm during the actual rape, *see, e.g.*, *Wynn v. State*, 313 Md. 533, 543 (1988) ("By employing the term 'uses' instead of 'while armed' the Legislature requires something more than merely being armed. . . ."), it is clear that he used a firearm when threatening the victim. Notably, both first and second degree assault were charged in the indictment. Appellant's actions, as recounted in the statement of facts, meet the statutory definition of first degree assault as an assault with a firearm. *See* Crim. Law § 3-202(a)(2). *See generally*, *Cruz v. State*, 407 Md. 202, 209 n.3 (2009) (recognizing three modalities of assault: "'1. A consummated battery or the combination of a consummated battery and its antecedent assault; 2. An attempted battery; and 3. A placing of a victim in reasonable apprehension of an imminent battery'") (quoting *Lamb v. State*, 93 Md. App. 422, 428 (1992), *cert. denied*, 329 Md. 110 (1993)).

Moreover, it is of no moment that the charges to which he pled guilty did not include either of the two assault charges because our cases hold that a person may be convicted of using a firearm, even in the absence of such an accusation:

> [T]he firearm offense "is separate and distinct from the felony or crime of violence during the commission of which the [firearm] was used," and, therefore, "an individual on trial for the [firearm] charge does not necessarily need to have been separately accused of the commission of a felony or crime of violence in an additional count or indictment before he can be charged

> with or convicted of the crime established in [CL § 4-204]." *Ford v. State*, 274 Md. 546, 551 (1975), overruled on other grounds by *Price v. State*, 405 Md. 10 (2008). *Accord Kohler v. State*, 203 Md. App. 110, 119 (2012) (observing that it is not necessary "for the State to separately charge the defendant with the predicate felony" when charging felony murder) (citation omitted).

Hallowell, 235 Md. App. at 508-09.

We conclude that there was an adequate factual basis for appellant's plea to Count 8, use of a firearm in the commission of a crime of violence. We further decline to consider appellant's claim, raised for the first time in his reply brief, that he was not advised of the elements of first degree assault. *See Robinson v. State*, 404 Md. 208, 215-16 n.3 (2008) ("An appellate court will not ordinarily consider an issue raised for the first time in a reply brief"); *State v. Jones*, 138 Md. App. 178, 230 (2001) ("The cases are legion, in Maryland and elsewhere, that an appellate court generally will not address an argument that an appellant raises for the first time in a reply brief"), *aff'd*, 379 Md. 704 (2004).

II.

Appellant next asserts that the circuit court violated the terms of the plea agreement when it imposed a sentence of twenty (20) years on Count 8 for use of a firearm conviction, thus making his sentence illegal. The State disagrees, asserting that the plea agreement was nonbinding, and that, at the plea hearing, the circuit court advised appellant that the maximum sentence was twenty (20) years. Appellant replies that the plea agreement was indeed binding, noting that the court did not advise appellant at the plea hearing that it was not bound by the agreement.

The "core message" of *Cuffley v. State*, 416 Md. 568 (2010), *Baines v. State*, 416

Md. 604 (2010), and *Matthews v. State*, 424 Md. 503 (2012), "is that when a defendant foregoes a trial and enters a guilty plea pursuant to an agreement with the State which is then accepted by the court, the defendant is entitled to have the State and the court honor the terms of that agreement." *Carlini v. State*, 215 Md. App. 415, 443 (2013). The guilty plea agreement in this case was a contract between appellant and the State. *Smith v. State*, 453 Md. 561, 573 (2017). "Whether a plea agreement has been violated is a question of law which this Court reviews *de novo*." *Hartman v. State*, 452 Md. 279, 289 (2017) (citing *Tweedy v. State*, 380 Md. 475, 482 (2004)). The Court of Appeals has recently stated the relationship between plea agreement interpretation and contract law, as follows:

> First, we must determine whether the plain language of the agreement is clear and unambiguous as a matter of law. If the plain language of the agreement is clear and unambiguous, then further interpretive tools are unnecessary, and we enforce the agreement accordingly. Second, if the plain language of the agreement is ambiguous, we 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. "[I]f examination of the terms of the plea agreement itself, by reference to what was presented on the record at the plea proceeding before the defendant pleads guilty, reveals what the defendant reasonably understood to be the terms of the agreement, then that determination governs the agreement." *Baines*, 416 Md. at 615, 7 A.3d at 585. Third, if, after we have examined the agreement and plea proceeding record, we still find 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.

Ray v. State, 454 Md. 563, 577-78 (2017) (some internal citations and footnotes omitted).

Under Md. Rule 4-243(a)(1)(E), a criminal defendant may agree to plead guilty on the condition that the State "will recommend, not oppose, or make no comment to the court with respect to a particular sentence, disposition, or other judicial action[.]" "The

recommendation of the State's Attorney with respect to a particular sentence, disposition, or other judicial action made pursuant to subsection (a)(1)(E) of this Rule is not binding on the court." Md. Rule 4-243(b).

By contrast, under Md. Rule 4-243(a)(1)(F), the State and a criminal defendant may agree to "submit a plea agreement proposing a particular sentence, disposition, or other judicial action to a judge for consideration[.]" "The judge may then accept or reject the plea[.]" Md. Rule 4-243(c).

Under the Rule, any proposed sentence, whether it be recommended by the State under Rule 4-243(a)(1)(E) or particularized in an agreement under Rule 4-243(a)(1)(F), is non-binding on the court. In the latter instance, however, the sentence becomes binding once the court accepts the plea. Conversely, if a plea is accepted pursuant to Maryland Rule 4-243(a)(1)(E), the court is not bound to any particular sentence.

Here, we conclude that the terms of the plea agreement were put on the record within the first several minutes of the plea hearing and the court accepted those terms. Defense counsel stated that "the range of the sentence would be five to ten years on the second degree rape and a five-year consecutive mandatory period of time on the handgun offense." The prosecutor repeated those terms stating, pertinent to our discussion, "Then Count 8, it's agreed to five years mandatory, consecutive to whatever is Count 2." The court then inquired "[a]nd that's everything?" to which the parties added that there were registration and probation requirements. After those were set forth, the court repeated "That's everything?" and both parties replied in the affirmative. Thereafter, after informing

appellant of the maximum possible sentences on the two counts, the court accepted the plea agreement as follows:

> Okay. All right. Then I find that there is a factual basis for the plea, and that it has been given freely, voluntarily, intelligently, and knowingly, and accept your plea of guilty to Count 2, Second Degree Rape, and Count 8, Use of a Firearm in a Crime of Violence.

The court reiterated that it had accepted the plea agreement when, at a subsequent hearing, it denied appellant's motion to withdraw his guilty plea.

Looking strictly to the plea hearing, the agreement appears clear and unambiguous. The only arguable indication of any ambiguity is when the court stated that the potential maximum sentence for the use conviction was twenty (20) years. Considering that the court never indicated that it was not bound by the agreement or that the agreement contemplated a period of suspended time in addition to the executed portion, we are persuaded that a reasonable person would conclude that the agreement did not call for a suspended sentence.

Furthermore, the State, in arguing that the sentence was lawful, looks primarily to comments the court made at the sentencing. These include the court's comment that this was not an "ABA plea," suggesting that the plea was a nonbinding recommendation. Notably, this comment was made at sentencing, after the court had already accepted the plea. And, even were we to consider the comment at sentencing, we agree with appellant that it created an ambiguity, and any ambiguity in the nature and terms of the agreement is to be resolved in his favor. *See Solorzano v. State*, 397 Md. 661, 673 (2007) ("Assuming that the agreement was ambiguous, the ambiguity should have been construed in favor of

the defendant"); *accord Cuffley*, 416 Md. at 583. As an aside, we note that, although judges and lawyers presumably understand the differences between the executed and suspended portions of a sentence, as well as the finer distinctions between binding pleas and nonbinding recommendations, those peculiarities are not so obvious to an average lay person who is likely "unaware of the niceties of sentencing law[.]" *Cuffley*, 416 Md. at 582.

Having concluded that appellant's sentence for the use of a firearm conviction was not in conformity with a binding plea agreement, we turn to the remedy. A defendant who has not received the benefit of a plea bargain has two options: either he or she can have the bargain specifically enforced or withdraw the plea of guilty. *See Santobello v. New York*, 404 U.S. 257, 267 (1971) (Douglas, J., concurring). This principle is based upon the Due Process Clause and the recognition that, to be valid, a guilty plea must be knowing, voluntary, and intelligent. *See Metheny*, 359 Md. at 601. The Court of Appeals has held that, ordinarily, where the plea agreement is breached, and it was not caused by the defendant, the remedy available to the defendant is to permit him or her to choose either specific performance or to withdraw the plea. *See Tweedy*, 380 Md. at 488; *Cuffley*, 416 Md. at 583; *see also Sweetwine v. State*, 42 Md. App. 1, 4 (1979) (observing that, if the defendant elects to withdraw the plea, "both the defendant and the state return to 'square one.' They both begin again with a clean slate") (footnotes omitted), *aff'd*, 288 Md. 199 (1980).

On appeal, appellant did not expressly elect a remedy but rather asked us to remand this case for a new hearing so as "to provide him the choice of specific performance of the agreement or withdrawal of his plea." We decline to do so.

With respect to appellant's first issue on appeal, his arguments relate solely to the conviction for use of a firearm. He does not mention the conviction or sentence for second degree rape. With respect to the second issue on appeal, appellant cites Maryland Rule 4-345(a), which provides that a court may correct an illegal sentence at any time. Again, he does not mention the conviction or sentence for second degree rape. In express terms and in effect, appellant's challenge is to the legality of his sentence for the use of a firearm conviction. We agree that the sentence was illegal because it was in violation of the plea agreement. Accordingly, we vacate the sentence for use of a firearm conviction and remand for a new sentencing proceeding to impose a sentence in accordance with the plea agreement.

SENTENCE BY THE CIRCUIT COURT FOR PRINCE GEORGES COUNTY FOR USE OF A FIREARM IN THE COMMISSION OF A CRIME OF VIOLENCE VACATED. CASE REMANDED FOR A RE-SENTENCING HEARING CONSISTENT WITH THIS OPINION. CONVICTIONS AND SENTENCE OTHERWISE AFFIRMED.

COSTS TO BE PAID ONE HALF BY APPELLANT AND ONE HALF BY PRINCE GEORGE'S COUNTY.