Circuit Court for Baltimore County
Case No. 03-K–13-005514

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1133

September Term, 2016

FRANCIS JOSEPH MALLEY

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: December 8, 2017

A criminal court may correct an "illegal sentence" at any time. Md. Rule 4-345(a). What constitutes an "illegal sentence" is, however, narrowly defined. *Colvin v. State*, 450 Md. 718, 725 (2016). For a claim to be remediable under Rule 4-345(a), the illegality "must inhere in the sentence itself, rather than stem from trial court error during the sentencing proceeding." *Matthews v. State*, 424 Md. 503, 512 (2012). One type of illegal sentences are those which exceed the limits imposed by binding plea agreements that has been accepted by the court. *Ray v. State*, 454 Md. 563, 572, 165 A.3d 408 (2017) ("*Ray II*") (citing, among other authorities, *Matthews v. State*, 424 Md. 503, 519 (2012)).

This problem sometimes arises in the context of plea bargains involving "hybrid sentences," that is, sentences that consist of terms of actual and suspended incarceration. Both this Court and the Court of Appeals have addressed when a hybrid sentence violates the terms of a plea bargain on several occasions in recent years. *See, e.g., Ray II,* 454 Md. 563; *Matthews,* 424 Md. 503; *Cuffley v. State,* 416 Md. 568 (2010); *Baines v. State,* 416 Md. 604 (2010); *Ray v. State*, 230 Md. App. 157 (2016), *aff'd* 454 Md. 563 (*"Ray I"*). (In *Ray I,* we characterized *Cuffley, Matthews,* and *Baines* as the "*Cuffley* Trilogy." 230 Md. App. at 173. In light of the further clarifications and analysis contained in *Ray II*, perhaps the term should now be the "*Cuffley* Quartet.")

The case before us calls us to apply the principles of these decisions to a factual scenario that is a bit different from the ones in the earlier cases.

Francis Joseph Malley pleaded guilty in the Circuit Court for Baltimore County to second-degree burglary and was sentenced to a term of fifteen years imprisonment, with

all but four years suspended, to be followed by three years of supervised probation. In this appeal, we must decide whether that sentence exceeded the terms of the plea agreement previously accepted by the court. We conclude that it did and will vacate the sentence and remand the case for resentencing.

Background

On August 29, 2013, Malley scaled the security fence of a used car business in Essex, broke into its office, and stole several items. His actions were recorded by a surveillance camera on the premises. A grand jury returned a four-count indictment, charging him with burglary in the second degree, burglary in the fourth degree, theft under $1,000, and malicious destruction of property with a value over $500.

On April 16, 2014, the case came before the circuit court. Apparently, Malley was not in the courtroom but rather in the courthouse holding facility. While Malley was being brought up to the courtroom, counsel asked to approach the bench, and a plea bargain was negotiated in a three-way dialogue between counsel and the court.

After informing the court that Malley had a significant prior criminal record,[1] and that the State had a strong case against him,[2] defense counsel expressed her client's desire

[1] Defense counsel and the prosecutor informed the court that Malley had been convicted of a third-degree sex offense, of failing to register as a sex offender, and of illegal possession of a regulated firearm, as well as multiple burglaries.

[2] In addition to the video recording, the State was prepared to present evidence that the police apprehended Malley a short distance from the used car lot a few minutes after the break-in occurred, that, at the time of his arrest, Malley was in possession of property that had been taken from the dealership, and, finally, that Malley had written an inculpatory letter to the owner of the dealership after his arrest.

that any incarceration be served in the Baltimore County Detention Center so that he could continue in a local substance abuse treatment program. Malley would be eligible to serve his sentence in the local detention center only if the sentence to be served did not exceed 18 months. *See* Md. Code, Correctional Services Article § 9-105(1). Defense counsel also stated that she wanted to review Malley's medical records before sentencing and that she was having difficulty in obtaining them. Thereafter, the following occurred (emphasis added):

> THE COURT: If he wants to do the plea today in front of me, I'll take the plea and defer disposition. I do want to hear from the victim if he's got something to say and I'll consider an 18 month commitment, won't bind myself to it.
>
> [DEFENSE COUNSEL]: You won't bind yourself? **Would you bind yourself to a cap of no more than five?**
>
> THE COURT: **Yes.**
>
> [DEFENSE COUNSEL]: Okay. May I have a moment?
>
> THE COURT: Yeah, hang on a second, **we're at, oh, five to 12 on guidelines?**
>
> [DEFENSE COUNSEL]: **Right.**
> THE COURT: **I'm fine, I'm fine with that.**
>
> [DEFENSE COUNSEL]: Okay.
>
> [THE STATE]: . . . second degree burglary . . .
>
> THE COURT: Well I'm fine with that.
>
> [DEFENSE COUNSEL]: **Okay. Cap it at five.**
>
> THE COURT: **Yeah.**

> [DEFENSE COUNSEL]: **A possibility 18 months, come back and argue. Okay, thank you.**

(Emphasis added.)

By this time, Malley was apparently in the courtroom and the bench conference ended. The transcript resumes (emphasis added):

> [DEFENSE COUNSEL]: [A]fter discussing the discussions at the bench with my client, Your Honor, Mr. Malley, you understand you'll be pleading guilty to second degree burglary, the Judge has agreed that **he won't give you more than five years**, we're going to put off the disposition and we'll take yet another attempt to get your [medical] records, we're going to come back in, I'm going to argue to try and get your 18 months in the County Detention Center, the State's going to look for five years **and the Judge is going to do something somewhere in between or maybe the worst and five. Is that your understanding?**
>
> MR. MALLEY: Yes, ma'am.
>
> * * *
>
> [DEFENSE COUNSEL]: The second ground on which you could ask to take an appeal is whether or not the Court gave you an illegal or an improper sentence. The maximum is 15. . . .
>
> MR. MALLEY: Yeah, 15, I'm sorry. Yes, 15.
>
> [DEFENSE COUNSEL]: The maximum is 15 years' incarceration.[3] **[The judge] has agreed that he's not going to give you any more than five and he may go as low as 18 months. Either or any sentence in between that is not illegal or improper** so you're not going to be able to appeal on that ground. Do you understand that?
>
> MR. MALLEY: Yes ma'am.

[3] *See* Md. Code (2002, 2013 Repl. Vol.), Criminal Law Article, § 6-203(c)(1).

(Emphasis added.)

Following defense counsel's examination of Malley, the court also examined him on the record. The court declared that it had found Malley's waivers of his trial rights to be "free, knowing, voluntary and intelligent[.]" The court then reiterated its understanding of the terms of the plea:

> The conditions, I'll repeat for the last time, are that I will agree to consider in the disposition hearing a sentence of 18 months in the local detention center. In any event, I agree to **cap my sentence** from the standpoint of the period of **active incarceration** at five years to the Division of Corrections. **So in no event will I sentence you to more than five years in the Division of Corrections,** and I'll keep an open mind towards 18 months or less in the County Detention Center. We're going to defer sentencing and I'll make a note of that in my Court file and I'll take that up at that time.

(Emphasis added.) After the State proffered a factual basis for the plea, the court accepted Malley's plea, announced that it would defer sentencing, and adjourned.

At the ensuing sentencing hearing, the circuit court, after declaring that it would "go a little bit below the guidelines in this case," imposed the maximum sentence of fifteen years imprisonment, with all but four years suspended, to be followed by three years supervised probation.

Malley subsequently filed a pro se petition seeking relief under the Maryland Uniform Postconviction Procedure Act, on the ground that his sentence was illegal

because it violated the terms of his plea agreement.[4] The circuit court treated his amended petition as a motion to correct an illegal sentence. After a hearing, the circuit court denied that motion, prompting this appeal.

A.

As the Court of Appeals has recently explained:

> Whether a trial court has violated the terms of a plea agreement is a question of law, which we review de novo. Interpretation of an agreement as to sentencing, including the question of whether the agreement's language is ambiguous, is a question of law, subject to de novo review.

Ray II, 454 Md. 563, 572–73 (quoting *Cuffley v. State*, 416 Md. 568, 581 (2010).

B.

If a trial court approves a plea agreement, it "shall embody in the judgment the agreed sentence . . . encompassed in the agreement," Md. Rule 4-243(c)(3). It therefore follows that, if a court thereafter imposes a sentence in excess of that which had been agreed upon as part of a binding plea agreement, the agreement has been violated. In reviewing an appellate contention that the sentence actually imposed was beyond that which had been agreed upon as part of a binding plea agreement, we must examine "**solely**" the record of the plea hearing "to ascertain precisely what was presented to the court, in the defendant's presence and before the court accept[ed] the agreement, to determine what the defendant reasonably understood to be the sentence the parties

[4] Malley acquired counsel and amended the petition by adding a claim of ineffective assistance of trial counsel. He withdrew his ineffective assistance claim at the postconviction hearing.

negotiated and the court agreed to impose." *Cuffley*, 416 Md. at 582 (emphasis in original).

As the Court of Appeals recently observed in *Ray II,*

> Plea bargains are similar to contracts. Thus, when interpreting plea agreements, courts draw upon contract law as a guide to ensure that each party receives the benefit of the bargain. We recognize that plea agreements, of course, involve more than contract rights. Accordingly, exclusive application of contract law is inappropriate because due process concerns for fairness and the adequacy of procedural safeguards guide any interpretation of a court approved plea agreement.

454 Md. at 576 (citations, quotation marks and brackets omitted).

The *Ray II* Court set out a three-step analysis that we will follow in this case:

> 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. 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.

Id. at 576 (citations omitted).

Finally, as the Court made clear in *Cuffley*:

> The test for determining what the defendant reasonably understood at the time of the plea is an objective one. It depends not on what the defendant actually understood the agreement to mean, but rather, on what a reasonable lay person in the defendant's position and unaware of the niceties of sentencing law would have understood the agreement to mean, based on the record developed at the plea proceeding.

416 Md. at 582.

With these principles in mind, we return to the case before us.

C.

Three points stand out.

The *first* is that there was not a formal written plea agreement. Instead, the agreement was worked out between counsel and the court at the bench. Although the record is not explicit, we think it likely that both the court, the prosecutor, and defense counsel envisioned that the five year "cap" to which the court committed was a limit on the court's discretion to sentence Malley to executed time. The court told counsel that it would "bind [it]self to a cap of no more than five" after confirming that "we're at five to 12 on guidelines." The court did not explain, presumably because counsel were perfectly aware that the Maryland Sentencing Guidelines "appl[y] only to actual incarceration[.]" *Maryland Sentencing Guidelines Manual*, ch. 13.1, at 57 n.2. Thereafter, when defense counsel reiterated that she understood the agreement as providing for a "[c]ap . . . at five," the court agreed without further clarification regarding the possibility that it might impose suspended time above that "cap."

As we've previously explained, our reading of the transcript indicates that Malley was not present in the courtroom during these discussions. Even if he were, however, there was nothing in the relatively brief exchange between the court and counsel that would have suggested to a reasonable person who was "unaware of the niceties of sentencing law," that his lawyer and the court were discussing only actual time that he would serve and not any suspended sentence.

Second, defense counsel's explanation of the plea agreement to Malley on the record did not draw a distinction between executed and suspended portions of the sentence. She informed her client that:

> [T]he Judge has agreed that he won't give you more than five years, we're going to put off the disposition and . . . we're going to come back in, I'm going to argue to try and get your 18 months in the County Detention Center, the State's going to look for five years and the Judge is going to do something somewhere in between or maybe the worst and five.

Later in the plea hearing, when defense counsel was in the process of explaining to Malley his very limited appellate rights if he pleaded guilty, she stated that the "maximum is 15 years' incarceration," but that the court had "agreed" that it was "not going to give you any more than five and [it] may go as low as 18 months." Counsel's explanation would not suggest to a listener that the court retained the authority to impose a suspended sentence in excess of the five year cap to which the court had committed itself. In fact, defense counsel's advisement can be reasonably interpreted as supporting the opposite inference, namely, that the court had agreed to impose a total sentence not to exceed five years imprisonment.

Third, when the court attempted to clarify the sentence to which it would bind itself, it explained that it would "agree to cap" Malley's "sentence from the standpoint of the period of **active** incarceration at five years to the Division of Corrections" (emphasis added). This probably was an accurate statement of the court's and counsels' understanding of the plea agreement. However, in the very next sentence, the court told Malley that: "in no event will I sentence you to more than five years in the Division of

Corrections." The juxtaposition of the two inconsistent statements would have done nothing to clarify the terms of the plea agreement to an individual who was "unaware of the niceties of sentencing law." *Cuffley*, 416 Md. at 582.

D.

As the Court of Appeals has emphasized, a binding plea agreement may provide for "a sentence that exceeds the guidelines, with all of it suspended save for that portion of the sentence that falls 'within the sentencing guidelines,'" but only if "either the State or defense counsel makes that term of the agreement absolutely clear on the record of the plea proceeding and the term is fully explained to the defendant on the record before the court accepts the defendant's plea." *Cuffley*, 416 Md. at 586. *Accord Matthews*, 424 Md. at 524. At no point in the guilty plea proceeding did either counsel or the court make it clear to Malley that the court was agreeing to limit active incarceration, but not agreeing to limit any suspended sentence.

Applying the holdings of those cases, we conclude that the sentencing term in Malley's binding plea agreement does not satisfy that standard and is, therefore, ambiguous. We explain.

In the guilty plea proceeding in *Cuffley*, the trial court commented that any conditions of probation were "entirely within [its] discretion." This could be construed as notifying Cuffley that he might receive a sentence beyond the guidelines (in that case, eight years), so long as the court suspended all but the part of the sentence that was within the guidelines. *Cuffley*, 416 Md. at 585. The Court of Appeals concluded, nonetheless, that

a reasonable lay person in Cuffley's position "could" have understood the court's comment "to mean that the court reserved the right to suspend a part of what, at most, would be an eight-year sentence and impose a period of probation accompanied by conditions." *Id.*

In *Matthews*, the Court of Appeals acknowledged the "possibility" that a lay defendant might "reasonably understand the phrase 'actual and immediate incarceration' to include only the non-suspended portion of a sentence because a defendant might never serve the suspended portion." *Matthews*, 424 Md. at 524. But it was "also possible that a lay defendant who, as in [that case], has just heard the State inform the court that it would be 'asking for incarceration within the guidelines' might reasonably understand the State to be referring to the total years of incarceration to which the defendant would be exposed, including any suspended portion." *Id.*

There is the same—or perhaps even a greater—degree of ambiguity in the present case. Defense counsel's explanation on the record did not suggest that Malley would be liable for a combination of active and suspended sentences in excess of five years. The court alluded to the plea agreement as limiting its discretion to five years of active incarceration, but in its next sentence, it informed Malley that "in no event will [it] sentence you to more than five years in the Division of Corrections." The failure to distinguish between active and suspended incarceration made the advisement in the present case, like those in *Cuffley* and *Matthews,* "ambiguous by definition." *Ray I*, 230 Md. App. at 186.

Because the record of the plea agreement proceeding was ambiguous, the ambiguity must be resolved in favor of Malley. *Cuffley*, 416 Md. at 583; *Solorzano v. State*, 397 Md. 661, 673 (2007).[5] Accordingly, we construe the binding plea agreement here as providing for a maximum combined total of actual and suspended sentence of five years imprisonment. Moreover, because the court below imposed four years of executed time, we hold that, upon resentencing, the court is limited to imposing no more than that same amount of executed time. *See* Md. Code (1974, 2013 Repl. Vol.), Courts & Judicial Proceedings Article, § 12-702(b); *Matthews*, 424 Md. at 525-26.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS REVERSED. THIS CASE IS REMANDED FOR RESENTENCING IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY BALTIMORE COUNTY.

[5] The Court of Appeals has recently reminded us that, absent a written plea agreement, reviewing courts must look to "the record developed at the plea proceeding. *Ray II,* 454 Md. at 577; *see also Cuffley*, 416 Md. at 582. Nonetheless, we note that informed of his sentence, Malley exclaimed: "I thought it was a five years cap," and his counsel responded "of jail time. It was a five year cap of jail time." This exchange is not dispositive, nor, indeed, even relevant, but it nonetheless illustrates the disconnect between Malley and his trial counsel as to the terms of the plea agreement.