Circuit Court for Montgomery County
Case No.: 117827C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 405

September Term, 2020

FONZIE AGNEW, JR.

v.

STATE OF MARYLAND

Graeff,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: May 5, 2021

Following a January 2012 trial in the Circuit Court for Montgomery County, a jury found Fonzie Agnew, Jr., appellant, guilty of first-degree assault and use of handgun in the commission of a felony or crime of violence. The court sentenced appellant to 25 years' imprisonment with 5 years suspended for first degree assault, and to 20 consecutive years' imprisonment with 15 years suspended for the weapons offense, for an aggregate total of 25 years' imprisonment. The court also imposed three years of probation.[1]

Due to an apparent clerical error, appellant's sentence for first-degree assault was recorded incorrectly as 25 years *with all but* 5 years suspended, instead of 25 years with 5 years suspended. That error resulted in an erroneous aggregate total of 10 years of active incarceration on appellant's commitment record. After serving 5 years and 326 days of

[1] Specifically, the court said the following when imposing sentence:

> So I have taken all these things I've talked about into consideration. And my sentence is that on the first count, which is first degree assault, you be sentenced to the Maryland Division of Corrections [sic] for a period of 25 years. I'm going to suspend five years of that sentence.
>
> On the second count, you have a mandatory minimum sentence of five years, but I'm going to suspend you, sentence you to 20 years. The sentence will be consecutive to the first count, and I will suspend all but five.
>
> So the math is, **25 years is your sentence. In other words, 20 years on the first count, five years, which is a mandatory minimum on the second count, and the balance of those sentences will be suspended**.
>
> Upon your release, you will be on three years of supervised probation with all general conditions to apply. A special condition, that you have no contact whatsoever with the victim in this case.

(emphasis added)

that erroneous 10-year period of active incarceration, appellant was released from confinement and placed on probation.

On April 17, 2019, appellant was charged with violating his probation as a result of being arrested for assault in Virginia. On May 30, 2019, the State, after realizing the clerical error in recordation of appellant's sentence, filed an "Emergency Motion to Correct Improper Docket Entries and Impose Remainder of Sentence." The next day, the circuit court granted the State's motion and ordered that the docket entries and the commitment record be corrected to reflect appellant's actual sentence and issued a bench warrant for appellant's arrest. On June 5, 2019 the court held a bench warrant hearing, and on June 13, 2019 the court issued an "Order for Amended Commitment" stating as follows:

> Initially this matter came before the Court on State's Motion to Correct Improper Docket Entries and Impose Remainder of Sentence. An error was made in the Docket Entries as to the Sentence, which resulted in an incorrect Commitment being issued. Because of this error the Defendant was paroled after serving 5 years and 326 days. The Court issued an immediate Order to Correct the Docket Entries and Commitment record and ordered a bench warrant be issued. The warrant was issued on May 31, 2019 and the Defendant was brought before the court for a bench warrant hearing on June 5, 2019; at which time the Court ordered the Defendant to serve the remainder of his sentence as set forth in docket entry #259. The Defendant requested credit for time served during the period he was released (in error) and not in custody, which was denied. Therefore, it is this 13th day of June 2019
>
> ORDERED, that the Clerk shall forthwith issue an amended commitment reflecting that the defendant received a sentence as to Count #3 – 25 years DOC, suspends [sic] 5 years with credit for 5 years and 326 days commencing June 4, 2019, as to Count #4 – 20 years, suspends all but 5 years DOC mandatory consecutive to Count #3; 3 years supervised probation with conditions. Costs waived.

Nearly a year later, appellant filed a motion to correct an illegal sentence raising several contentions concerning his sentence and his return to confinement. He contended (1) that he was entitled to credit for the time he spent on probation, (2) that his convictions for first-degree assault and the weapons offense should have merged for sentencing purposes, (3) that the court did not justify its sentence, and (4) that he was denied counsel during the bench warrant hearing. The court summarily denied appellant's motion to correct an illegal sentence, from which appellant noted an appeal. For the reasons that follow, we shall affirm.

On appeal, appellant re-raises the contentions that he raised in his motion to correct an illegal sentence and adds a few more. In his *pro se* Informal Brief of Appellant, he first asserts that his due process rights were infringed because, when he was brought to court for the June 5, 2019 bench warrant hearing, he thought that he was brought to court for a violation of probation hearing. He claims that he was "taken into custody and sent back to prison to serve a 20[-]year sentence because the state[']s attorney passed the judge some papers that [he] never even got the chance to read." As far as what occurred during that hearing, because appellant has failed to provide us with a transcript of it, there is nothing for us to review. *Mora v. State*, 355 Md. 639, 650 (1999). In any event, nothing that appellant asserts implicates the lawfulness of his sentence.

Appellant next contends that he was denied his Sixth Amendment right to counsel when he appeared without counsel for the bench warrant hearing. As noted earlier, appellant failed to provide a transcript of the hearing. Moreover, it appears that the hearing was held to correct the docket entries and the commitment record. No hearing is required

to make those corrections. *Scott v. State*, 379 Md. 170, 191 (2004). Appellant has therefore failed to impress upon us how or why he was entitled to counsel during the hearing.

Appellant's next contention is, in essence, that, for various reasons, his return to incarceration is not fair to him, his wife, and his two young children. Appellant was clearly and unambiguously sentenced to 25 years' imprisonment in 2012. He was mistakenly released from prison early, and then returned to his original position when the court corrected his commitment record and docket entries. Nothing about any of that comes close to making his sentence illegal within the contemplation of Maryland Rule 4-345.

Next, appellant claims that his sentence was increased when he was returned to prison. As noted earlier, the circuit court's order simply corrected the docket entries and the commitment record to accurately reflect the sentence that was imposed in 2012. Appellant's argument here seems to be based on the fact that the circuit court declined to award him sentencing credit for the time he mistakenly spent on probation. The failure to award credit, however, does not render a sentence inherently illegal. *Bratt v. State*, 468 Md. 481 (2020).[2]

Next appellant asserts that his sentence for use of a handgun in the commission of a felony or a crime of violence should merge, for sentencing, into first-degree assault. That argument is foreclosed by the non-merger provision found in section 4-204(c)(1)(i) of the Criminal Law Article which states that the sentence for use of a handgun in the commission

[2] Nothing in this opinion is meant to prejudice appellant's ability to raise any other claim that he is being unlawfully confined beyond the duration of his sentence.

of a felony or a crime of violence may be imposed "in addition to any other penalty imposed for the crime of violence or felony."[3]

Appellant's final contention, *i.e.*, that the court erred by not considering appellant's "accomplishments," like most of his other contentions, is falsely premised on the idea that appellant was sentenced, or re-sentenced, when the court corrected the commitment record and docket entries. Once that false premise is removed, appellant's argument collapses under its own weight. But even if it did not, the court's failure, *vel non*, to have considered appellant's "accomplishments" would not make his sentence illegal within contemplation of Maryland Rule 4-345.

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

[3] The Court of Appeals approved of that non-merger provision in *Whack v. State*, 288 Md. 137 (1980).