

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 808

September Term, 2018

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BILLY SMITH

v.

STATE OF MARYLAND

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Meredith,  
Shaw Geter,  
Raker, Irma S.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Meredith, J.

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Filed: August 22, 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.

In this appeal, Billy Wayne Smith, appellant, contends that the Circuit Court for Washington County erred in denying his motion to correct illegal sentence. Smith argues that, when the court revoked his probation in 2010 for offenses he committed while incarcerated, and the court then reinstated portions of 2006 sentences that had previously been partially suspended in favor of probation, the resulting sentence was illegal. He contends that, because he was incarcerated when he committed the 2010 assaults, his period of probation had never started, and he therefore could not have violated it. Consequently, Smith contends that the circuit court imposed an illegal sentence, and subsequently erred in denying his motion to correct an illegal sentence pursuant to Maryland Rule 4-345(a). A similar argument was rejected in *McKinney v. State*, 239 Md. App. 297 (2018), *cert. denied*, 462 Md. 573 (2019), and we find no error in the trial court's denial of Smith's motion to correct his sentence.

#### **FACTS AND PROCEDURAL HISTORY**

On July 18, 2006, Smith was facing trial on four cases in the Circuit Court for Washington County, arising from actions he committed on March 2 and 3, 2006. The State offered Smith a plea deal, which Smith accepted. Smith pled guilty to armed robbery in Case No. 37600; attempted armed robbery in Case No. 37601; and first-degree assault in Case No. 37739. The State entered the fourth case, Case No. 37732, *nolle prosequi*, and the first three cases were consolidated for sentencing. Pursuant to the consolidated plea agreement, the court sentenced Smith to a total of 18 years' executed time: 16 years, all but 8 years suspended, followed by 3 years of supervised probation for

armed robbery in Case No. 37600; a consecutive 15 years, all but 6 years suspended, followed by 3 years of supervised probation for attempted armed robbery in Case No. 37601; and a consecutive 10 years, all but 4 years suspended, followed by 3 years of supervised probation, for first-degree assault. The latter two sentences were run consecutive to the first, and the probationary periods were all run concurrent with each other. One of the conditions of probation was that Smith commit “no further crimes[.]”

While incarcerated on these sentences, Smith was twice convicted of second-degree assault, for two separate incidents committed while he was in custody for the sentences imposed in 2006. On March 25, 2009, Smith was sentenced in the District Court for Somerset County to 12 months’ incarceration, consecutive to any other sentence, for second-degree assault. And on June 15, 2010, Smith was sentenced in the District Court for Washington County to 18 months’ incarceration, consecutive to any other sentence, for second-degree assault.

On July 13, 2010, the State’s Attorney for Washington County filed a Revocation of Probation petition. At the revocation hearing on October 12, 2010, Smith did not admit to having violated his probation, but did stipulate that he had incurred two criminal new convictions while incarcerated. Smith argued that he should not be found in violation of probation because his crimes were not “heinous” or felonies. He did not argue, as he does in this appeal, that the court did not have the power to revoke his probation “for acts committed while incarcerated[.]” Through counsel, Smith specifically acknowledged the holding of *Matthews v. State*, 304 Md. 281 (1985), at the revocation hearing, but he

asserted that *Matthews* did not apply because the defendant in that case was already on work release.

After hearing arguments, the court revoked Smith's probation and re-imposed portions of the previously suspended sentences. Describing Smith as "simply . . . a career criminal," the court explained: "You have now proven that not only are you that but [you] also cannot conform your conduct to that which is required by the Division of Corrections. For that because you violated probation so significantly," the court sentenced Smith to serve some, but not all, of the time that previously had been suspended on each of the three 2006 sentences.

More specifically, in Case 37600, the court sentenced Smith to serve 5 years (of the 8 previously suspended); in Case 37601, the court sentenced Smith to serve 4 years (of the 9 previously suspended); and in Case 37739, the court sentenced Smith to serve 4 years (of the 6 previously suspended). The court stated: "All of these sentences shall run consecutively to the last to expire of all unserved or unexpired sentences." The court added: "Probation will be terminated in all of these cases."

Three commitment records were entered as a consequence of the revocation of probation and re-imposition of portions of the three previously suspended sentences. Each of the commitment records included a notation explaining: "Commitment is for execution of previously suspended sentence after Defendant was found in violation of probation."

On May 10, 2018, Smith filed the instant motion to correct illegal sentence pursuant to Maryland Rule 4-345(a). The circuit court denied the motion without a hearing, and this appeal followed.

### STANDARD OF REVIEW

A claim that a sentence is illegal is a question of law we review *de novo*.

### DISCUSSION

Maryland Rule 4-345(a) provides: “The court may correct an illegal sentence at any time.” In *McKinney, supra*, 239 Md. App. at 314-16, Judge Charles E. Moylan, Jr, writing for the Court, quoted the following pronouncements from the Court of Appeals:

In *Johnson v. State*, 427 Md. 356, 367, 47 A.3d 1002 (2012), the Court of Appeals spoke . . . forcefully about Rule 4–345(a)’s narrow window of availability.

To constitute an illegal sentence under Rule 4–345(a), “the illegality must inhere in the sentence itself, rather than stem from trial court error during the sentencing proceeding.” Accordingly, “we have denied relief pursuant to Rule 4–345(a) because the sentences imposed were not inherently illegal, despite some form of error or alleged injustice.”

(Emphasis supplied; citations omitted).

In *Tshiwala v. State*, 424 Md. 612, 619, 37 A.3d 308 (2012), the Court was equally firm:

[W]here the sentence imposed is not inherently illegal, and where the matter complained of is a procedural error, the complaint does not concern an illegal sentence for purposes of Rule 4–345(a). A sentence does not become “an illegal sentence because of some arguable procedural flaw in the sentencing procedure.”

These principles, delineating the narrow scope of a Rule 4-345(a) motion to correct an illegal sentence, have been recognized and applied in a multitude of this Court's opinions. ". . . We have consistently defined this category of 'illegal sentence' as limited to those situations in which the illegality inheres in the sentence itself[.]"

(Emphasis supplied; citations omitted.)

Smith argues that "the trial court's errors are two-fold." Smith contends first that the circuit court erred in finding him to have violated the terms of a probation that he had not yet started, emphasizing that he was "serving an active sentence of incarceration at the time he received the subsequent convictions and, thus, he was never released onto probation prior to the date on which he incurred the convictions which were the basis of the violation of probation." This argument urged us to find that, because the circuit erred in revoking Smith's probation before the active period of his probation had even begun, the court's re-imposition of portions of the previously suspended balances of his sentences resulted in an illegal sentence. The State responds preliminarily that this argument is not cognizable pursuant to a motion to correct an illegal sentence because it focuses on the sentencing procedure rather than the resulting sentence. But the State further asserts that Smith's claims fail on the merits in any event.

In *McKinney*, we addressed a similar contention of the State that the argument raised by McKinney was more focused upon the procedure by which his sentence was imposed than the resulting sentence itself. Our conclusion was that McKinney "was not subjected to any illegal sentence pursuant to Rule 4-345(a)." 235 Md. App. at 318.

But we agree with the State that, here, even if we assume Smith's argument about the sentence imposed following his revocation of probation could be properly challenged by filing a motion pursuant to Rule 4-345(a), there is no merit to the claim of error.

With respect to the question of whether probation can be revoked before the active period of probation has begun, our holding in *McKinney* leaves no doubt that it can be revoked for any behavior that occurs subsequent to imposition of the sentence that included a period of probation. We stated in *McKinney*: "A revocation of probation can be ordered because of triggering misbehavior that occurs not only during a period of active probation . . . but also because of misbehavior occurring before the active probationary period has even begun[.]" *Id.* at 300. "The behavior that triggers revocation . . . may occur in jail as well as on the street." *Id. Accord Matthews v. State*, 304 Md. 281, 292-93 (1985) ("[A] trial court has the authority to revoke probation for criminal acts committed after the imposition of sentence but before service of probation based on a condition implicit in the grant of probation that the defendant obey all laws. Our statutory scheme does not preclude the revocation of probation before it commences and the purposes for granting probation would be effectuated by recognizing this authority. The Maryland courts have long held that probation is a matter of grace, not of right.").

Smith also complains that the re-imposition, in a consecutive sequence, of portions of each of the three previously suspended sentences resulted in him now being subject to six periods of incarceration for three convictions. Although Smith alluded to "double

jeopardy,” he cited no case that requires the sentencing court to structure the sentence in any other manner when there is an intervening conviction that was a violation of probation. Here, the sentencing court actually reduced the total remaining time to be served by Smith on the 2006 convictions such that the executed portions of the sentences will now be less than the totals of the originally-imposed executed plus suspended portions would have been. We fail to perceive any merit in Smith’s argument regarding the structure of his current sentences.

**JUDGMENTS OF THE CIRCUIT COURT  
FOR WASHINGTON COUNTY  
AFFIRMED. COSTS TO BE PAID BY  
APPELLANT.**