Circuit Court for Anne Arundel County
Case No. 02-K-09-001963

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2625

September Term, 2016

TIMOTHY JOHN STEWART

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: March 6, 2018

In June 2011, a jury in the Circuit Court for Anne Arundel County convicted Timothy Stewart, appellant, of two counts of second-degree rape, three counts of second-degree sexual offense, four counts of third-degree sexual offense, sexual abuse of a minor, and unnatural and perverted sexual practice. The court sentenced him to a total of 165 years of imprisonment, with all but 50 years suspended, to be followed by a five-year period of supervised probation. This Court affirmed his convictions and sentence in an unreported opinion. *See Stewart v. State*, No. 1851, Sept. Term 2011 (filed Aug. 21, 2014).

On December 19, 2016, appellant filed a motion to correct an illegal sentence pursuant to Rule 4-345(a).[1] Appellant argued that his sentence was illegal because the court was required by Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("C.P."), § 11-723 to impose a period of extended sexual offender parole supervision, which it did not do. On January 25, 2017, the court denied appellant's motion without a hearing, concluding that the requirements of appellant's supervised probation were proper and satisfied C.P. § 11-723. Appellant then timely noted this appeal. Assuming that the court's failure to impose a more severe sentence on appellant constitutes an illegal sentence, for the reasons stated below, we affirm.

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

[1] This rule provides that a "court may correct an illegal sentence at any time."

unlawful.'" *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). "'A sentence does not become an illegal sentence because of some arguable procedural flaw in the sentencing procedure.'" *Id.* (quoting *Tshiwala v. State*, 424 Md. 612, 619 (2012)). Whether a sentence is illegal or not is a question of law which we review *de novo*. *State v. Crawley*, 455 Md. 52, 66 (2017).

At the time of appellant's sentencing, C.P. § 11-723(a) provided: "Except where a term of natural life without the possibility of parole is imposed, a sentence for an extended parole supervision offender shall include a term of extended sexual offender parole supervision." An extended parole supervision offender was defined, in part, as a person who "has been convicted of a violation of § 3-303, § 3-304, § 3-305, § 3-306(a)(1) or (2), or § 3-307(a)(1) or (2) of the Criminal Law Article" or who "has been convicted of a violation of § 3-602 of the Criminal Law Article for commission of a sexual act involving penetration of a child under the age of 12 years[.]" C.P. § 11-701(f)(2) & (4). Subsection (b) of C.P. § 11-723 provides that a term of extended sexual offender parole supervision "for a defendant sentenced on or after **August 1, 2006**, shall" be for a period from three years to life and "commence on the expiration of the later of any term of imprisonment, probation, parole, or mandatory supervision." (Emphasis added).

After a review of the record of appellant's trial, we are persuaded that appellant does not qualify as an "extended parole supervision offender," and, therefore, the court was not required to impose a period of extended sexual offender parole supervision. We explain.

For his conduct between April 10, 2003, and April 17, 2006, appellant was convicted of: two counts of second-degree rape, in violation of Maryland Code (2002),

Criminal Law Article ("Crim."), § 3-304; three counts of second-degree sexual offense, in violation of Crim. § 3-306; and one count of third-degree sexual offense, in violation of Crim. § 3-307. Application of C.P. § 11-723 to appellant's convictions for these offenses would, however, constitute an *ex post facto* application of the law, which would be unconstitutional because the General Assembly enacted C.P. § 11-723 on June 22, 2006. *See* U.S. CONST. art. I, § 9, cl. 3; *Quispe del Pino v. Md. Dep't of Pub. Safety & Corr. Servs.*, 222 Md. App. 44, 49 (2015) (observing that a litigant hoping to prevail in an *ex post facto* claim "'must first show that the law that [he is] challenging applies retroactively to conduct that was completed before the enactment of the law in question'" (emphasis omitted) (quoting *Sec'y, Dep't of Pub. Safety & Corr. Servs. v. Demby*, 390 Md. 580, 593 n.10 (2006))).

For the period between April 18, 2006, and April 17, 2008, appellant was convicted of three counts of third-degree sexual offense. Assuming that this conduct occurred after June 22, 2006, the date of the enactment of C.P. § 11-723, appellant does not meet the definition of an "extended parole supervision offender." To qualify as such, appellant would have had to be convicted of violation of Crim. § 3-307(a)(1) or (2).[2] *See* C.P. § 11-

[2] These sections prohibited:

> (1)(i) engag[ing] in sexual contact with another without the consent of the other; and
>
> (ii) 1. employ[ing] or display[ing] a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;

701(f)(2). The jury instructions from appellant's trial make clear that appellant was convicted of violating subsections (a)(3)-(5) of that statute.[3]

Appellant's remaining conviction that could qualify him as an "extended parole supervision offender" is sexual abuse of a minor, a violation of Crim. § 3-602. The record indicates that appellant was convicted of this offense for conduct occurring between April

> 2. suffocat[ing], strangl[ing], disfigure[ing], or inflict[ing] serious physical injury on the victim or another in the course of committing the crime;
>
> 3. threaten[ing], or plac[ing] the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
>
> 4. commit[ting] the crime while aided and abetted by another;
>
> (2) enag[ing] in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual.

[3] These subsections prohibited:

> (3) engag[ing] in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim;
>
> (4) engag[ing] in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or
>
> (5) engag[ing] in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

18, 2003, and June 24, 2009. For the reasons stated above, appellant's conduct prior to June 22, 2006, cannot serve to render his sentence illegal because application of C.P. § 11-723 to those actions would constitute an unconstitutional *ex post facto* application of the law. Furthermore, in order to meet the definition of an "extended parole supervision offender" for this conduct, C.P. § 11-701(f)(4) provides that the child had to be under the age of 12 at the time of an act of penetration. In 2006, the child victim in this case was 14.

Accordingly, appellant does not meet the definition of an "extended parole supervision offender" for any of his convictions. The circuit court, therefore, was not required to impose a period of extended sexual offender parole supervision, and appellant's sentence is not illegal.

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