Circuit Court for Baltimore City
Case Nos. 106123020 & 106123023

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 58

September Term, 2024

KENNETH J. JOHNSON

v.

STATE OF MARYLAND

Beachley,
Zic,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: June 20, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In 2006, two teenagers, Brandon Harvell (victim #1) and DeWarren Artes (victim #2) were shot as they were walking in an alley in Baltimore.[1] At the time of the incident, victim #1 identified his girlfriend's brother, Kenneth Johnson (the Appellant in this case), as the person who shot him. Appellant had argued with victim #1 earlier that day, shouting "you dead, you dead" at him when the fight was broken up. Shortly after the shooting, the police arrested two suspects, Kevin Martin and Timothy Davis, in the general vicinity of the crime scene. Appellant was arrested later. Appellant, Martin, and Davis were charged, separately, with multiple offenses.[2] All three defendants were tried together in 2007 before a jury sitting in the Circuit Court for Baltimore City.

The jury convicted Appellant of attempted murder in the first-degree (victim #1); attempted murder in the second-degree (victim #2); and two counts each (one count for each victim) of use of a handgun in the commission of a crime of violence and wearing, carrying, or transporting a handgun. The jury also found Appellant guilty of two counts each (one for each victim) of conspiracy to murder, conspiracy to assault, conspiracy to use a handgun in the commission of a felony or crime of violence, and conspiracy to wear, carry, or transport a handgun.

[1] We identify the victims as victim #1 and victim #2 to avoid confusion, and we mean no disrespect by failing to utilize their names throughout the opinion.

[2] Each defendant was charged in two separate cases, based on the alleged crimes committed against each victim. Appellant was charged in Case No. 106123020 with offenses relating to victim DeWarren Artes and charged in Case No. 106123023 with offenses relating to victim Brandon Harvell. The cases were tried together.

The jury convicted co-defendant Davis of two counts of first-degree assault (victims #1 and #2); use of a handgun in the commission of a crime of violence (two counts); wearing, carrying, or transporting a handgun (two counts); conspiracy to commit first-degree assault (victims #1 and #2); conspiracy to use a handgun in the commission of a felony or crime of violence (two counts); and conspiracy to wear, carry, or transport a handgun (two counts). Significant to this case, the jury acquitted Davis of conspiracy to murder both victims.[3]

The jury acquitted co-defendant Martin of attempted murder and of assault of both victims, but it found him guilty of conspiracy to murder victim #1 and conspiracy to assault victim #1. Martin was acquitted of conspiracy to murder victim #2. The jury also found Martin guilty of conspiracy to use a handgun in the commission of a felony or crime of violence (two counts) and conspiracy to wear, carry, or transport a handgun (two counts). On appeal, this Court affirmed the judgments against Martin. We vacated the convictions as to Davis and remanded for a new trial (based on the suppression court's failure to suppress certain evidence related to Davis). *Martin & Davis*, No. 1182, Sept. Term 2007 (filed April 22, 2010).

After merging the conspiracy convictions, the court sentenced Appellant in case ending in 020 to life imprisonment for conspiracy to murder DeWarren Artes (victim #2), 30 years for the attempted murder of victim Artes, and to 20 years for use of a handgun in the commission of a crime of violence, with those sentences to run consecutively to each

[3] The jury also acquitted Davis of attempted murder as to both victims.

other. The court sentenced Appellant in case ending in 023 to 20 years for the attempted murder of Brandon Harvell (victim #1) and to three years for wearing and carrying a handgun, with both sentences to run concurrently with the 30-year sentence in case ending in 020. Appellant appealed, raising a general sufficiency of the evidence challenge to his convictions. The thrust of his argument was that the testimony of victim #2 was inconsistent and that testimony, coupled with the circumstantial evidence produced by the State, was legally insufficient. This Court rejected Appellant's argument and affirmed the judgments. *Johnson v. State*, No. 996, Sept. Term, 2007 (filed September 9, 2009) [hereinafter "*Johnson I*"], *cert. denied*, 411 Md. 601 (2009).

In February 2024, Appellant, representing himself, filed a Rule 4-345(a) motion to correct an illegal sentence.[4] He asserted that his life sentence for conspiracy to murder victim #2 (Artes) was illegal because the jury had acquitted his co-defendants of that conspiracy offense. In short, he maintained that, because the verdicts were "inconsistent," the jury's verdict finding him guilty of conspiracy to murder victim #2 was "defective" and the court "should have not accepted" it. The circuit court summarily denied the motion.

On appeal, Appellant—who continues to represent himself—makes the same argument he did in his motion. Because his co-defendants were acquitted of conspiracy to murder victim #2, he maintains that the guilty verdict against him for that offense was

[4] Appellant's motion to correct an illegal sentence included both cases (*i.e.*, case numbers ending in 020 and 023) on the pleading and, hence, was filed in both cases. His motion, however, focused only on the verdicts rendered with respect to victim #2 (DeWarren Artes) and seemed to ignore the fact that the two cases were tried together.

"inconsistent with the rule of consistency" and the "conviction as to him is void." He also claims that the jury was not instructed that "if it found two of the co-defendants not guilty of the conspiracy to murder [victim #2], then it couldn't find any of the defendants guilty." As in his motion, he asserts that the trial court "failed to exercise its responsibility not to accept the defective verdict."

The State responds that "Johnson's inconsistent verdict claim is not properly before this Court" because, by failing to object to the alleged inconsistent verdicts when announced, he waived it. But even if not waived, the State asserts that, when Appellant was tried and convicted, legally inconsistent verdicts were lawful. The State relies on *Pitts v. State*, 250 Md. App. 496 (2021), to support its position.

For the reasons to be discussed, we hold that Appellant's conviction for conspiracy to murder is valid as he and co-defendant Martin were both found guilty of conspiring to murder victim #1 (Brandon Harvell). The court erred, however, in merging that conviction, Count 7 of case no. 106123023, with Count 7 in case no. 106223020 (conspiracy to murder victim #2 - DeWarren Artes) because Appellant's co-defendants were both acquitted of the latter offense. In other words, the sentencing error in this case arose from a merger mistake. Appellant should have been sentenced for conspiracy to murder Brandon Harvell in case ending in 023, and no sentence should have been imposed for the conviction for conspiracy to murder DeWarren Artes in case ending in 020. Accordingly, we shall vacate the

conviction and life sentence for Count 7 in case ending in 020 and remand for sentencing on Count 7 in case ending in 023.[5]

DISCUSSION

Rule 4-345(a) provides that a court may "correct an illegal sentence at any time[,]" but the Rule is very narrow in scope and is "limited to those situations in which the illegality inheres in the sentence itself[.]" *Chaney v. State*, 397 Md. 460, 466 (2007). An inherently illegal sentence is one in which there "has been no conviction warranting any sentence for the particular offense[,]" *id.*; where "the sentence is not a permitted one for the conviction upon which it was imposed[,]" *id.*; where the sentence exceeded the sentencing terms of a binding plea agreement, *Matthews v. State*, 424 Md. 503, 519 (2012); or where the court "lacked the power or authority" to impose the sentence. *Johnson v. State*, 427 Md. 356, 370 (2012). However, a "motion to correct an illegal sentence is not an alternative method of obtaining belated appellate review of the proceedings that led to the imposition of judgment and sentence in a criminal case." *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *State v. Wilkins*, 393 Md. 269, 273 (2006)). In other words, "only claims sounding in substantive law, not procedural law, may be raised through a Rule 4-345(a) motion." *Id*. at 728. Appellate court review of the circuit court's ruling on a

[5] In both indictments filed in the respective cases, the conspiracy to commit murder was charged in Count 7. On the verdict sheets, the offense was labeled Count 8. At trial and sentencing, the court followed the verdict sheets when speaking of the conspiracy to murder convictions, referring to them, in each case, as Count 8. The Commitment Record followed the indictment, that is, the sentence for conspiracy to murder is referred to as Count 7 in each case.

motion to correct an illegal sentence is *de novo*. *Bratt v. State*, 468 Md. 481, 494 (2020).

As noted, Appellant was convicted of conspiracy to murder both victim #1 and victim #2, as well as additional conspiracies. After the verdict was announced and the jury dismissed, the court advised the parties that, despite all the separate conspiracy convictions, "there's only one conspiracy" and, therefore, they all "merge" and "[s]o we're basically talking about one conspiracy conviction for Mr. Johnson."[6] The court further stated that, "Count Eight of [case ending in] 20" (conspiracy to murder victim #2) "merges with Count Eight of [case ending in] 23" (conspiracy to murder victim #1).[7] In other words, the court concluded that all of the conspiracy convictions in both of Appellant's cases merged into the conviction for conspiracy to murder victim #1 (Brandon Harvell in case ending in 023).

At the subsequent sentencing hearing, the court reiterated its position with respect to the merger of the conspiracy convictions. The court, however, stated that Count 8 of case ending in 020 (conspiracy to murder victim #2) "is the flagship conspiracy Count."[8]

[6] "It is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit." *Tracy v. State*, 319 Md. 452, 459 (1990). "The unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Id*. To convict a defendant of multiple conspiracies, the State must prove that more than one unlawful agreement existed. *Savage v. State*, 212 Md. App. 1, 13 (2013).

[7] *See* footnote 4 *supra*. The conspiracy to murder offenses were labeled Count 8 on the verdict sheets, but they were charged in Count 7 in the respective indictments.

[8] The court may have misspoken, as following the dismissal of the jury after the verdicts were hearkened, the court had announced that Appellant's conviction for conspiracy to murder victim #2 (case ending in 020) "merges with" the conviction for conspiracy to murder victim #1 (case ending in 023). In other words, it appears to us that (continued)

The court then sentenced Appellant, without objection, to life imprisonment in case 020 for conspiracy to murder DeWarren Artes (victim #2).

Co-defendant Martin was convicted of conspiracy to murder victim #1 and acquitted of conspiracy to murder victim #2 and co-defendant Davis was acquitted of conspiracy to murder both victims. Given that the co-defendants and alleged co-conspirators were acquitted of conspiracy to murder victim #2 *in the same trial* as Appellant, Appellant should also have been acquitted of that offense. *See Regle v. State*, 9 Md. App. 346, 351 (1970) ("[I]t is the well settled general rule that one defendant in a prosecution for conspiracy cannot be convicted where all of his alleged coconspirators . . . have been acquitted[.]").

Because the core of a conspiracy is the agreement between two or more persons to commit a crime or unlawful act, *id*. at 350-51, the conviction of one defendant for conspiracy in a joint trial and the acquittal of the other(s) of the same offense violates the rule of consistency. *State v. Johnson*, 367 Md. 418, 424 (2002) ("The legal tenet known

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the court, at that time, recognized that the conspiracy to murder victim #1 was the "flagship conspiracy Count," not the conspiracy to murder in case ending in 020. This appears correct because the State's theory at trial was that Appellant had targeted victim #1 (Brandon Harvell) following an argument with him earlier that day. *See Johnson I*, slip op. at 3 ("On the day of the shooting, [Appellant] and Harvell got into an altercation because someone had told Johnson that Harvell hit his sister. The fight was broken up by Harvell's aunt . . . when she allegedly heard Johnson threaten her nephew's life."). We also noted in *Johnson I* that, when Harvell selected Appellant's photograph from a photo array shortly after the incident, he stated he picked that photo "because he was the one who say he was gonna kill me that night." *Id*. at slip op. 3 n. 1. And in the co-defendants' appeal, this Court recounted Harvell's aunt's testimony that, as Appellant fled from the argument with Harvell, she heard him shout at Harvell "you dead, you dead." *Martin & Davis*, *supra*, slip op. at 12.

as the 'rule of consistency' embodies the postulate that where the participation of only one person is established, the crime of conspiracy cannot exist and a conviction thereunder is void.").

The Maryland Supreme Court addressed the "rule of consistency" in the conspiracy context in *Gardner v. State*, 286 Md. 520, 524 (1979), where it stated:

> [I]t is settled that the crime of conspiracy necessarily requires the participation of at least two people. *Where the participation of only one is shown the crime is incomplete and a conviction as to him is void*. This proposition is recognized in the law as the rule of consistency: that "As one person alone cannot be guilty of conspiracy, when all but one conspirator are acquitted, conviction of the remaining conspirator cannot stand." *Hurwitz v. State*, 200 Md. 578, 592 (1952). The rule developed many years ago when the practice was to try all persons charged with the crime of conspiracy together. Under such circumstances, common sense dictated that verdicts based on the same evidence and circumstances should be consistent. Accordingly the rule has developed primarily regarding joint trials.

(Emphasis added). [9]

In this case, Appellant did not object to the verdict when announced at trial or later at sentencing. Nor did he raise the issue on direct appeal. The State therefore maintains that, because legally inconsistent verdicts were permissible when Johnson was convicted, he has waived his claim. The State, as noted, cites *Pitts*, *supra*, in support of its position.

Pitts was convicted in 1997 of murdering two sisters, G'Angela and Trina Johnson. 250 Md. App. at 501. The jury convicted him of the first-degree murder of both sisters and

[9] In *Gardner*, 286 Md. at 528, and *Johnson*, 367 Md. at 420, the Maryland Supreme Court held that the rule of consistency is inapplicable to conspiracy verdicts issued in *separate* trials. In other words, a defendant may be convicted of conspiracy even though the co-conspirator, tried separately after (*Gardner*) or before (*Johnson*) the defendant, was acquitted of the same conspiracy.

of the second-degree murder of Trina; it acquitted him of the second-degree murder of G'Angela. *Id*. at 501-02. The acquittal of Pitts of the second-degree murder of G'Angela was inconsistent with its verdict finding him guilty of murdering her in the first degree. Nineteen years later, Pitts filed a motion to correct an illegal sentence arguing that his life sentence for murdering G'Angela was inherently illegal because it arose from a legally inconsistent verdict. *Id*. at 502-03. The circuit court denied relief and on appeal this Court affirmed that judgment. In short, we held that Pitts was not entitled to relief under Rule 4-345(a) because, at the time of his trial, legally inconsistent verdicts were tolerated. *Id.* at 519 (legally inconsistent verdicts prior to *Price v. State*, 405 Md. 10 (2008), were tolerated and did not give rise to an inherently illegal sentence subject to correction by Rule 4-345(a)).[10]

In our view, *Pitts,* which relies heavily on *Price* (holding that legally inconsistent verdicts are no longer tolerated) and *Givens v. State*, 449 Md. 433 (2016) (adopting the concurrence in *Price* and holding that a defendant must object to a legally inconsistent verdict to preserve the issue for appellate review) is inapplicable to the case before us for the simple reason that *Pitts, Price*, and *Givens* and the cases cited therein did not involve a *conspiracy* verdict.

Here, the State has not pointed to any authority holding that a conspiracy conviction violating the rule of consistency in a jointly tried case is or ever has been permitted or

[10] We alternatively held that even if Pitts's case was covered by *Price*, Pitts "failed to satisfy the procedural requirements of *Givens v. State*" pertaining to a contemporaneous objection to the verdict. *Pitts*, 250 Md. App. at 526.

tolerated in Maryland. Rather, the opposite appears true. Moreover, as the Honorable Charles E. Moylan, Jr. observed in *Pitts*, there are "varieties of verdict inconsistencies" and "one may not misapply the law controlling one variety of inconsistent verdicts to a case involving another distinct variety or cherry-pick language from one variety and apply it to another." 250 Md. App. at 512.

Our Supreme Court has stated that a conspiracy verdict violating the rule of consistency in a jointly tried case is "void." *Johnson*, 367 Md. at 424. A legally inconsistent verdict in a non-conspiracy case may be reversible where the issue is preserved, but the conviction is not necessarily void. Thus, requiring a defendant in Appellant's position to object to the jury's guilty verdict of conspiring to murder victim #2 while acquitting his co-conspirators of the same offense would have no meaningful effect. The purpose of requiring a defendant to object to a legally inconsistent verdict is to provide the jury with the opportunity to resolve the inconsistency. *See Givens*, 449 Md. at 475 (observing that, "[w]here a guilty verdict is inconsistent with a not-guilty verdict, the defendant might raise such an issue with the expectation that the trial court will send the jury back to resolve the inconsistency, and in hopes that the jury may find the defendant not guilty of both charges"). The right to do so lies exclusively with the defendant and it is not the role of the court to take it upon itself to send the jury back to deliberate further. *Pitts*, 250 Md. App. at 522 (sending an inconsistent verdict back to the jury with instructions to resolve the inconsistency is an "option" that "belongs to the defendant alone and is not available to either the prosecution or to the trial judge sua sponte."); *Ndunguru*

v. State, 233 Md. App. 630, 642 (2017) ("[A] trial court may not, in the absence of a request from the defendant, advise a jury that its verdicts are inconsistent and send the jury back to resolve the inconsistency.").

Appellant was found guilty of conspiring to murder victim #2 while his co-defendants were both acquitted of that offense. If the jury had been instructed to resolve the inconsistency in the verdicts, the jury would have been required to revisit their verdicts with respect to Appellant *and* his co-defendants. The co-defendants certainly would not have consented to sending the jury back for further deliberations to resolve this inconsistency and risk the jury finding them guilty of the offense for which they had already been acquitted. In light of the acquittal of the co-defendants of conspiring to murder victim #2, the jury's verdict finding Johnson guilty of that offense "cannot stand." *Hurwitz*, 200 Md. at 592. There was simply no incentive for Appellant to request that the jury reconsider that verdict. The error that resulted in the life sentence for conspiracy to murder victim #2 was not with the verdict, *per se*, but with the court imposing sentence on a void conviction.

In our view, *Jordan v. State*, 323 Md. 151 (1991), is instructive and more on point with this case than *Pitts*. In *Jordan*, the Maryland Supreme Court reversed this Court's holding that a defendant could not challenge on direct appeal sentences imposed for conspiracy to commit murder and conspiracy to commit robbery because he failed to preserve the issue for appellate review. Jordan argued that, because the conspiracy was one crime, he should have been sentenced for only one conspiracy conviction. *Id*. at 159-60. The State maintained that, because trial counsel acquiesced in the separate conspiracy

convictions, the issue was not reviewable. *Id*. at 160. After acknowledging that the facts in the case did not "support the determination that two conspiracies existed[,]" the Supreme Court concluded that *sentencing* Jordan for conspiracy to commit murder and to a separate sentence for conspiracy to commit robbery "was plain error" and "[a]n illegal sentence resulted." *Id*. at 161. Invoking Rule 4-345(a), the Supreme Court continued: "If we conclude that sentencing Jordan for two conspiracies was unlawful, we must also conclude that Jordan has not waived his right to object to the unlawful sentence." *Id*. Then, after noting that "Jordan can only be sentenced once for the conspiracy that was the product of the agreement," the Supreme Court held that the "conviction for conspiracy to commit robbery" must be vacated. *Id*. at 161-62.

We believe *Jordan* is applicable here. The court unlawfully sentenced Appellant for conspiracy to murder victim #2 when both co-conspirators in the same trial were acquitted of that offense. As the Maryland Supreme Court has stated, "[w]here the participation of only one is shown the crime [of conspiracy] is incomplete and a conviction as to him is void." *Gardner*, 286 Md. at 524. Appellant's sentence on that count, therefore, is inherently illegal and subject to correction under Rule 4-345(a) at any time because no sentence should have been imposed on the void conviction. *See Alston v. State*, 425 Md. 326, 339 (2012) ("Where the trial court imposes a sentence or other sanction upon a criminal defendant, and where no sentence or sanction should have been imposed, the criminal defendant is entitled to relief under Rule 4-345(a).").

Accordingly, we shall vacate the conviction and sentence for conspiracy to murder DeWarren Artes (victim #2) (Count 7 in case ending in 020). To be clear, the conviction for conspiracy to murder Brandon Harvell (victim #1) (Count 7 in case ending in 023) did not violate the rule of consistency as co-defendant Martin was also found guilty of that offense.[11] Because the court had originally "merged" all the conspiracy offenses in both cases for sentencing purposes, it may on remand "un-merge" the conviction for conspiracy to murder Brandon Harvell and sentence Appellant on that Count.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY DENYING MOTION TO CORRECT AN ILLEGAL SENTENCE REVERSED. CONVICTION AND SENTENCE FOR CONSPIRACY TO MURDER IN CASE NO. 106123020 VACATED. CASES REMANDED FOR RESENTENCING. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.

[11] Again, the verdict sheets labeled these offenses as "Count 8," but the respective indictments and Commitment Record label them as Count 7. To avoid any confusion on remand, we refer to them here as Count 7.