Circuit Court for Harford County
Case Nos. 12-K-08-635, 12-K-08-975, 12-K-08-976, 12-K-08-1197, 12-K-08-1299, 12-K-09-310.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 140, 141, 142, 143, 144 & 145

September Term, 2018

JAMES RANDALL JORDAN, JR.

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Berger,

JJ.

Opinion by Berger, J.

Filed: January 3, 2019

This appeal is from an Order of the Circuit Court for Harford County denying a motion to correct an illegal sentence filed by appellant, James Jordan, Jr. On March 15, 2010, appellant entered pleas of guilty in six separate criminal cases as part of what the circuit court judge called a "package deal." On May 3, 2010, the court imposed consecutive sentences in each of the six cases, that, when added together totaled 31.5 years of imprisonment with all but 10 years suspended. Nevertheless, immediately after announcing those individual sentences, the court summarized its sentence by saying: "So that the total in all cases is 26 and a half years, suspend all but 10 years." This case turns on whether the court's seemingly conflicting statements about the duration of appellant's sentence created an ambiguity such that appellant's sentence is subject to correction under Md. Rule 4-345.

For the reasons discussed below, we conclude that appellant's sentence is illegal. We, therefore, reverse the circuit court's judgment denying appellant's motion to correct an illegal sentence and remand the case for re-sentencing not inconsistent with this opinion.

BACKGROUND

Although it is largely immaterial to our resolution of this appeal, for clarity, we shall recount with some specificity the history of this case. As indicated above, appellant pleaded guilty to six separate cases at one time. All of the cases were for theft-related offenses. The plea agreement contemplated that, in exchange for appellant's six guilty pleas, the State would place a seventh case on the stet docket, enter a *nolle prosequi* on certain charges in each of the six cases in which appellant pleaded guilty, and request actual

incarceration not to exceed 15 years. Under the agreement, the defense was free to argue for less incarceration.

On May 3, 2010, when imposing appellant's sentence, the circuit court announced the following:

> I'm going to start with [the case ending in] 635. On count two, five years to the Division of Correction, suspend three. Now, all of these sentences are going to be consecutive one after the other. In [the case ending in] 975 on count four, 10 years to the Division of Correction, suspend eight. In [the case ending in] 976 on count four, five years to the Division of Correction, suspend two.
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> In [the case ending in] 1299, five years Division of Correction, suspend three. In [the case ending in] 310, five years DOC, suspend all of it. In [the case ending in] 1197 on count one, 18 months DOC, suspend all of it. **So that the total in all the cases is 26 and a half years, suspend all but 10 years**.

(Emphasis added).

Immediately before the sentencing hearing ended, the circuit court realized it had "made a mistake" with respect to the sentence in the case ending in 1299 and corrected itself saying: "On 1299 it is five suspend two and then in the other one it's 18 months," explaining "[t]hat makes it come out right." This "correction" had the effect of changing the suspended portion of that sentence from three years to two years (and thereby changing the active portion of the sentence from two years to three years). In addition, the probation order contains the following notation: "26 ½ years @ DOC – s/a/b 10 years."

The following table reflects the foregoing sentences (including the court's correction to the sentence in the case ending in 1299):

Case No.	Charge	Sentence (in years)	Active/Executed	Suspended
12-K-08-635	Count 2 Identity Theft	5	2	3
12-K-08-975	Count 4 Conspiracy to Commit Theft	10	2	8
12-K-08-976	Count 4 Conspiracy to Commit Theft	5	3	2
12-K-08-1197	Count 1 Theft	1.5	0	1.5
12-K-08-1299	Count 4 Theft	5	3	2
12-K-09-136		stet		
12-K-09-310	Count 4 Theft	5	0	5
Actual Total		**31.5**	**10**	**21.5**
Court Announced "Total"		**26.5**	**10**	**--**

During the sentencing hearing no one mentioned the discrepancy between the "announced" total sentence and the "actual" total sentence. However, the issue arose during two subsequent violation of probation (VOP) hearings. During both of those hearings, appellant questioned the VOP court's calculation of the outstanding portion of appellant's sentence based on appellant's understanding that the original sentence was the "announced" sentence of 26.5 years. In both hearings, the VOP court explained that it had thoroughly reviewed appellant's sentence both in the VOP proceedings and in an earlier

opinion and order denying appellant's petition for post-conviction relief,[1] and had concluded that appellant's original sentence was 31.5 years.[2]

At the outset of the first VOP hearing, on May 12, 2016, the court stated that appellant had "21 years and six months" remaining on his sentence, which correctly reflected the "actual" total sentence, but not the "announced" total. Appellant's counsel then questioned whether the court had accurately calculated appellant's "back-up time" and said "the violation of probation report says 26 years suspend all but 10 years to be served initially on this case." The VOP court then explained each individual sentence, that the resulting total sentence was 31.5 years, that appellant had served 10 years, and that therefore the balance was 21.5 years. At that point, appellant personally expressed his belief that the original sentence was 26.5 years, that he had served 10 years, and that therefore the balance was 16.5 years. Thereafter, the court reiterated how it had arrived at its conclusion that the original sentence was 31.5 years. After finding appellant to have

[1] The same judge presided over the post-conviction proceedings and the VOP proceedings. The judge who presided over the guilty plea and sentencing had retired before the VOP proceedings took place.

[2] The court was referring to a footnote in the opinion and order denying appellant post-conviction relief. In that footnote the post-conviction court acknowledged that the probation order had a notation on it indicating that the total sentence was 26 ½ years. However, the post-conviction court, referring to the correction the sentencing court made to the sentence in the case ending in 1299 at the conclusion of the sentencing hearing, noted that it believed that the sentencing court had corrected the conflict between the "actual" total sentence and the "announced" total sentence. That finding of the post-conviction court was clearly incorrect. Unfortunately, the post-conviction court's error was repeated by the VOP court at both VOP hearings.

violated the terms of his probation, the court imposed five years of the previously suspended sentences and suspended the remainder of the sentence.[3]

On March 16, 2017, another hearing was held to determine whether appellant had violated the terms of his probation. The question of how much of appellant's sentence was outstanding arose once again. During this proceeding, the VOP court believed that appellant had 16.5 years remaining on his sentence as he had originally been sentenced to 31.5 years, had served 10 years, and 5 years had been imposed during the prior VOP proceedings (31.5 - 10 – 5 = 16.5). Appellant's counsel told appellant that there was 11.5 years remaining of the original sentence and that his notes indicated that appellant was originally sentenced to 26.5 years. The probation agent agreed with appellant's counsel's calculation that the original sentence was 26.5 years, that appellant had served 10 years, that 5 years had been executed during the previous VOP hearing and that, therefore, there were 11.5 years remaining of appellant's sentence (26.5 – 10 – 5 = 11.5). The VOP court then, once again, reiterated how it had arrived at its conclusion that appellant's original sentence was 31.5 years. Appellant personally expressed confusion about the duration of his sentence. After finding appellant to have been in violation of the terms of his probation, the court executed 13 years of the previously suspended sentences.

[3] The parties both agree that, in executing a portion of appellant's sentence, the VOP court made the exact sort of error that the original sentencing court made, i.e., it announced sentences for each of the individual counts, and then announced a total that conflicted with the actual total. The actual total arrived at by adding the VOP court's sentences was 22.5 years with all but 5 years suspended. The announced total was 21.5 years with all but 5 years suspended. This error would prove to be inconsequential, however, because during a subsequent VOP hearing, the error was corrected *sub silentio* when the subsequent VOP court announced its sentence.

In 2018, appellant filed a motion to correct an illegal sentence contending, *inter alia*, that his sentence was illegal because the VOP court executed more time than was left on his sentence. According to appellant, the VOP court only had the ability to order the execution of 11.5 years of imprisonment, yet, the VOP court ordered the execution of 13 years.

DISCUSSION

Maryland Rule 4–345(a) provides that "[t]he court may correct an illegal sentence at any time." The Court of Appeals has "consistently defined" an illegal sentence under Md. Rule 4-345(a) "'as limited to those situations in which the illegality inheres in the sentence itself; i.e., there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed[.]'" *Bryant v. State*, 436 Md. 653, 662–63 (2014) (*quoting Chaney v. State*, 397 Md. 460, 466 (2007)).

A circuit court's ruling on a motion to correct an illegal sentence filed pursuant to Maryland Rule 4–345(a) is subject to appellate review upon the timely filing of a notice of appeal. *State v. Kanaras*, 357 Md. 170, 183–84 (1999). In determining whether a sentence is illegal, we exercise *de novo* review. *Carlini v. State*, 215 Md. App. 415, 443 (2013).

In *Robinson v. Lee*, 317 Md. 371 (1989), the Court of Appeals emphasized that the "need for clarity in the imposition of multiple sentences is a matter of great public concern" and held that a "trial judge's obligation is to articulate the period of confinement with clarity so as to facilitate the prison authority's task." *Id.* at 379. Where there is ambiguity, the Court determined that the rule of lenity applies and explained that:

> Fundamental fairness dictates that the defendant understand clearly what debt he must pay to society for his transgressions. If there is doubt as to the penalty, then the law directs that his punishment must be construed to favor a milder penalty over a harsher one.

Id. at 379-80.

The Tenth Circuit Court of Appeals has noted that:

> The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty. Sentencing should be conducted with the judge and defendant facing one another and not in secret. It is incumbent upon a sentencing judge to choose his words carefully so that the defendant is aware of his sentence when he leaves the courtroom.

U.S. v. Villano, 816 F.2d 1448, 1452–53 (10th Cir.1987).

The Supreme Court of Georgia summarized the concept as follows: "[S]entences for criminal offenses should be certain, definite, and free from ambiguity, and, where the contrary is the case, the benefit of the doubt should be given to the accused." *Cross v. Huff*, 208 Ga. 392, 396, 67 S.E.2d 124, 126 (1951).

We have observed that a "contract is ambiguous if it is subject to more than one interpretation when read by a reasonably prudent person." *Chesapeake Bank of Maryland v. Monro Muffler/Brake, Inc.*, 166 Md. App. 695, 706 (2006), (quoting *Sy–Lene of Washington, Inc. v. Starwood Urban Retail II, LLC*, 376 Md. 157, 167 (2003)). Black's Law Dictionary, (10th ed. 2014), defines an "ambiguity" as "[d]oubtfulness or uncertainty of meaning or intention, as in a contractual term or statutory provision; indistinctness of signification, esp. by reason of doubleness of interpretation."

In our view, the appellant's sentence is prototypically ambiguous. To reiterate, the court sentenced appellant as follows:

> I'm going to start with [the case ending in] 635. On count two, five years to the Division of Correction, suspend three. Now, all of these sentences are going to be consecutive one after the other. In [the case ending in] 975 on count four, 10 years to the Division of Correction, suspend eight. In [the case ending in] 976 on count four, five years to the Division of Correction, suspend two.
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> In [the case ending in] 1299, five years Division of Correction, suspend three. In [the case ending in] 310, five years DOC, suspend all of it. In [the case ending in] 1197 on count one, 18 months DOC, suspend all of it. So that the total in all the cases is 26 and a half years, suspend all but 10 years.

As earlier explained, when the individual sentences are all added together, they amount to 31.5 years with all but 10 years suspended, which is directly contradictory to what the court said when summarizing the sentence as "26 and a half years, suspend all but 10 years." Accordingly, we conclude that appellant's sentence is "subject to more than one interpretation when read by a reasonably prudent person" and is, therefore, ambiguous. *Chesapeake Bank of Maryland*, 166 Md. App. at 706.

Indeed, the record demonstrates that a reasonably prudent person would have believed that they were, in fact sentenced to "26 and a half years, suspend all but 10 years" because (1) that is exactly the total sentence that the court clearly announced, and (2) it would be challenging, to say the least, to add in one's head simultaneously the two floating

variables consisting of the executed and suspended portions of the sentences for all six offenses – especially for one untrained in the law.[4]

Because the sentence is ambiguous, "the law directs that [the] punishment must be construed to favor a milder penalty over a harsher one." *Robinson v. Lee*, 317 Md. at 380. In this case, that means that, by operation of law, appellant was originally sentenced on May 3, 2010 to 26.5 years imprisonment, with all but 10 years suspended (26.5-10=16.5 years). During the first VOP hearing, held on May 12, 2016, the court directed execution of 5 years of the previously suspended 16.5 years (16.5-5=11.5). As a result, the maximum sentence that remained suspended after May 12, 2016 that could have been ordered to be executed during the March 16, 2017 VOP hearing was 11.5 years, not 16.5 years. Hence, when the VOP court ordered the imposition of a 13-year sentence, it imposed a sentence not permitted "for the conviction upon which it was imposed." *Bryant*, 436 Md. 662–63. As a result, the VOP court imposed an illegal sentence, which under Md. Rule 4-345, can be corrected at any time. We, therefore, reverse the decision of the circuit court denying appellant's motion to correct an illegal sentence and remand the case for re-sentencing where the maximum possible sentence cannot exceed 11.5 years.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY REVERSED. SENTENCES VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR HARFORD COUNTY FOR RE-SENTENCING CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY HARFORD COUNTY.

[4] This point is all the more demonstrated by the fact that the sentencing court apparently could not achieve such a mathematical feat even with the benefit of paper and pencil. In addition, as outlined earlier, there were other mistakes made in appellant's sentence by the sentencing court and the VOP court, one of which was seemingly inadvertently corrected.