Circuit Court for Baltimore City
Case No. 18204820

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3021

September Term, 2018

ROBERT SMALLWOOD

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: December 4, 2019

The appellant, Robert P. Smallwood, contends that the Circuit Court for Baltimore City erred in sentencing him to life in prison. According to Mr. Smallwood, the maximum sentence the court was permitted to impose was life, suspend all but 80 years. We disagree and, therefore, will affirm the sentence.

BACKGROUND

The tale of this case is an unnecessarily complicated one. A more fulsome description of the procedural background is contained in our 2018 opinion in *Smallwood v. State*, 237 Md. App. 389 (2018). For present purposes, it will suffice to identify the three sentencing events that are at the center of Mr. Smallwood's current appeal.

The 1982 Sentencing

In 1982, a jury sitting in the Circuit Court for Baltimore City found Mr. Smallwood guilty of first-degree murder and use of a handgun in the commission of a crime of violence. *Id.* at 393. At sentencing, Mr. Smallwood's counsel advocated for a life sentence, with all but 12 years suspended. The State argued for life with no time suspended. The following dialogue ensued:

> THE COURT: All right, the Court has considered the facts and circumstances in this case. It does not feel that it should suspend any portion of the life sentence under the circumstances.
>
> How long has he been in jail?
>
> [DEFENSE COUNSEL]: Your Honor, my calculations show from 1-18-82 to 2-5-82 when he made bail, and thereafter after the jury returned a verdict of guilty, which was 6-7–
>
> THE CLERK: I figured 72 days, Judge.
>
> THE COURT: 72 days?

> THE CLERK: Which would take it back to May 19th.
>
> THE COURT: If the calculations are correct he is entitled to 72 days credit. The sentence of this Court is a sentence to the Department of Corrections for the term of his natural life less 72 days, in the first count . . . in which he was found guilty of murder in the first degree. In the second count, the handgun count, the sentence is fifteen years to the Department of Correctional Services. However, the sentence will run concurrent with the sentence imposed in the first count.

The clerk then entered the sentence on the docket as: "Judg[]ment – Natural Life as to 1st Count – 15 years as to 2nd count concurrent to 1st count."

On direct appeal, we affirmed. *Id.*

The 2013 Sentencing

In 2013, the circuit court heard argument concerning Mr. Smallwood's motion to correct an illegal sentence. *Id.* at 393-94. At the hearing, in which Mr. Smallwood was not represented by counsel, the circuit court first attempted to explain to Mr. Smallwood why his sentence was not illegal. In the face of Mr. Smallwood's persistent failure (or unwillingness) to understand the circuit court's explanation, the court abandoned the effort and ruled: "So, Mr. Smallwood, I'll grant your request. I will modify your sentence, and I'm going to note the objection of the State."[1] *Id.* at 394 n.1. Then, in the same hearing, and without entertaining any argument or evidence regarding a new appropriate sentence, the court announced that Mr. Smallwood's new sentence would be "life suspend all but 80 years. And, for the concurrent sentence, it's 15 years and you get credit for the 72 days." *Id.* at 394. The court also added five years' probation to the split sentence. *Id.*

[1] The State did not appeal the trial court's judgment holding the 1982 sentence illegal. As a result, the propriety of that ruling was not before us in the prior appeal.

The 2018 Sentencing

In our 2018 opinion, we held that "Mr. Smallwood had a right to counsel at his resentencing." *Id.* at 413. Because that right was violated, we vacated his sentence and remanded for resentencing. *Id.* at 413-14. In doing so, we made the following "comment for the guidance of the circuit court on remand":

> The "upper bound" for a new sentence after a prior sentence has been found illegal, for purposes of application of § 12-702(b) of the Courts and Judicial Proceedings Article, is either: (1) "a previous lawful sentence imposed, if any"; or (2) the "resulting legal sentence" after the illegality is removed. *Greco*, 427 Md. at 509. Because "removing" an illegality can result in an increased sentence—if, for example, the original sentence were less than a statutory minimum or, as in *Greco*, the illegality stemmed from failure to impose a period of probation for a split sentence—the cap on a new sentence, in some circumstances, can be higher than the originally-imposed illegal sentence. *State v. Crawley*, 455 Md. 52, 68 (2017) (holding that circuit court acted properly in correcting an illegal sentence by adding a period of probation to sentence originally imposed). Here, the only sentence previously imposed was "the term of his natural life less 72 days." The "illegality" alleged by Mr. Smallwood was the purported ambiguity of the phrase "less 72 days." Stripped of that, the original sentence imposed on Mr. Smallwood for his murder conviction was life, with credit for the 72 days he had already served. Thus, the maximum sentence that can be imposed on remand, subject to the provisions of § 12-702(b), is life, with credit for those 72 days and for all of the time he has served since. *See* Crim. Proc. § 6-218(c) (requiring credit for time served upon resentencing); *Parker v. State*, 193 Md. App. 469, 520 (2010) (concluding "that the General Assembly intended for a defendant to receive credit for the time served on a previous sentence that is later vacated").

Id.

In November 2018, Mr. Smallwood reappeared before the motions court, this time with counsel, for a sentencing hearing. Unlike the 2013 proceeding, in which the court announced a new sentence without considering any argument or evidence, this time the circuit court entertained argument and evidence from the State and Mr. Smallwood. The

State: (1) introduced evidence of Mr. Smallwood's Department of Corrections disciplinary record, which showed that his most recent disciplinary event had occurred in 2009; and (2) pointed the court to the portion of the 1982 sentencing transcript, quoted above, in which the court stated expressly that it did not intend to suspend any portion of Mr. Smallwood's mandatory life sentence and indicated that the 72 days was credit for time served.

Mr. Smallwood presented a psychological-social report and the testimony of a social worker who summarized Mr. Smallwood's social and mental health history and family support system. Mr. Smallwood argued that the upper limit for his new sentence, unless premised on conduct occurring after his 2013 sentencing, was life suspend all but 80 years.

In announcing its ruling, the circuit court reviewed the information that had been presented by both sides, especially the information presented by Mr. Smallwood. The court, however, found Mr. Smallwood's psychological-social report and history "not persuasive." Based on its review of the information presented, and "[c]onsidering the nature of the offense and the nature of Mr. Smallwood's adjustment," the court then resentenced Mr. Smallwood to the same sentence originally imposed in 1982: life, with credit for time served.

DISCUSSION

We "review[] without deference the issue of whether a trial court made a legal error in sentencing." *Scott v. State*, 454 Md. 146, 188 (2017) (citing *Bonilla v. State*, 443 Md. 1, 6 (2015)).

I. MR. SMALLWOOD'S 1982 SENTENCE WAS NOT ILLEGAL.

In our 2018 opinion, we expressly took "no position as to whether Mr. Smallwood's [1982] sentence was illegal," as the "procedural posture of the case [at that time] preclude[d] us from weighing in on that issue." *Smallwood*, 237 Md. App. at 395 n.2. Whether the 1982 sentence was illegal is, however, relevant to Mr. Smallwood's current appeal. As such, we address the matter here and conclude that the 1982 sentence was not illegal.

Mr. Smallwood's argument to the contrary is premised on an untenable reading of the phrase "for the term of his natural life less 72 days." Before the circuit court in 2013, Mr. Smallwood purported to interpret that language to mean that the court had suspended 72 days of his sentence, which Mr. Smallwood argued could be measured by counting backwards from his expected date of death based on his then-current life expectancy. *Id.* at 393. That is not a reasonable interpretation of the language employed by the circuit court even in a vacuum. But we need not operate in a vacuum because, as set forth above, the sentencing colloquy makes clear beyond any reasonable dispute that the court's intent was to impose a life sentence, with no time suspended and with credit for 72 days' time served before trial. Nor is there any ambiguity in the corresponding docket entry, which reflects a sentence for murder of "Natural Life," with no mention of any time suspended. Moreover, (1) Mr. Smallwood had served exactly 72 days in pretrial detention and (2) the court did not impose a term of probation, which would have been mandatory had any time been suspended, *see Greco v. State*, 427 Md. 477, 504-05 (2012).

For all of these reasons, we find no ambiguity or illegality in Mr. Smallwood's 1982 sentence. The only reasonable interpretation of that sentence is that it was for life imprisonment, with no time suspended and with credit for 72 days' time served.

II. THE CIRCUIT COURT DID NOT COMMIT LEGAL ERROR IN SENTENCING MR. SMALLWOOD IN 2018.

We now return to Mr. Smallwood's present claim. He argues that his 2018 sentence exceeds the maximum sentence that the court was permitted to impose under § 12-702(b) of the Courts Article, which provides:

> (b) If an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper judgment or sentence, or conduct a new trial, and if there is a conviction following this new trial, the lower court may impose any sentence authorized by law to be imposed as punishment for the offense. However, it may not impose a sentence more severe than the sentence previously imposed for the offense unless:
>
> (1) The reasons for the increased sentence affirmatively appear;
>
> (2) The reasons are based upon additional objective information concerning identifiable conduct on the part of the defendant; and
>
> (3) The factual data upon which the increased sentence is based appears as part of the record.[2]

[2] This language is based on *North Carolina v. Pearce*, 395 U.S. 711 (1969), in which the United States Supreme Court "observed that it would be a 'flagrant violation' of the Due Process Clause of the Fourteenth Amendment for a trial court to adopt a policy of imposing a heavier sentence after a successful appeal by a defendant." *State v. Thomas*, 465 Md. 288, 304 (2019) (quoting *Pearce*, 395 U.S. at 723-24). The Supreme Court erected a barrier to higher sentences on remand to protect defendants against judicial "vindictiveness against a defendant for having successfully attacked [the defendant's] first conviction . . . ." *Thomas*, 465 Md. at 304 (quoting 395 U.S. at 725-26). In enacting § 12-702(b), the Maryland General Assembly "adopted not only the *Pearce* doctrine but also significant portions of the *Pearce* language as the statutory policy of Maryland." *Jones v. State*, 307 Md. 449, 454 (1986). Although the Supreme Court has subsequently retreated from *Pearce*, that has had "no bearing on the General Assembly's statutory policy and the intent embodied in [§ 12-702(b)]." *Id.* at 454-55. "Thus, the prophylactic policy

Md. Code Ann., Cts. & Jud. Proc. § 12-702(b) (Repl. 2013; Supp. 2019). Section 12-702(b) thus establishes: (1) a general rule, that "the lower court may impose any sentence authorized by law to be imposed as punishment for the offense"; (2) an exception to the general rule, that the lower court "may not impose a sentence more severe than the sentence previously imposed for the offense"; and (3) an exception to the exception, provided three specified criteria are met.

Here, we agree with both parties that the court's sentence on remand does not implicate either the general rule or the exception to the exception, as the sentence does not exceed that authorized by law for first-degree murder, and the three criteria for the exception to the exception are not met. As a result, the sole question is whether the sentence runs afoul of the exception prohibiting imposition of "a sentence more severe than the sentence previously imposed for the offense." The answer to that question depends entirely on whether the "sentence previously imposed for the offense" is the 1982 sentence or the 2013 sentence. If it is the former, then Mr. Smallwood's current sentence may stand. If it is the latter, then his current sentence is excessive and must be vacated.

The parties' arguments and our analysis focus largely on the language of the statute and two relatively recent Court of Appeals decisions construing that language, *Greco v. State*, 427 Md. 477 (2012), and *Gardner v. State*, 420 Md. 1 (2011). In *Greco*, after the defendant was convicted of first-degree murder, the circuit court imposed a sentence of life, suspend all but 50 years, with no period of probation. *Greco*, 427 Md. at 504-05.

underlying *Pearce*—to prevent either the reality or the 'apprehension' of judicial vindictiveness—remains part of Maryland statutory law." *Thomas*, 465 Md. at 306.

Under *Cathcart v. State*, 397 Md. 320, 327-30 (2007), however, the failure to include a period of probation automatically converted the sentence to a term of 50 years. *Greco*, 427 Md. at 507. Because Maryland law requires imposition of a mandatory life sentence for first-degree murder, that 50-year sentence was illegal. *Id.* at 513.

In providing instructions to the circuit court for resentencing the defendant, the Court explained how to determine the maximum (or "upper bound") sentence that could be imposed on remand: "[T]he sentencing court must look through the illegal sentence to a previous lawful sentence imposed, if any, to determine the maximum sentence that may be imposed on remand. Alternatively, the trial court must remove the illegality, with the resulting sentence serving as the maximum for purposes of resentencing." *Id.* at 509. The "upper bound" for a sentence on remand from an appeal to correct an illegal sentence is thus "what the prior maximum legal sentence would have been." *Id.* at 511.

In *Greco*, "removing" the illegality meant adding a period of probation to the original sentence, thus increasing the overall sentence. *Id.* at 512-13; s*ee also State v. Crawley*, 455 Md. 52, 68 (2017) (holding that circuit court acted properly in correcting an illegal sentence by adding a period of probation to the sentence originally imposed). The Court therefore directed "the Circuit Court [on remand to] impose a sentence of life imprisonment, all but fifty years suspended, to be followed by some period of probation." *Greco*, 427 Md. at 513. The Court observed that this result did not offend "the policy undergirding [Courts Article] § 12-702(b), to protect a defendant against the potential for vindictiveness on the part of the sentencing judge," because the sentencing court would be

"correct[ing] an illegality and resentenc[ing] pursuant to the appellate court's specific instructions for remand." *Id.* at 512-13 (internal citation omitted).

In *Gardner*, the case on which Mr. Smallwood primarily relies, the Court addressed whether the "sentence previously imposed" for purposes of § 12-702(b) would be the sentence originally imposed by the trial court or a harsher sentence subsequently imposed by a three-judge panel. 420 Md. at 5-7. The Court started with the observation that "[i]n the ordinary case the 'sentence previously imposed' is the sentence imposed by the judge who presided over the original trial or guilty plea." *Id.* at 5. While Mr. Gardner's appeal was pending, however, he sought review of his sentence by a three-judge panel, which unanimously agreed to increase the sentence from 25 years' executed time to 45 years' executed time. *Id.* at 6. This Court then reversed the original conviction on grounds that were entirely unrelated to the sentence imposed by either the original trial judge or the three-judge panel. *Id.* at 7. On remand, the trial judge imposed a sentence of 40 years' executed time. *Id.* On appeal, Mr. Gardner argued that that sentence exceeded the upper bound established by § 12-702(b), which he asserted was the 25-year sentence originally imposed by the trial judge. *Id.* at 8.

The Court of Appeals agreed with the State that the maximum sentence available on remand was the sentence the three-judge panel had imposed, not the original sentence. *Id.* at 10. Engaging in statutory interpretation, the Court observed that, as originally enacted, § 12-702(b) had included a reference to "the original sentence" that was distinct from the "sentence previously imposed." *Id.* Thus, the Court concluded, the terms must have distinct meanings. *Id.* at 10-11. Moreover, the phrase "sentence previously imposed"

had to be read in the context of the statutory scheme, which allowed for review of a sentence by a three-judge panel. *Id.* at 12. Under that scheme, when a three-judge panel increases a defendant's sentence, "the panel's sentence becomes the 'sentence of the court.'" *Id.* at 14 (quoting *Rendelman v. State*, 73 Md. App. 329, 336 (1987)).

As it did in *Greco*, the Court in *Gardner* also considered the policy underlying the statute. The Court concluded that "[t]he concern for resentencing vindictiveness that undergirds § 12-702(b) d[id] not arise in the . . . context [of this case]" because it was the three-judge panel's decision—which was made before the appeal was resolved and so could not have been influenced by vindictiveness resulting from the outcome of the appeal—that gave rise to the possibility of an increased sentence on remand. 420 Md. at 15. As a result, § 12-702(b) presented no bar to a sentence on remand that exceeded by 15 years the original sentence that the same judge had previously imposed. *Id.*

Mr. Smallwood contends that just as the three-judge panel's sentence replaced the original trial judge's sentence in *Gardner*, and so became the sentence of the circuit court for purposes of § 12-702(b), here the 2013 sentence replaced the 1982 sentence, and so became the sentence of the circuit court that should have established the upper bound on remand. That analysis fails, however, to account for the significant differences between *Gardner* and this case. Most notably, the appeal in *Gardner* that led to reversal of the underlying judgments had nothing at all to do with the sentence in that case. *Id.* at 7. The three-judge panel's increased sentence resulted from an ordinary and lawful procedure that was never called into question. Here, by contrast, we concluded in our 2018 opinion that the 2013 sentence—the sole subject of the prior appeal—was the result of a flawed and

unlawful procedure. *Smallwood*, 237 Md. App. at 412-13. In other words, whereas the three-judge panel's sentencing in *Gardner* was collateral damage—the unproblematic product of a valid process that happened to follow a flawed verdict—the sentencing here was the very problem that necessitated the remand. Thus, the same considerations that weighed in favor of treating the three-judge panel's sentence as the "sentence previously imposed" do not apply to the 2013 sentence here.

Mr. Smallwood appears to interpret *Gardner* as standing for the proposition that the "sentence previously imposed" is always the sentence most recently imposed that is not inherently illegal. For several reasons, we cannot agree. First, as the Court of Appeals detailed in *Gardner*, we must treat the General Assembly's language choices in § 12-702(b) as purposeful. Had the General Assembly intended the sentence to be used for comparison to be the one most recently imposed, it could have said so.

Second, the Court's opening statement in *Gardner* is directly to the contrary: "In the ordinary case the 'sentence previously imposed' is the sentence imposed by the judge who presided over the original trial or guilty plea." 420 Md. at 5.

Third, *Greco* expressly requires that, at least in the context of correcting an illegal sentence on remand, the sentencing court "look through the illegal sentence to a previous lawful sentence imposed" if any. 427 Md. at 509. Although Mr. Smallwood contends that this "look through" is limited to inherently illegal sentences, rather than sentences that are unlawful for other reasons, we see no reason why that would necessarily be the case. Although it is true that *Greco* only addressed illegal sentences, that was the context in which that case arose. And nothing about the language of § 12-702(b) suggests that an

inherently illegal sentence should be treated differently from a sentence that is unlawful for a different reason. Section 12-702(b) generally authorizes a circuit court to impose "any sentence authorized by law to be imposed as punishment for the offense." The prohibition against imposing "a sentence more severe than the sentence previously imposed for the offense" protects a defendant from judicial "vindictiveness . . . for having successfully attacked his first conviction." *Gardner*, 420 Md. at 15 (quoting *Pearce*, 395 U.S. at 725). This purpose is satisfied by identifying a prior, valid sentence—untainted by substantive illegality, violation of a fundamental constitutional right, or other unlawful action—to provide the limit on remand. Here, the 1982 sentence served that function.

Fourth, an interpretation that *any* subsequent sentencing—whether or not lawfully entered—establishes a new upper limit would lead to absurd results. Here, for example, were we to agree with Mr. Smallwood on the merits, and then remand for imposition of a new sentence, what sentence would serve as the upper limit on remand? If we were to accept the interpretation that the upper bound is always the most recently imposed sentence that is not inherently illegal, that would now be the 2018 sentence.[3] That result would, of course, deprive him of the benefit of his appeal.

In the clarity of hindsight, the guidance offered in our 2018 opinion was not as precise as we would now prefer. Nevertheless, we still conclude that the 1982 sentence was the appropriate upper bound on remand, as it was the only sentence untainted by any

[3] Mr. Smallwood does not argue that the "sentence previously imposed" means the lowest sentence previously imposed. Although that interpretation would not lead to the same absurd results as the interpretation he does offer, it is foreclosed by *Gardner*.

actual illegality, constitutional violation, or other unlawful action.[4] Moreover, our 2018 opinion concluded that the circuit court denied Mr. Smallwood his right to counsel when resentencing him. We intended with our remand to rewind the proceedings to the point where the court erred, with Mr. Smallwood (1) convicted of first-degree murder and use of a firearm in connection with a crime of violence, (2) needing to be resentenced, and (3) having only previously been sentenced to life, with credit for time served. At that point, the 1982 sentence served as the upper bound for Mr. Smallwood's new sentence. In other words, on remand, Mr. Smallwood was entitled to be placed back into the position he should have occupied in 2013, not into a better one.

Mr. Smallwood was entitled to a constitutionally adequate sentencing procedure, not a particular result. His 2013 sentence was the product of a constitutionally deficient procedure. After (erroneously) granting his motion to correct an illegal sentence, the trial court imposed a new sentence without (1) affording Mr. Smallwood a right to counsel, (2) giving Mr. Smallwood an opportunity to advocate for a lesser sentence, (3) hearing from the State as to an appropriate sentence, or (4) obtaining any additional information that might have a bearing on an appropriate sentence. At the sentencing hearing on remand, Mr. Smallwood was represented by counsel and both parties presented argument and evidence regarding an appropriate sentence. Just because the result of that proceeding was

[4] Of course, if the 1982 sentence had not existed to serve as an upper bound for the imposition of a new sentence on remand, then, pursuant to *Greco*, the upper bound would have been established by the 2013 sentence. *Cf.* 427 Md. at 509 (absent a "previous lawful sentence," "the trial court must remove the illegality, with the resulting sentence serving as the maximum for purposes of resentencing").

less favorable to Mr. Smallwood than the result of the earlier, constitutionally defective procedure does not mean his rights were violated. Like the defendant in *Gardner*, who, by seeking review from the three-judge panel, took the "[r]isk of the panel increasing [his] sentence," *Gardner*, 420 Md. at 16, Mr. Smallwood took a risk in asking this Court to overturn what he may now view as a favorable new sentence. His dissatisfaction with the result does not render it unlawful.

Finally, as in *Gardner* and *Greco*, we view it important that our application of § 12-702(b) to the rather unique circumstances here does not implicate the policy concerns undergirding that statute. That is so because the upper bound for the court's sentence on remand was established by the original sentence imposed in 1982 and the decision and guidance provided by our 2018 decision. The 2018 sentence was identical to the 1982 sentence and fully in accord with our guidance. *See Smallwood*, 237 Md. App. at 413-14. In addition, the transcript of the proceedings on remand does not hint of vindictiveness, but instead conveys a reasoned assessment of appropriate evidence. We therefore view this result as entirely consistent with the policy embodied in § 12-702(b) of the Courts Article. *See Gardner*, 420 Md. at 14-15 (noting the importance of construing § 12-702(b) to "give[] full effect to the purpose underlying the General Assembly's enactment of that provision," which is to protect defendants from judicial vindictiveness on remand).

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.