UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 908

September Term, 2016

JORDAN SHOOK

v.

STATE OF MARYLAND

Meredith,
Reed,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: May 31, 2017

Appellant, Jordan Marshall Shook, was charged with burglary in the first degree, burglary in the third degree, burglary in the fourth degree, first degree assault, two counts of second degree assault, reckless endangerment, three counts of carrying a dangerous weapon and trespassing. On August 14, 2013, pursuant to an agreement with the State, Appellant entered a plea of guilty in the Circuit Court for Allegany County (Finan J.) to second degree assault. On the same day, the court imposed a sentence of ten years, with all but 11 months and 29 days suspended, to run consecutive to a four-year sentence imposed on the same day in another case. On May 10, 2016, Appellant was found in violation of probation and sentenced to thirty days' time served. Appellant did not file an application for leave to appeal from his conviction and sentence or from the finding of violation of probation. On May 19, 2016, Appellant filed a Motion to Correct an Illegal Sentence. On June 7, 2016, the court denied the motion without a hearing. In this appeal, appellant posits the following question for our review:

Did the lower court err in denying Appellant's Motion to Correct Illegal Sentence?

FACTS AND LEGAL PROCEEDINGS

The basis for appellant’s conviction in his assault case stems from an incident on March 7, 2013, in which appellant entered his wife’s apartment, where he did not reside, and began choking her and striking her with a hammer as she slept. The attack only ceased when the victim’s brother, who was also in the apartment, heard the assault, broke into the bedroom and chased appellant.

On August 14, 2013, appellant entered a guilty plea in two cases. In case number

K-13-14984, appellant pled guilty to possession of heroin and, in the instant case, case number K-13-15106, appellant pled guilty to second degree assault. Appellant requested that the sentence in this case "be a D.O.C. sentence," *i.e*, designated under the Department of Corrections. Appellant's trial counsel indicated that, if there were some obstacle to implementing the sentence in this case, "we will ask for modification to try to effectuate the plea agreement, if that occurs at some future date." Pursuant to an agreement with appellant, the State recommended the following sentence: In case number K-13-14984, a sentence within the guidelines of three to five years and, in the instant case, a consecutive sentence "of ten years, suspending all but eleven months and twenty-nine days, that time be served in the Department of Corrections." The State also recommended three years' supervised probation.

In imposing the sentence, the court opined as follows:

> BY THE COURT: All right, well, you have been in court before and told Judges the same thing; hopefully one of these times it will be sincere and hopefully it is this time. At this point the Court would sentence you in Number 15106 to four years in the Division of Correction, based on the State's Attorney's recommendation, and consecutive to that sentence in Number, I had that backwards, excuse me. That sentence was in 14984, four years, pardon me. And in Number 15106, which is the assault charge, the former case being for the possession of heroin charge, in the 15106, the assault charge, the Court would sentence the Defendant to ten years, suspend all but eleven months and twenty-nine days, based on the State's recommendation to depart below the sentencing guidelines for the reasons indicated; place the Defendant on three years of supervised probation, conditions would be all standard reporting conditions, and to participate in whatever drug treatment the Defendant may be directed to participate in at that time. The Court would order that this sentence be served at the Division of Correction. Both commitments would be at D.O.C., and the sentence is going to commence on September 1, is that correct?

BY MR. STANKAN [Defense Counsel]: That's the agreement.

BY MR. BEAN [Prosecutor]: Yes, Your Honor.

The Commitment Record issued August 16, 2013, states in part: "Sentence 10 years 0 months 0 days 0 hours with 9 years 0 months 1 days 0 hours suspended" and "All but 0 years 11 months 29 days 0 hours is/are suspended and the defendant is placed on probation for a period of 3 years 0 months 0 days 0 hours commencing upon."

On January 10, 2014, appellant filed a Motion for Modification of Sentence in which he averred that the D.O.C. had advised that the consecutive sentence in the instant case could not be served at the facility "because, even though this was part of one agreement, the 11 months and 29 days would have to be served at the local detention center." Accordingly, appellant, with the State's consent, moved the court to "grant a modification of the defendant's commitment from 11 months and 29 days in this matter to 1 year and 1 day so that the defendant can complete his service of Sentence at the Department of Corrections as contemplated by the parties."

By Order of Court, January 10, 2014, appellant's sentence was modified as follows:

> It is hereby ORDERED, that the defendant's sentence/commitment is MODIFIED with the consent and agreement of the Defendant and Counsel as follows:
>
> Sentence is modified from 11 months and 29 days to 1 year and 1 day, DOC, consecutive.

The docket entries record the Order of January 10, 2014, as follows:

> It is hereby ORDERED, that the defendant's sentence/commitment is modified with the consent and agreement of the Defendant and Counsel as follows: Sentence is modified from 11 months, 29 days to 1 year and 1 day, DOC, consecutive. W.

> Timothy Finan[.] Same probation terms and conditions as previously outlined by the Court, per Judge Finan.
>
> The Amended Commitment Record, issued January 27, 2014, states in part:
>
> Sentence 10 years 0 months 0 days 0 hours with 0 years 0 months 0 days 0 hours suspended"; and "All but 1 years 0 months 1 days 0 hours is/are suspended and the defendant is placed on probation for a period of 0 years 0 months 0 days 0 hours commencing upon.

Appellant was released on or about April 4, 2016. On April 14, 2016, the State filed a "Motion for Appropriate Relief," requesting that the court recognize, as clerical error, the omission from the commitment record of the suspended time of 8 years and 29 days along with the omission of any period of probation and to "[m]odify the docket entry" to reflect imposition of these terms of Appellant's sentence. Appellant filed an answer to the State's motion, arguing that Maryland Rule 4-345(c), discussed below, precluded any increase in Appellant's sentence. By Order of April 27, 2016, the court granted the State's motion: "Having read the foregoing Motion for Appropriate Relief, it this 27[th] day of April, 2016, ORDERED, that the Motion is hereby: Granted."

On May 10, 2016, Appellant appeared before the court on a violation of probation. The court provided the following explication of its Order of April 27, 2016:

> BY THE COURT: Yes, I mean my, my, I granted the State's motion, umm, April 27th, for the reason indicated, that this was a, I went back and looked at the courtroom notes, I believe. (Pause) So it was certainly understood by all that the original sentence was ten years, with all but eleven months and twenty-nine days suspended, three years of supervised probation. That was announced in the courtroom. Thereafter, there was a Motion to Modify the Sentence filed by the Defendant, which indicates a desire to have the sentence to the Department of Corrections, which obviously, in my judgment, is meant, not to modify the sentence to only the Department of Corrections sentence and extinguish the probation, but to

> change it, as expressed, to avoid service of the actual sentence imposed at the local detention center. And so the request from Mr. Stankan was, paragraph seven, that the Defendant, through counsel, and with the consent and agreement of the State, Mr. Bean, are requesting this Honorable Court grant a modification to Defendant's commitment from eleven months and twenty-nine days in this matter to one year and one day, which is actually an increase of the sentence, and I did precisely what counsel asked. I modified the commitment to, from eleven months and twenty-nine days to one year and one day. Umm, if there was anything, so, and I granted the State's request, which was to conform the commitment to be clear we are talking about probation, as well. If we are going to go back technically, the modification itself may have been illegal, because I increased the Defendant's sentence, and he wasn't even here. So . . .
>
> BY MR. STANKAN: Your Honor, I understand all of that.
>
> BY THE COURT: If you want to go back and undo all of that . . .
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> BY MR. STANKAN: I understand all that and on behalf of my client I would make a motion. I filed the answer to the motion and cited, cited case law in the matter, Your Honor.
>
> BY THE COURT: Okay.

The court proceeded to find that appellant violated probation[1] and sentenced appellant to a period of thirty days, time served, and continued probation. On May 19, 2016, appellant filed a Motion to Correct Illegal Sentence, claiming that the court imposed an illegal sentence on April 27, 2016 "by increasing the defendant's sentence beyond one year and one day to the Department of Corrections." On June 7, 2016, the court denied appellant's Motion and the judge wrote on the Order that the sentence was "not an illegal sentence" and that "the modification to the underlying sentence was that which Defense

[1] The State notes, in its brief, that, subsequent to the instant appeal, appellant was charged with violation of probation, with a hearing scheduled for April 11, 2017.

Counsel requested." The court also attached appellant's Motion to Modify the Sentence from January 10, 2014, circling lines 1 and 7:

> 1. That the defendant was sentenced in the matter on the 14th day of August 2013 to 10 years, all but 11 months and 29 days consecutive to any other sentence, 3 years of supervised probation upon release.
>
> ***
>
> 7. That the defendant through Counsel, and with the consent and agreement of the State (ASA Bean) are requesting that this Honorable Court grant a modification of the defendant's commitment from 11 months and 29 days in this matter to 1 year and 1 day so that the defendant can complete his service of Sentence at the Department of Corrections as contemplated by the parties.

The judge also circled and underlined, "[w]herefore, the Defense and State request that: (a) That sentence in the matter be modified from 11 months and 29 days to 1 year and 1 day" and also notated again that the court "did this at Def[endant's] request."

The instant appeal followed.

DISCUSSION

Standard of Review

In *Carlini v. State*, 215 Md. App. 415, 443 (2013), we observed:

> Rule 4–345(a) appellate review deals only with legal questions, not factual or procedural questions. Deference as to factfinding or to discretionary decisions is not involved. Once the outer boundary markers for a sentence are objectively established, the only question is whether the ultimate sentence itself is or is not inherently illegal. That is quintessentially a question of law calling for *de novo* appellate review.

Contentions of the Parties

Appellant contends that the trial court erred in denying his Motion to Correct Illegal

Sentence. Specifically, appellant asserts that the court imposed an illegal sentence on April 27, 2016 "by increasing the defendant's sentence beyond one year and one day to the Department of Corrections." Appellant contends that, although the sentence set forth in the January 10, 2014 Order is not illegal on its face, *i.e.*, modifying the sentence to one year and one day, "there was no basis in Rule 4-345(a) for increasing the sentence by adding to it suspended time and a term of probation." Appellant maintains that the 2014 Order "did not contain a suspended portion of sentence or a term of probation" and, therefore, the modification imposed on April 27, 2016 was illegal. Appellant requests that we reverse the circuit court's judgment, vacate his sentence and remand for reimposition of the sentence reflected in the Order of January 10, 2014, "exclusive of any term of suspended sentence and any term of probation."

The State responds that the circuit court did not err in denying his Motion to Correct Illegal Sentence. According to the State, "The docket entry reflecting the limited modification of the executed portion of his sentence in Case No. K-13-15106, [was] entered at [appellant's] express request and for his benefit." The State rejects appellant's "attempt to recast the circuit court's ruling, granting his request for modification as to one aspect of his sentence, as a re-sentencing." Therefore, the State argues that the "sentence is not illegal and fully complies with his plea agreement" and the motion was properly denied.

Rule 4–345 – Sentencing – Revisory Powers of the Court

"The sole authority for modifying a sentence imposed is Maryland Rule 4–345(e), a product of the Court of Appeals'[] rule-making authority. That Rule requires a person

wishing to challenge his sentence to file a motion to modify it within ninety days of imposition." *Tolson v. State*, 201 Md. App. 512, 517 (2011). Maryland Rule 4-345 governs the revisory powers of the circuit court with respect to sentencing and, in part, provides:

> (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 proceeding.
>
> ***
>
> (e) Modification Upon Motion. (1) Generally. Upon a motion filed *within 90 days after imposition of a sentence* (A) in the District Court, if an appeal has not been perfected or has been dismissed, and (B) in a circuit court, whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it *may not increase the sentence*.
>
> ***
>
> (f) Open Court Hearing. The court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard. The defendant may waive the right to be present at the hearing. No hearing shall be held on a motion to modify or reduce the sentence until the court determines that the notice requirements in subsection (e)(2) of this Rule have been satisfied. If the court grants the motion, the court ordinarily shall prepare and file or dictate into the record a statement setting forth the reasons on which the ruling is based.

(Emphasis supplied).

Subpart (e) illustrates what a criminal defendant seeking to modify his or her sentence may do, "but requires such a motion to be filed within 90 days of the imposition

of that sentence." *Greco v. State*, 347 Md. 423, 425 (1997). In the case *sub judice*, appellant was originally sentenced on August 14, 2013 and filed a motion to modify that sentence on January 10, 2014, which, patently, well exceeds the mandatory 90-day deadline for the filing of motion to modify a sentence.[2] Appellant's January 2014 Motion was expressly a modification, not an allegation that the sentence was illegal, pursuant to subpart (a), or that there was "fraud, mistake or irregularity," pursuant to subpart (b). Accordingly, the circuit court did not retain jurisdiction over the matter to modify appellant's original sentence. Appellant's Motion to Modify Sentence, filed on January 10, 2014, does not allege illegality, fraud, mistake or irregularity; rather, it is framed as a modification request, referencing the original plea agreement and appellant's preference to serve his sentence in the Department of Corrections as opposed to a local detention center, "as contemplated by the parties." *See Tolson*, 201 Md. App. at 518 (noting "[o]nce a court has lost jurisdiction, under Rule 4–345, after denying a motion to modify because ninety days have elapsed since the imposition of sentence, it may not consider a second motion to modify sentence and impose a new sentence").

Although neither appellant nor the State raise this issue in their briefs, we are constrained to follow the Maryland Rules. Appellant argues that the court was required to comply with the plea agreement and was also required to modify the sentence in order to accommodate appellant's request that he be allowed to serve time in the D.O.C., but we

[2] The time period between August 14, 2013 and January 10, 2014 consists of 149 days, not counting Wednesday, August 14, 2013, pursuant to Md. Rule 1–302.

are unpersuaded by the argument that compliance with the plea agreement trumps the express time limit imposed by the Rule. The Court of Appeals, in *Solorzano v. State*, 397 Md. 661, 669–70 (2007), expressly noted that, once a "trial judge 'approves' a plea agreement, the trial court is required to fulfill the terms of that agreement if the defendant pled guilty in reliance on the court's acceptance." However, we do not interpret that to mean that the trial court, in complying with terms of the plea agreement, can violate the Maryland Rules. MD. CONST. art. IV, § 18 (The Maryland Rules have the "force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law."). The circuit court lacked jurisdiction to legally modify appellant's sentence on January 10, 2014. Consequently, the January 10, 2014 modification is a nullity and the original August 14, 2013 sentence is still in effect. *See Tolson*, 201 Md. App. at 518–19 (holding that, where the circuit court lacked jurisdiction, the "modified sentence was a nullity. And, because that sentence was a nullity, his original [] sentence . . . remain[ed] in effect").

Therefore, the question presented to this Court, *i.e.*, "Did the lower court err in denying Appellant's Motion to Correct Illegal Sentence," is moot because the alleged illegal sentence is a nullity. Accordingly, the original sentence remains in effect, *Tolson, supra*, and the appeal is dismissed. MD. RULE 8–602(a)(10) ("[O]n its own initiative, the Court may dismiss an appeal [when] . . . the case has become moot").

APPEAL DISMISSED.
COSTS TO BE PAID ONE HALF BY APELLANT AND ONE HALF BY ALLEGANY COUNTY.