

Circuit Court for Baltimore County
Case NO. K04-3966

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 778

September Term, 2017

EUGENE EDWARD GARDNER

v.

STATE OF MARYLAND

Woodward, C.J.,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: March 9, 2018

*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.

Eugene Edward Gardner appeals the denial, by the Circuit Court for Baltimore County, of his motion to correct an illegal sentence, which he had filed pursuant to Md. Rule 4-345(a). The State moves to dismiss the appeal because Gardner’s sentence is not inherently illegal. We agree with the State that Gardner is raising a procedural challenge to his sentence and, thus, his claim is not the proper subject of a Rule 4-345(a) motion. Accordingly, we shall dismiss the appeal.

Rule 4-345(a) provides that a court “may correct an illegal sentence at any time,” even if the defendant failed to object at the time the sentence was imposed. *See Bryant v. State*, 463 Md. 653, 662 (2014). The rule is very narrow in scope, however, and “only applies to sentences that are ‘inherently’ illegal.” *Id.* (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). An “inherently illegal” sentence is one in which ““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*, 436 Md. at 663 (quoting *Chaney*, 397 Md. at 466). In contrast, where a challenge to a sentence is based on a procedural error in the sentencing proceeding, the sentence is not subject to correction pursuant to Rule 4-345(a). *See Tshiwala v. State*, 424 Md. 612, 619 (2012).

Gardner was convicted in 2005 of armed robbery and use of a handgun in the commission of a felony. Based on the fact that Gardner was a subsequent offender, prior to sentencing the State filed a timely notice, pursuant to Rule 4-245, of its intent to seek a

mandatory twenty-five year sentence, without the possibility of parole.¹ The court imposed the mandatory sentence. Upon appeal, this Court reversed the convictions and remanded the case for a new trial.²

Upon retrial in 2008, Gardner was again convicted of both offenses. At sentencing, the parties discussed Gardner’s status as a subsequent offender and defense counsel confirmed for the court that Gardner had “numerous convictions” and “the statute’s met.” Defense counsel further stated that, “[w]e conceded that last time and we will do it this time.” The State, after noting that the defense was “stipulating” to the “predicates,” nonetheless reviewed with the court Gardner’s prior convictions. Gardner made no objection. In fact, defense counsel agreed that, “because of the enhanced penalties, the Court must impose 25 years without parole.” The court ultimately sentenced Gardner to the mandatory twenty-five years without parole for armed robbery and to a consecutive twenty-year term, all but fifteen years suspended, for the handgun offense. Upon appeal, this Court affirmed the judgments. *Gardner v. State*, No. 2909, September Term, 2007 (filed October 19, 2009).

¹ Rule 4-245(c) provides:

When the law prescribes a mandatory sentence because of a specified previous conviction, the State’s Attorney shall serve a notice of the alleged prior conviction on the defendant or counsel at least 15 days before sentencing in circuit court or five days before sentencing in District Court. If the State’s Attorney fails to give timely notice, the court shall postpone sentencing at least 15 days unless the defendant waives the notice requirement.

² The reversal was not based on sentencing.

In 2017, Gardner filed a motion to correct an illegal sentence in which he maintained that his sentence to twenty-five years without parole was illegal because the State had failed to re-serve the Rule 4-245(c) notice prior to his sentencing following his retrial. The circuit court denied the motion, finding that, if it was required, Gardner had waived the notice requirement.

Gardner’s motion was clearly based on an alleged procedural error in the sentencing proceeding. Notably, he does not contend that he did not qualify for the enhanced sentence as a subsequent offender, nor does he challenge the validity of the predicate convictions that the State had relied upon. As the Court of Appeals has stated, “a sentence proper on its face” does not become “an ‘illegal sentence’ because of some arguable procedural flaw in the sentencing procedure.” *State v. Wilkins*, 393 Md. 269, 273 (2006) (quotation omitted). Because Gardner’s claim was not cognizable in a Rule 4-345(a) motion, we dismiss the appeal. *See Colvin v. State*, 450 Md. 718, 728 (2016) (directing dismissal of an appeal that raised an illegal sentence claim not cognizable under Rule 4-345(a)).

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.