UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0586

September Term, 2015

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DEANGELO FERDALE SAVAGE

v.

STATE OF MARYLAND

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Kehoe,
Nazarian,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

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Opinion by Kenney, J.

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Filed: August 18, 2016

On February 22, 2007, Deangelo Ferdale Savage, appellant, pled guilty in the Circuit Court for Wicomico County to possession of cocaine and possession of a firearm during a drug transaction. Pursuant to a plea deal, the circuit court subsequently sentenced appellant to fifteen years in prison, with all but five years suspended, for possession of a firearm and a consecutive fifteen years, with all but three years suspended, for possession of cocaine, to be followed by a three-year period of probation. This appeal comes to us from the denial of appellant's motion to correct an illegal sentence, which the circuit court denied on April 13, 2015. Appellant presents two questions for our review, which we have consolidated into one:[1]

Did the circuit court err in denying the motion to correct an illegal sentence?

For the reasons that follow, we answer this question in the negative and affirm.

## BACKGROUND

At the February 22, 2007 plea and sentencing proceeding, the State advised the court that it had entered into a binding plea agreement with appellant as follows:

> Your Honor, this matter is scheduled for trial this morning. It's my understanding we have reached a plea agreement, that would be presented to the Court in a binding nature. It's my understanding that Mr. Savage is going to waive his right to a jury trial this morning, enter guilty pleas to count one, which charges him with felonious possession of cocaine, and count five, which charges him with possession of a firearm during and in relation to a drug trafficking

[1] The questions presented in appellant's brief read:

> A. Did the sentencing court violate the terms stated in the appellant's binding plea agreement?
>
> B. Were the terms of the plea agreement ambiguous, as presented to the appellant at the time of its initial imposition?

> crime. Upon findings of guilt under counts one and five the State will dismiss the remaining charges against Mr. Savage. We have agreed not to seek any enhancement as a subsequent offender. The binding nature is that Mr. Savage would receive active incarceration of five years, which is the mandatory minimum under count five, and that he would receive three years of active incarceration under count one, which would run consecutive to the time imposed under count five, for a total active incarceration of eight years, five of that with limited possibilities of parole.
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> The State is recommending that this be fashioned in a split sentence with the length of suspended time at the discretion of the Court, the terms and conditions of probation also at the discretion of the Court.
>
> The Defendant has agreed to voluntarily forfeit his interest in a 1995 Oldsmobile. I will have that order of forfeiture prepared once I receive the VIN number from members of the task force and I will submit that to the Court this morning for signature.
>
> That is my understanding of the agreement that we have reached, that we discussed in chambers also.

The court accepted the plea agreement, found the facts presented sufficient to sustain the plea, and sentenced appellant as indicated above. No application for leave to appeal was filed. Appellant has, however, filed multiple *pro se* post-conviction motions, including motions for a modification of sentence, a motion for a diminution of sentence, a "motion for post conviction procedure," and a motion for a reduction of sentence. The court denied these motions, and no appeal was taken from any of these decisions.

Meanwhile, on September 20, 2011, appellant was convicted of two counts of conspiracy to commit first-degree burglary, two counts of conspiracy to commit third-degree burglary, one count of accessory before the fact to first-degree burglary, and one count of accessory before the fact to third-degree burglary. *Savage v. State*, 212 Md. App.

1, 12 (2013). These crimes were committed after appellant was released and while on probation. The circuit court merged the third-degree burglary convictions into the corresponding first-degree burglary counterparts and sentenced appellant to three consecutive eight-year prison terms. *Id.* This Court vacated one of the conspiracy convictions and corresponding sentence on appeal, but otherwise affirmed the judgments. *See id.* at 26-31.

On September 30, 2011, the circuit court determined that appellant had violated the terms of probation imposed in his 2007 case, namely the condition requiring him to obey all laws, and imposed the suspended time, consecutive to the sentence in the 2011 case. On December 8, 2011, appellant filed his first motion to correct an illegal sentence, which the court promptly denied on December 14th. No appeal was taken. On April 1, 2014, appellant filed his second motion to correct an illegal sentence, which the court denied on May 9th. No appeal was taken. On April 3, 2015, appellant filed his third motion to correct an illegal sentence, which the court denied on April 13th. Appellant timely noted this appeal.

## STANDARD OF REVIEW

Maryland Rule 4-345(a) provides that a "court may correct an illegal sentence at any time." "We review the legal issue of the sentencing in this case as a matter of law." *Bonilla v. State*, 443 Md. 1, 6 (2015) (citations omitted). Accordingly, we review the circuit court's denial of appellant's motion *de novo*. *Meyer v. State*, 445 Md. 648, 663 (2015) (citations omitted).

To constitute an illegal sentence, subject to correction pursuant to Md. Rule 4-345(a), the sentence must be inherently illegal. *See Carlini v. State*, 215 Md. App. 415,

419-20 (2013) (discussing differences between procedurally illegal sentences and inherently illegal sentences). In this case, appellant contends that the circuit court, after revoking his probation, imposed a sentence in violation of the agreed upon plea agreement. The Court of Appeals has recognized that if a sentencing court imposes a sentence that deviates from the plea agreement, such a sentence is inherently illegal and may be corrected at any time pursuant to Rule 4-345(a). *Bonilla*, 443 Md. at 6-12. Accordingly, if the circuit court deviated from the plea agreement, as appellant argues it did, then the court would have imposed an inherently illegal sentence. *See also* Md. Rule 4-243(c)(3) ("If the plea agreement is approved, the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.").

**DISCUSSION**

Appellant contends that the plea agreement mandated an eight-year term of imprisonment, not eight years of active imprisonment with additional suspended time. Furthermore, he contends that the plea agreement contained a provision that the sentence would be imposed concurrent to any sentence that appellant was then serving. He asserts that his case has "remarkable" similarities to *Cuffley v. State*, 416 Md. 568 (2010).

The State responds that the circuit court correctly denied appellant's motion to correct an illegal sentence. The State asserts that the prosecutor at the sentencing hearing advised appellant that the court had discretion to impose suspended time in addition to the agreed-upon eight years of active incarceration. Moreover, the State argues that there was

no provision in the plea agreement that appellant's sentence be served concurrently to any other sentence he may receive later from a violation of probation finding. As such, the State maintains that there is no inherent illegality in imposing the previously suspended time consecutive to any other sentence.

This Court has recognized that plea agreements are contracts, and, as such, we interpret them like any other contract. *See Falero v. State*, 212 Md. App. 572, 587-93 (2013). Accordingly, pursuant to the objective interpretation of contracts, "unless a contract's language is ambiguous, we give effect to that language as written without concern for the subjective intent of the parties at the time of formation." *Ocean Petroleum, Co., v. Yanek*, 416 Md. 74, 86 (2010) (citing *Cochran v. Norkunas*, 398 Md. 1, 16 (2007)). Moreover, if a question later arises "concerning the meaning of the sentencing term of a binding plea agreement," then it "must be resolved by resort solely to the record established at the Rule 4-243 plea proceeding." *Matthews v. State*, 424 Md. 503, 516 (2012) (emphasis omitted) (quoting *Cuffley*, 416 Md. at 582).

We have remarked, however, that the interpretation of a plea agreement "is also informed by due process and principles of fundamental fairness, so that the standards of contract interpretation alone are 'not enough to resolve disputes over the proper interpretation of a plea bargain.'" *Buzbee v. State*, 199 Md. App. 678, 700 (2011) (quoting *Cuffley*, 416 Md. at 580). "Courts must 'construe[, therefore,] the terms of a plea agreement according to the reasonable understanding of the defendant when he pled guilty.'" *Buzbee,* 199 Md. App. at 700 (quoting *Solorzano v. State*, 397 Md. 661, 668 (2007)). This is an objective standard and depends "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." *Baines v. State*, 416 Md. 604, 615 (2010) (quoting *Cuffley*, 416 Md. at 582).

Turning to the merits of appellant's argument, we are not persuaded that *Cuffley* is "remarkably" similar to this case. Cuffley pled guilty to a charge of robbery, and he entered into a plea agreement with the State whereby the parties agreed upon a sentence "within the guidelines," which the prosecutor and Cuffley's counsel determined was four to eight years. 416 Md. at 573. The circuit court accepted the plea agreement, noted the agreed-upon sentence, and remarked that "[a]ny conditions of probation are entirely within my discretion." *Id.* at 574. At the subsequent sentencing proceeding, the court sentenced Cuffley to fifteen years in prison, with all but six years suspended, consecutive to a sentence Cuffley was serving for a violation of probation, to be followed by a five-year period of probation and other special conditions. *Id.*

The Court of Appeals noted that "by its express terms, Rule 4-243 requires strict compliance with its provisions." *Id.* at 582. The Court determined that the agreement in that case was for a sentence "within the guidelines," that is, four to eight years. *Id.* at 584-85. The Court noted: "No mention was made at *any* time during that proceeding–much less before the court agreed to be bound by the agreement and accepted [Cuffley]'s plea–that the four-to-eight year sentence referred to executed time only." *Id.* at 585 (emphasis added). Furthermore, "[n]either counsel nor the court stated that the court could impose a sentence of more than eight years' incarceration that would include no more than eight years of actual incarceration, with the remainder suspended." *Id.* The Court concluded,

therefore, that a reasonable person "would not understand that the court could impose the sentence it did." *Id.* The Court ordered that the circuit court re-sentence Cuffley because "the sentencing term of the agreement to which the court bound itself . . . was that the court would impose a total sentence of no more than eight years, a portion of which the court in its discretion might suspend in favor of a period of probation, with conditions." *Id.* at 585-86.

In this case, by contrast, there were numerous statements made at the sentencing proceeding indicating that the agreed-upon sentence was not limited to eight years in total. After informing the court of the counts to which appellant would plea, the prosecutor discussed the sentencing terms of the agreement:

> [THE STATE]: We have agreed not to seek any enhancement as a subsequent offender. The binding nature is that Mr. Savage would receive *active* incarceration of five years, which is the minimum mandatory under count five, and that he would receive three years of *active* incarceration under count one, which would run consecutive to the time imposed under count five, for a total *active* incarceration of eight years, five of that with limited possibilities of parole.
>
> The State is recommending that this be fashioned in a split sentence *with the length of suspended time at the discretion of the Court, the terms and conditions of probation also at the discretion of the Court.*
>
> * * *
>
> THE COURT: Is that your understanding [of the agreement], [appellant's counsel]?
>
> [APPELLANT'S COUNSEL]: It is, Your Honor, thank you.

(Emphasis added).

When examining appellant before accepting the plea, the court insured that he understood the sentencing terms of the agreement:

> THE COURT: You understand the maximum penalties for both of these charges are 20 years in prison, each one carries a maximum, that's the most you could get, but there is a binding plea so you're not going to get that but I just want you to know what the maximums are.
>
> Also with the drug charge of possession with intent to distribute, that also carries a fine of $25,000, but under the plea agreement you're not going to be required to pay a fine, do you understand that?
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: And do you understand the plea agreement as the prosecutor just outlined it?
>
> [APPELLANT]: Yes, sir.

The discussion continued:

> [THE STATE]: As we discussed in chambers, Your Honor, while the binding nature is one year below the guidelines, the guidelines do not take into consideration the mandatory nature, the limited opportunities of parole that Mr. Savage is facing for the time he will receive under count five and the State is asking that given that consideration, the fact that Mr. Savage has stepped forward and admitted his guilt and accepted responsibility in this action that you accept the binding nature of the plea. We do believe, *the State believes that a split sentence would be appropriate with a period of supervised probation so when Mr. Savage is released from the Division of Corrections he will be supervised and the Court can maintain some sort of hopefully guidance so Mr. Savage when he's released will become a productive member of the community.*
>
> * * *
>
> [APPELLANT'S COUNSEL]: The situation today is that Mr. Savage does have two very young children for whom he would like to be able to provide support. I understand that the *active* sentence that the

> Court's going to impose is going to be eight years with five of those years without parole
>
> * * *
>
> *If the Court is going to impose additional time I'd ask the Court to consider a small amount, not a dramatic period of time, 15 years suspend all but eight, 20 years suspend all but eight. I think an additional period of suspended time, after that kind of time at the Division of Corrections, would be sufficient to send the message to the community and to Mr. Savage that the Court would like to send.*

(Emphasis added).

Unlike the sentencing proceeding in *Cuffley*, where the sentencing court merely "alluded to" its discretionary powers, 416 Md. at 576, the plea agreement in this case, as explained at the sentencing proceeding, made clear that the court had the discretion to impose additional suspended time. Immediately prior to sentencing, appellant's counsel asked the court "to consider a small amount" if the court were to impose additional suspended time, recognizing that the eight years of incarceration in the plea agreement referred to active incarceration. We are persuaded, therefore, that a reasonable person in the defendant's position would have understood that the court had the discretion to impose additional suspended time.

Moreover, the Court of Appeals concluded that its holding in *Cuffley* "should not be interpreted as foreclosing a binding plea agreement that provides for a so-called 'split sentence' like the sentence imposed in this case, that is, a sentence that exceeds the guidelines, with all of it suspended save for that portion of the sentence that falls 'within the sentencing guidelines.'" 416 Md. at 586. "To the contrary, such plea agreements are *entirely permissible*, *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." *Id.* (emphasis added). We conclude that such term was explained to appellant in this case, and the sentencing court did not violate the terms of the plea agreement in sentencing appellant in 2007.

To the extent that appellant contends that, following the revocation of probation, the suspended time could not be ordered executed and made consecutive to any other sentence, we find this claim to be without merit. Appellant is correct that when the sentence was imposed in 2007, it was made concurrent to any other sentence appellant was then-serving. There was no term in the plea agreement, however, that should appellant violate probation and the suspended portions of the sentence be imposed, that that time be served concurrently with any other sentence appellant was serving upon activation of the suspended time.

Moreover, this Court has remarked: "The law in this State is settled[;] a previously suspended sentence of incarceration, reimposed following a revocation of probation is not modified upward by a direction from the trial judge that it be served consecutively to an intervening sentence of incarceration then actually being served." *Nelson v. State*, 66 Md. App. 304, 311 (1986) (citations omitted). As the 2011 burglary case was not outstanding in 2007, his 2007 sentence could not be concurrent with the 2011 sentence when it was imposed.

In sum, we find no error with the circuit court's denial of appellant's motion to correct an illegal sentence.

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