

Circuit Court for Baltimore County  
Case No: 03-K-12-004576

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 206

September Term, 2018

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TORRY JERRELL BOYER

v.

STATE OF MARYLAND

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Friedman,  
Beachley,  
Moylan, Charles E., Jr.  
(Senior Judge, Specially Assigned),

JJ.

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PER CURIAM

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Filed: April 2, 2019

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Torry Jerrell Boyer appeals the denial, by the Circuit Court for Baltimore County, of his motion to correct an illegal sentence. His claim of sentence illegality centers on his assertion that, when he pleaded guilty to possession with intent to distribute cocaine and to conspiracy to distribute cocaine, he was misadvised that he was subject to an enhanced sentence as a subsequent offender for both offenses when in fact he was subject to punishment as a subsequent offender for only one of the two crimes. Because Mr. Boyer’s sentence for possession with intent to distribute has already been modified to correct any illegality and because his sentence for conspiracy to distribute cocaine is legal, we affirm.

## **BACKGROUND**

### Plea & Sentencing Hearing

Mr. Boyer was charged in four distinct cases with various offenses. On November 7, 2013, he appeared in court with counsel and, pursuant to a plea agreement, pleaded guilty to possession with intent to distribute cocaine (case no. K-12-3794), conspiracy to distribute cocaine (case no. K-12-4576), and second-degree assault (case no. K-13-4441). In exchange for the pleas, the State agreed to *nol pros* charges in another case (case no. K-13-3611) and to forgo pursuing a sentence of 25 years without parole for the controlled dangerous substance (“CDS”) offenses, a sentence Mr. Boyer could have received given his status as a subsequent offender of the CDS laws. The court agreed to bind itself to a sentence of 20 years’ imprisonment, the first ten years without the possibility of parole, for the CDS offenses and to impose no more than ten years’ imprisonment for the assault, with all sentences to run concurrently with each other.

In the on-the-record examination of Mr. Boyer before the court accepted the pleas, defense counsel reviewed with him the limited grounds on which Mr. Boyer could later challenge his plea or sentence. In doing so, defense counsel noted that it would be difficult to challenge the legality of the sentence, stating: “So I’m telling you now in view of the fact that on each of these narcotic cases you could have faced 25 years without parole because you do have a record, and in the assault case you could have faced 10 years.”

After the court accepted the pleas, the State urged the court to impose sentence as agreed upon in the plea agreement.

STATE: At this time the – since [defense] counsel has previously been provided . . . a copy of the State’s intention – at that time it was 25 years without the possibility of parole, but this time pursuant to the plea, we are just seeking the 20 with the first 10 without. I had previously provided notice under Maryland Rule 4-245, along with the documents to support the requirements under the statute allowing him to be eligible for that time and defense counsel is stipulating to his priors.

DEFENSE COUNSEL: That is correct.<sup>[1]</sup>

After a review of Mr. Boyer’s criminal history, which included multiple convictions for CDS offenses, the court stated that, “[u]nder the circumstances, the plea offer by the State is more than reasonable” and noted that defense counsel had “worked out an extraordinary plea agreement[.]” The court then sentenced Mr. Boyer to 20 years’ imprisonment, the first ten years without the possibility of parole for each of the CDS

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<sup>1</sup> The Rule 4-245 notice is not in the record before us.

offenses and to five years for the assault, with all sentences to run concurrently with each other.<sup>2</sup>

### Post-Conviction

In 2017, Mr. Boyer filed petitions for post-conviction relief in which he alleged that his trial lawyer had rendered ineffective assistance of counsel by advising him that “he was eligible for two mandatory third-time offender sentences of 25 years each that could be run consecutively, and thus if he went to trial he risked a mandatory minimum sentence of 50 years.” He asserted that the advice “was incorrect as the enhanced penalty for a third drug offense could only have been applied once,” that is, to either the offense for possession with intent to distribute or the conspiracy to distribute, but not to both. He claimed that, had he been properly advised, he would not have taken the plea or he would have negotiated a more favorable plea agreement.

After an apparent agreement with the State, Mr. Boyer and the State filed a “joint motion” for modification or reduction of sentence pursuant to § 5-609.1 of the Criminal Law Article. In relevant part, the motion stated:

In consideration for the defendant withdrawing his Petitions for Post-Conviction Relief with prejudice in case nos. K-12-3794 and K-12-4576, the State consents to this Motion for Modification, and the parties request that the Court resentence

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<sup>2</sup> Shortly after he was sentenced, Mr. Boyer filed an application for review of sentence by a three-judge panel. The State opposed any change in sentence, noting that “[t]he defendant was given consideration when the State chose not to proceed on the twenty-five years without the possibility of parole as to each [CDS] case.” The panel concluded that Mr. Boyer’s sentence was “fair and reasonable” and ordered that it “remain unchanged.”

the defendant to a term of 20 years’ incarceration in case no. 12-12-003794 [possession with intent to distribute CDS]. This new sentence would run concurrent with the defendant’s sentences in Case Nos. K-12-45786<sup>3]</sup> and K-13-3611. In addition, the Defendant agrees to waive his right to file a Motion for Modification in case no. K-12-4576 [conspiracy to distribute cocaine].

At a December 4, 2017 hearing on the joint motion, the court found that Mr. Boyer had “knowingly, voluntarily, and willfully withdrawn” his petitions for post-conviction relief with prejudice and “knowingly, voluntarily, and willfully waived his right” to file a motion for modification of sentence pursuant to Crim. Law § 5-609.1 in case no. K-12-4576. The court then modified his sentence for possession with intent to distribute (case no. K-12-3794) to 20 years’ imprisonment, to run concurrently with his other sentences.

#### Motion to Correct Illegal Sentence

After the court modified Mr. Boyer’s sentence, he filed (as a self-represented litigant) a “motion to correct an illegal sentence pursuant to Rule 4-345(a) and (b) due to fraud, mistake or irregularity” in case no. K-12-4576. Mr. Boyer asserted that his sentence for conspiracy to distribute cocaine “was and remains an illegal sentence which is not permitted by statute.” He maintained that the State had “misled” him and the trial court when it informed the court that he was subject to enhanced sentences on both of the CDS offenses. He further asserted that the “State’s misapplication of [§5-608 of the Criminal Law Article relative to enhanced penalties for subsequent CDS offenders] was used to mislead [him] into believing that he was getting a fair deal and sentence, when all

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<sup>3</sup> It appears that the correct case number is K-12-4576.

along, the State knew or should have known that it had bargained for an illegal sentence[.]” He further stated that “the State tricked [him] into believing that he faced 50 years in prison in the likely event that he was found guilty” and if the State had correctly interpreted the penalty provisions, he “would not have accepted a plea agreement that included sentences of 20 years, 10 years without the possibility of parole in both cases.” For those reasons, he maintained that his “sentence continues to be illegal and unconstitutional.” The court summarily denied the motion.

### **DISCUSSION**

On appeal, Mr. Boyer contends that the circuit court abused its discretion when it denied his motion without a hearing and without making findings of fact or stating reasons for its decision. He also claims his trial counsel “unlawfully coerced him into entering into a false plea agreement” and his post-conviction counsel “misled and tricked” him into withdrawing his petitions for post-conviction relief with prejudice. Although acknowledging that his sentence for possession with intent to distribute cocaine was modified, he nonetheless insists that his sentence for conspiracy to distribute cocaine “remains illegal” – not because the sentence was unauthorized, but because of the alleged “trickery” surrounding his plea and subsequent withdrawal of his request for post-conviction relief.

The State responds that Mr. Boyer’s sentence to 20 years’ imprisonment, the first ten years without possibility of parole, for conspiracy to distribute cocaine is legal and, therefore, the court correctly denied his motion to correct it. As for Mr. Boyer’s assertions that the prosecutor and his attorneys had deceived him, the State maintains that

those arguments are not the proper subject of a Rule 4-345(a) motion to correct an illegal sentence. The State also points out that “fraud, mistake, and irregularity” are narrowly defined terms and the allegations raised by Mr. Boyer do not fall within those definitions. We agree with the State.

The Court of Appeals has explained that there is no relief under Rule 4-345(a) where “the sentences imposed were not inherently illegal, despite some form of error or alleged injustice.” *Matthews v. State*, 424 Md. 503, 513 (2012). A sentence is “inherently illegal” where there was no conviction warranting any sentence, *Chaney v. State*, 397 Md. 460, 466 (2007); where the sentence imposed was not a permitted one, *id.*; or where the sentence imposed exceeded the sentence agreed upon as part of a binding plea agreement. *Matthews*, 424 Md. at 514. None of those scenarios are present in this case.

Mr. Boyer does not assert that the trial court was without authority to impose a 20-year sentence, the first ten years without the possibility of parole, for his conviction for conspiracy to distribute cocaine. And Boyer’s sentence is not contrary to the terms of his plea agreement. In essence, he is unhappy with his decision to withdraw, with prejudice, his post-conviction petitions and to forgo the opportunity to seek modification of his sentence for conspiracy to distribute cocaine in exchange for the State’s consent to the modification of his sentence for possession with intent to distribute cocaine – rights the circuit court found that Mr. Boyer had “knowingly, voluntarily, and willfully waived.” Any complaints Mr. Boyer has about his post-conviction counsel must be raised by another mechanism. *See Brightwell v. State*, 223 Md. App. 481, 488 n. 3 (observing that

a “motion to correct illegal sentence is not the appropriate mechanism through which to claim ineffective assistance of counsel”), *cert. denied*, 445 Md. 5 (2015).

In short, the circuit court did not err in denying Mr. Boyer’s motion to correct his sentence because his sentence is legal. And because the court denied the motion, a hearing was not required.

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