UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2777

September Term, 2012

JASON DAVID FERRIS

v.

STATE OF MARYLAND

Woodward,
Nazarian,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: September 16, 2015

Appellant, Jason David Ferris, contends in this appeal that the trial court illegally increased his punishment from concurrent sentences to consecutive sentences in violation of Maryland Rule 4-345. Therefore, we must consider whether the court's post-sentence action was, in fact, an increase of his sentence, or mere administrative clarification of the sentence originally imposed.

Ferris pleaded guilty in the Circuit Court for Calvert County to one count of theft under $1,000 and five counts of first-degree burglary. The court sentenced appellant on all six offenses. The sentences included actual incarceration, probation, and restitution.

The court's pronounced sentence was 18 months for theft and 15 years for each of the five burglary offenses, with each one to be served consecutive to the sentence for theft. Two days later, on its own motion, the sentencing court convened another hearing, the essence of which we shall discuss, *infra*.

Following the post-sentencing hearing, Ferris moved, pursuant to Md. Rule 4-345, to "vacate the increased sentences." From denial of that relief, Ferris has noted his timely appeal, asking:

Did the court err by increasing [his] sentence two days after sentencing him?

For the reasons set forth below, we answer this question in the affirmative and remand for further proceedings.

FACTUAL BACKGROUND and PROCEEDINGS

On June 4, 2012, during a hearing before the Circuit Court for Calvert County appellant entered guilty pleas in six different cases pending against him. Five cases charged first-degree burglary (case nos. K-12-053, 054, 055, 056, and 057, respectively); the other charged theft under $1,000 (case no. K-12-052). Appellant entered an Alford plea[1] to theft under $1,000 in case no. K-12-052. He entered guilty pleas to the five counts of first-degree burglary in case nos. K-12-053 through K-12-057.

There was no agreement as to the sentences to be imposed, and the court advised that the length and terms of his sentence would be at the discretion of the sentencing judge. The court informed him that the sentencing judge, "whoever that judge may be, has the power to give you consecutive time, concurrent time or no time, and that's in that judge's discretion and today in this courtroom I have no control over it."

Later, on August 13, 2012, appellant's sentencing hearing was convened before another judge. At the outset, the court acknowledged that the State would be requesting a concurrent sentence of 18 months in the theft case, and consecutive sentences of 20 years, with all but five years suspended, in each of the five burglary cases. The court further

[1]An *Alford* plea is a guilty "plea containing a protestation of innocence[,]" *North Carolina v. Alford,* 400 U.S. 25, 37 (1970), where a "'defendant does not contest or admit guilt.'" *Jackson v. State,* 207 Md. App. 336, 361 (2012) (quoting *Bishop v. State,* 417 Md. 1, 18-19 (2010)).

acknowledged the following: "Defendant is free to allocute for less. Terms and length of probation up to the court, and there is restitution."[2]

The State, in addition to probation and restitution totaling $51,934 for all offenses, requested the following sentences: K-12-052 (theft under $1,000): 18 months, concurrent to the burglaries; K-12-053 (burglary): 20 years, suspend all but 5 years, starting 12/30/2011; K-12-054 (burglary): 20 years, suspend all but 5 years, consecutive to K-12-053; K-12-055 (burglary): 20 years, suspend all but 5 years, consecutive to K-12-053; K-12-056 (burglary): 20 years, suspend all but 5 years, consecutive to K-12-053; K-12-057 (burglary): 20 years, suspend all but 5 years, consecutive to K-12-053.

Defense counsel requested, in addition to restitution, that the court impose a lesser sentence of ten years, with all but five years suspended for each burglary offense.

After hearing further arguments by counsel, victim impact statements, and allocution by appellant, the court pronounced, in relevant part, the following sentences:

> THE COURT: Sentence of the court in K-12-52 is 18 months Division of Corrections . . . which is the maximum sentence. Credit for 227 days. Restitution of $200 . . . as well as a judgment against Mr. Ferris for that amount . . . .

[2]The court's words were as follows: "[T]he state is going to be requesting in the 52 case 18 months concurrent to whatever he's serving in the 53 case; 20 years, suspend all but five years, starting December 30 of '11; the 54 case the same sentence consecutive; the 55 case the same sentence consecutive; the 56 case the same and consecutive; and 57 the same and consecutive."

Next we have K-12-53. That's a first-degree burglary. Your guidelines for that for active time is 15 years to 20 years. In all of these because there's going to be a lesser sentence than the active, I am also going to put recommendation of the state because your five years is actually under the guidelines, Ms. [State's Attorney].

Sentence of the court in K-12-53 is 15 years Division of Corrections, suspend all but five years, and *that's consecutive to K-12-52.* Restitution in this matter along with K-12-57 is $12,100 . . . . It will be a judgment in her favor against you as well. Because there's a split sentence, there's going to be five years probation.

* * *

K-12-54, again, it's a first-degree burglary. Again, the guidelines because of your record is 15 years to 20 years. Sentence of the court is 15 years, suspend all but 5 years, *and that is consecutive to K-12-52.* Restitution in this case is $34,800. . . . Same period of probation.....

* * *

K-12-55 is first-degree burglary. The guidelines are 15 years to 20 years max. Fifteen years Division of Corrections, suspend all but five years, and *that's consecutive to K-12-52*, and there's restitution . . . in the amount of $1,600. Same terms and conditions of probation, and it's reduced to judgment in his favor against you. . . .

K-12-56, there is restitution of [$]3,234. Again, that's 15 years Division of Corrections. That's going to be totally suspended *and consecutive to K-12-52.* Same periods of probation. Same conditions and same appellate rights. . . .

And K-12-57. . . . It's 15 years, suspend all but four years, *and that's consecutive to K-12-52.* Again, restitution has already been rolled into the $12,100.

If you add this up, sir, and if you do day for day – and I know that's not true because you're going to be paroled out – you would be into your 50th year. Those decades – and you already hit one of them. You already hit the 30 and

> you made wrong choices. When you hit 40, I hope you're still with us and you're making better – but if you serve day for day, you'll be out when you're 50.
>
> I will look at this case, and if I am not here, the transcript will show that I affirmatively said that if you can stay infraction free, the earliest the court will look at it is two years, but in the range of two to five years we will look at this again for a Health General commitment.
>
> * * *
>
> The total consecutive sentence is 20 and a half years. Give us a minute. While we're redoing that form, I'm going to take a short break so we can get this commitment done properly . . . .

(Emphasis added). No further action was taken by the court on August 13, 2012, regarding appellant's sentence.

Two days later, on August 15, 2012, the court initiated a second hearing regarding appellant's sentence, during which the following occurred:

> THE COURT: We are here at the Court's request. Yesterday I received ... a call from the clerk's office about the commitment, and the commitment that should have been in place and was clearly noted in the courtroom was that Mr. Ferris' backup time was 54 years was suspended. 20 years, 6 months was imposed. 227 days was given credit for time served. I am looking at both the docket entries and the probation order that unequivocally tell you that.
>
> The quarrel from the clerk's office was *the Court having made the first sentence 18 months, the next sentences consecutive to K-12-52, and then the others consecutive to 12-52* when it should have been to 53, 54, 55, 56 and 57.[3]

[3]In each of the sentencing worksheets, signed by the sentencing judge in cases K-12-054, K-12-055, K-12-056 and K-12-057, appellant's prison time is recorded as consecutive to K-12-052, all in blue ink. Then, in black ink a higher numeral is written over the numeral 52 in each of these cases. For example, in K-12-057, the '52 is changed to '56.

> You can put your argument on the record, Ms. [Defense Counsel], and then I'll hear from the State, if she wishes to add anything.
>
> It was *the Court's clear intention*, as I look at the docket sheet and the probation order, what the sentence was.

(Emphasis added).

After pointing out that the court had made all five of appellant's 15-year burglary sentences in K-12-053 through K-12-057 consecutive to his 18-month sentence for theft under $1,000 in K-12-052, defense counsel argued as follows:

> DEFENSE COUNSEL: It is our contention that what the Court is trying to accomplish today will be adding to the sentence that was imposed on Monday, the 13th, and our contention as well is that that is illegal, in that it's increasing the sentence that was imposed on my client on Monday, the 13th, today being the 15th of August.
>
> I say these words because Mr. Ferris – the sentence was imposed upon him by the Court. The sentence that was given to him was not illegal. In other words, there wasn't something sort of fundamentally wrong with it or just – fundamentally wrong with it is I guess the best way to put it or illegal.
>
> So what is trying to be attempted today is some sort of fix of a problem, and my contention is that Mr. Ferris was remanded to the sheriff. He left the courtroom. It's my reading of the case law, I have Ridgeway, Sawyer, [*Hoile*] and Brown, they all are sort of talking about the same thing, and there is a distinction between illegal sentence that can be changed and in that instance can be increased, versus a pronounced sentence that is not illegal.
>
> I'm reading from [*Hoile*], and I do not want –
>
> THE COURT: The pronounced sentence was what I just said.
>
> DEFENSE COUNSEL: And I hear what the Court said.
>
> THE COURT: The pronounced sentence.

Defense counsel emphasized that, whereas an illegal sentence may be corrected at any time, a court's correction of a mistake in sentencing "that results in an increased sentence may only occur before the defendant leaves the courtroom following the sentencing proceeding." The prosecutor disagreed, supporting the court's position that there had not been any confusion about what the sentence was, and the judge, who had "clearly said these sentences are consecutive[,]" was giving Ferris the "entire parameters of the sentence[.]" The court then stated:

> Mr. Ferris, stand up.
>
> There is no confusion in my mind, nor in your's I'm sure, as to what the sentence was Monday, August 13. . . . It is a clerical change of the docket entry to ensure that when you get to the Division of Corrections, that they note exactly what the sentence was.
>
> For purposes of this case, I'm going to append the original docket entries, which show 20 years, 6 months to be served in the Division of Corrections, and the corrected or the clarified – I guess the more correct term would be the clarification of docket entry that shows the 20 years, 6 months executed sentence, 54 years suspended.

On September 5, 2012, appellant filed, in each of his cases, a Motion for Appropriate Relief - Modification to Correct Illegal Sentence. His motion pointed out that on August 13, 2012, "the aggregate sentence as announced is: 21.5 years, suspend all but 6.5 years[,]" whereas "the aggregate of the sentence from 15 August 2012 is 76.5 years, suspend all but 20.5 years starting on 30 December 2011[,]" to which counsel objected because it resulted in an increase to the initial sentence announced by the court. Appellant argued, pursuant to

Md. Rule 4-345, that the sentence imposed on August 15, 2012, in the court's convened hearing, was illegal because it was not imposed at the initial sentencing proceedings, was not corrected prior to his being taken from the courtroom, and the net effect was to increase his sentences for burglary in case nos. K-12-054 through 057.

The court denied appellant's motion on September 17, 2012. This appeal followed.

DISCUSSION

Appellant argues that the circuit court erred by increasing his sentence two days after sentencing him. On this record, we agree.

Appellant asks that we vacate the sentences pronounced at the August 15, 2012 hearing, and re-impose the court's originally pronounced sentence of 16 years and six months, with all but six years and six months suspended. He maintains that, by failing to correct an alleged error in the announcement of the sentences before he left the courtroom at the conclusion of the August 13, 2012 sentencing proceeding, the court violated Maryland Rule 4-345(c). He concludes that the court's clarification of his pronounced sentence, in the second hearing, actually increased the length of his sentence, which is illegal under Maryland law.

The State contends that it was not illegal for the court to revise the first-pronounced sentences from being consecutive to case no. K-12-052 to being consecutive to each other because the court "clearly announced – before Ferris ever left the courtroom – that the consecutive sentences imposed totaled 20 years and six months." Suggesting "that it is the

transcript of the sentencing hearing on August 13, 2012 that controls[,]" the State argues that critical examination of this transcript reflects that "the sentencing judge intended to and did impose an aggregate executed sentence of 20 years and six months." The State concludes that, "at best, the hearing on August 15, 2012 was for clarification or housekeeping purposes[,]" and argues that "[a]n active sentence of only six years and six months would not make sense given the court's statements."

We are persuaded by appellant's argument that the court's announcement of a new sentence two days after its sentencing hearing was illegal under Maryland law. Maryland Rule 4-345 provides in relevant part as follows:

> **Sentencing – Revisory power of court.**
>
> (a) **Illegal sentence.** The court may correct an illegal sentence at any time.
>
> (b) **Fraud, mistake, or irregularity.** The court has revisory power over a sentence in case of fraud, mistake, or irregularity.
>
> (c) **Correction of mistake in announcement.** The court may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing hearing.

Once a sentence is deemed to have been imposed by a court, the court's power to increase the sentence terminates, even if the court seeks to correct an inadvertent "slip of the tongue." *State v. Sayre,* 314 Md. 559, 563-65 (1989). At the time of the Court's decision in *Sayre*, Md. Rule 4-345(b) provided that a "court may modify or reduce or strike, but may not increase the length of, a sentence" once it has been imposed. *Id.* at 560. The rule was

thereafter amended, in 1992, to provide courts with a limited opportunity "to correct the pronouncement of a sentence, provided that the error was corrected on the record before the defendant left the courtroom." *Ridgeway v. State,* 369 Md. 165, 172 n. 2 (2002).

As both Md. Rule 4-345 and appellate holdings have made plain, an illegal sentence may be corrected at any time. But, "correcting a mistake in a sentencing order that results in an increased sentence may only occur 'before the defendant leaves the courtroom following the sentencing proceedings.'" *Ridgeway,* 369 Md. at 170 (quoting Rule 4-345). In *Ridgeway,* the court failed to impose any sentence at all, resulting in an illegal sentence that could be corrected after the defendant left the courtroom. The Court wrote in *Ridgeway*:

> Because, with respect to a modification – and particularly an increase – of a *legal* sentence, it is not always possible "to distinguish between an inadvertent slip of the tongue and a true change of mind," [*Sayre,* 314 Md.] at 564, and because we were "unwilling to allow a procedure that [would] permit an inquiry of the sentencing judge's subjective intent," *id.* at 565, we held that "once sentence has been imposed, there can be no inquiry into intention or inadvertence" under Rule 4-345(b). *Id.*

369 Md. at 172.

In *Hoile v. State,* 404 Md. 591, *cert. denied,* 555 U.S. 884 (2008), the Court of Appeals reviewed the history of Md. Rule 4-345 and the circumstances under which a sentencing judge may correct a mistake in an announced sentence. The Court explained that Md. Rule 4-345 was again amended in 2004, but it was "clear that the penultimate drafters

of the new Rule did not intend to eliminate the prohibition on increasing a sentence because of fraud, mistake or irregularity." 404 Md. at 626. Focusing on the important distinction in Md. Rule 4-345 between an initially imposed legal versus illegal sentence, the Court wrote:

> "[A]n illegal sentence may be corrected at any time, while correcting a mistake in a sentencing order that results in an increased sentence may only occur before the defendant leaves the courtroom following the sentencing proceedings."

Hoile, 404 Md. at 626 (quoting *Ridgeway,* 369 Md. at 170). For further support, the Court in *Hoile* quoted a concurrence by Judge Wilner:

> Except when sentence review is sought by the defendant under [Criminal Procedure Article] §§ 8-101 through 8-109, or an appeal is taken by the State under [Courts & Judicial Proceedings Article] § 12-302 to correct the failure of a court to impose a sentence mandated by law, the sentence may not be increased after it is imposed. *The revisory power of the court extends only to modifications that are clarifying in nature or that do not adversely affect the defendant.*

Id. at 626-27 (emphasis by Court in *Hoile*) (quoting *Lopez-Sanchez v. State,* 388 Md. 214, 248 (2005) (concurrence)).

In the case *sub judice,* the transcript clearly shows that on August 13, 2012, the court pronounced legal 15 year sentences, consecutive to case no. K-12-052, in each of appellant's five burglary cases. A sentence is defined as "the judgment that a court formally pronounces after finding a criminal defendant guilty." *Parker v. State,* 193 Md. App. 469, 486 (2010). Two days later, on August 15, 2012, the sentencing judge explained that when she viewed the docket sheet and probation order noting that actual time of 20 years and six months was

imposed, with 54 years suspended, "it was the Court's clear intention" to make the burglary sentences consecutive to each other, rather than to case no. K-12-052. In fact, that observation is a concession by the court that it had mistakenly announced that four of the burglary sentences would be consecutive only to the 18-month theft sentence, rather than to each of the burglary sentences, in turn.

"When there is a conflict between the transcript and the commitment record, unless it is shown that the transcript is in error, the transcript prevails." *Douglas v. State,* 130 Md. App. 666, 673 (2000). *See also, Gatewood v. State,* 158 Md. App. 458, 481-82 (2004) (transcript prevails over docket entries, and concurrent sentences presumed over consecutive); *Jackson v. State,* 68 Md. App. 679, 687-88 (1986) (transcript of the sentencing hearing takes precedence over docket entries, unless shown to be in error).

Fundamental fairness dictates that ambiguity regarding a sentence imposed on a criminal defendant must be resolved in the defendant's favor. *Robinson v. Lee,* 317 Md. 371, 379-80 (1989). "If there is doubt as to the penalty, then the law directs that his punishment must be construed to favor a milder penalty over a harsher one." *Id.* at 380, citing *Wright v. State,* 24 Md. App. 309, 319-20 (1975) (penal statutes shall be strictly construed against the government); *Gatewood v. State,* 244 Md. 609, 617 (1966) (criminal statutes must be interpreted in favor of defendants), and *Grimm v. State,* 212 Md. 243, 245 (1957) (courts must strictly interpret criminal statutes in favor of defendants).

The State contends that appellant's longer sentence was clearly and unambiguously imposed by the court on August 13, 2012, when it announced the court's calculation of the total executed sentence to be "20 and a half years." The State presses its argument that the second hearing was simply "for clarification or housekeeping purposes." It is unlikely, however, that a subsequent hearing for "clarification" of the sentences would not have been required had the original pronouncements been seen as unambiguous. Only after a "quarrel from the clerk's office" was it discovered that the total sentence announced was inconsistent with the individual sentences announced for each case, that the court elected to hold the second hearing to clarify its announcement of appellant's sentences.

The clear language of Md. Rule 4-345(c) provides that the correction of an announcement must be made before a defendant leaves the courtroom at the conclusion of the sentencing hearing. We do not accept the State's position that the court's summary observation that "the total sentence is twenty and a half years" overrides the court's earlier specificity in pronouncing six separate sentences for six separate convicted counts. In our view, the specifically pronounced sentences prevail over the court's subsequent summary.

In sum, appellant is subject to a sentence of 18 months for the theft conviction and sentences for the burglary convictions are as pronounced at the original sentencing hearing, each consecutive to the theft sentence, but concurrent to each other.

We shall remand this matter to the Circuit Court for Calvert County for resentencing in accord with this opinion.[4] The probation and restitution provisions of the sentence shall remain unaffected by our decision.

SENTENCES OF THE CIRCUIT COURT FOR CALVERT COUNTY VACATED;

CASE REMANDED TO THAT COURT FOR RESENTENCING IN ACCORD WITH THIS OPINION.

COSTS TO BE PAID BY CALVERT COUNTY.

[4]K-12-052: 18 months, 227 days credit, to begin 12/30/2011 (no change);

K-12-053: 15 years, suspend all but 5 years, consecutive to K-12-052 (no change);

K-12-054: 15 years, suspend all but 5 years, consecutive to K-12-052;

K-12-055: 15 years, suspend all but 5 years, consecutive to K-12-052;

K-12-056: 15 years, totally suspended, consecutive to K-12-052;

K-12-057: 15 years, suspend all but 4 years, consecutive to K-12-052.