Circuit Court for Carroll County
Case Nos: 06-K-14-045364 & 06-K-14-045890

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 857

September Term, 2020

GREGORY MICHAEL GUNTHER

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 2, 2021

*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.

Gregory Michael Gunther appeals from the denial of his Rule 4-345(a) motion to correct an illegal sentence, which he had filed in the Circuit Court for Carroll County. He asserts that his sentences for distribution of heroin (circuit court case number 06-K-14-045364) and possession with intent to distribute heroin (circuit court case 06-K-14-045890) violated the sentencing terms of a binding plea agreement he had entered in 2015. The State agrees with Mr. Gunther and, for the reasons to be discussed, we also concur. We shall, therefore, reverse the judgment of the circuit court and remand for resentencing.

BACKGROUND

Plea & Sentencing

On May 27, 2015, Mr. Gunther appeared in court for a plea hearing. The prosecutor informed the court that the "State's understanding is that we are going to do a not guilty agreed statement of facts" to distribution of heroin and possession with intent to distribute heroin, upon a finding of guilt the remaining counts will be nol prossed, and "[a]t sentencing the State will be seeking 10 years of incarceration[,]" with the defense "free to argue for any alternative." Defense counsel responded: "And that Your Honor bound yourself to a cap of 10 years. That is my understanding." The prosecutor concurred, stating "[t]hat is the State's understanding as well."

The following colloquy between the court and counsel occurred shortly thereafter:

> THE COURT: [A]s far as the Court is concerned, what I bound myself to was - -
>
> [DEFENSE COUNSEL]: A cap of 10.

> [PROSECUTOR]: A cap of 10 and you would consider - - when he is getting near the parole period of time. And the guidelines are three to seven. So the total guidelines are six to 14.
>
> THE COURT: What are you asking for?
>
> [DEFENSE COUNSEL]: I am asking for local time.
>
> ***
>
> I am trying to keep him out of DOC. And I feel that [certain] information, as I said, that the State is trying to bring in, is for inflammatory purposes and to possibly sway Your Honor towards the 10-year sentence versus allowing me to allocute.

During the examination of Mr. Gunther before the court accepted the plea, defense counsel elicited that he was then 29 years old and had received his GED. Counsel confirmed that Mr. Gunther understood the statutory maximum penalties for the offenses was 20 years for each count. The colloquy continued:

> [DEFENSE COUNSEL]: But you know that the judge -- we had a pretrial conference, and at that pretrial conference the judge agreed that you would not get any more than 10 years on both cases. Do you understand that?
>
> GUNTHER: Yes, ma'am.
>
> [DEFENSE COUNSEL]: And you understand that I can ask for less than that, correct?
>
> GUNTHER: Yes, ma'am.
>
> [DEFENSE COUNSEL]: And that the State is asking for two 10-year sentences concurrent on these two cases? Do you understand that too?
>
> GUNTHER: Yes, ma'am.

After the examination was completed, the court announced that it had found that Mr. Gunther "knowingly and voluntarily waived his right to trial by jury, as well as the right which he gives up by proceeding on an agreed statement of facts." After hearing the

agreed statement of facts in both cases, the court denied defense counsel's motion for judgment of acquittal and found Mr. Gunther guilty beyond a reasonable doubt of distribution of heroin and possession of heroin with intent to distribute.

The court then moved to sentencing. Defense counsel reminded the court that the parties had had "extensive conversations about Mr. Gunther's cases at the bench and in a pretrial conference." Defense counsel argued for leniency and urged the court to impose a sentence that would allow Mr. Gunther to serve it at the local detention center, rather than in the Division of Correction, and suggested that to do that the court could impose two consecutively run 18-month sentences.

The State informed the court that the guidelines for both cases, when stacked, was six to 14 years and that a 10-year sentence would be "in the middle of the guidelines." The prosecutor further stated: "The State is asking you - - the Court indicated that you were going to give him a cap at the 10-year sentence and consider a health general at the time he would be eligible for parole. On a 10-year sentence under the Maryland law he is parole eligible at 25 percent. So two and a half years." The prosecutor then "suggested that by giving him a 10-year sentence it would balance" the goals of "rehabilitation with deterrence in punishment." In sum, the prosecutor informed the court "that a 10-year sentence is appropriate however the Court wants to fashion it on the two cases[.]"

To this point in the proceedings, nothing whatsoever was said on the record about a term of probation or any suspended time. Nevertheless, the court sentenced Mr. Gunther for the distribution offense to 15 years' imprisonment, suspending all but three years to be served in the Division of Correction and to a consecutively run term of 12 years for

possession with intent to distribute, suspending all but 18 months, to be served at the Carroll County Detention Center—an aggregate term of 27 years, with all but four and one-half years suspended. The court ordered a five-year term of supervised probation upon release. No one objected to the sentence, and Mr. Gunther did not appeal.

<u>Violations of Probation</u>

Mr. Gunther was released in March 2017 and began serving his term of probation. On November 7, 2017, he appeared in court for a violation of probation hearing and he admitted that he had violated various conditions of his probation, which the court found were technical in nature. The court imposed the 15-day presumptive statutory cap for a first technical violation and continued his probation. Because he had served 79 days in jail pending the violation of probation hearing, the court, in essence, noted that the extra days would be banked for future credit if needed.

On September 14, 2018, Mr. Gunther appeared in court for another violation of probation hearing and admitted to violating certain conditions of probation, some technical and some non-technical. The court revoked his probation in both cases and ordered him to serve eight years of his back-up time in the distribution case and a consecutively run eight years in the possession with intent to distribute case—a total term of 16 years' imprisonment. He was awarded credit for time served pending the violation of probation hearing.

<u>Motion to Correct an Illegal Sentence</u>

In January 2020, Mr. Gunther filed a Rule 4-345(a) motion alleging that his sentences in both cases were illegal because they exceeded the 10-year cap agreed to by

the parties at the 2015 plea hearing. At a hearing held on the motion, defense counsel argued that the binding plea agreement provided for a total sentence in both cases not to exceed 10 years. Counsel pointed out that, at the plea hearing, the words "suspended," "active," and "executed" were never mentioned, much less in relation to the "10-year cap," and that the word "probation" was not iterated until the court pronounced sentence. Counsel, therefore, maintained that the court's imposition of an aggregate sentence of 27 years, suspending all but 4 and one-half years, for the two cases was a breach of the binding plea agreement and, therefore, illegal. The State disagreed, asserting that the cap on "ten years of incarceration" meant ten years of active time or time served in prison. The court agreed with the State that cap of 10 years meant Mr. Gunther's "exposure . . . as far as jail time" and hence, denied relief.[1]

DISCUSSION

A sentence that exceeds the terms of a binding plea agreement is an inherently illegal sentence that may be corrected at any time pursuant to a Rule 4-345(a) motion. *Matthews v. State*, 424 Md. 503, 519 (2012). The interpretation of a plea agreement, and whether a sentence violated its terms, are questions of law which we review de novo. *Ray v. State*, 454 Md. 563, 572-73 (2017).

In *Ray*, the Court of Appeals set forth a three-step analysis for construing the terms of a binding plea agreement when resolving an illegal sentence claim. First, we look to the plain language of the agreement to determine whether that language "is clear and

[1] The judge who denied the Rule 4-345(a) motion was not the same judge who sentenced Mr. Gunther in 2015.

unambiguous as a matter of law." 454 Md. at 577. If it is, "then further interpretative tools are unnecessary, and we enforce the agreement accordingly." *Id.* But if the plain language is ambiguous, we next look to the record developed at the plea hearing to determine "what a reasonable lay person in the defendant's position would understand the agreed-upon sentence to be[.]" *Id.* If "we still find ambiguity regarding what the defendant reasonably understood to be the terms of the agreement," then we must resolve the ambiguity in favor of the defendant, *id.* at 577-78, and he is "entitled to have the plea agreement enforced, based on the terms as he reasonably understood them to be[.]" *Matthews*, 424 Md. at 525.

Here, because there is no written plea agreement in the record before us (and neither party asserts that the agreement was reduced to writing), we look to the terms of the plea agreement as placed on the record at the May 27, 2015 plea hearing. *Cuffley v. State*, 416 Md. 568, 582 (2010) ("[A]ny question that later arises concerning the meaning of the sentencing term of a binding plea agreement must be resolved by resort *solely* to the record established at the Rule 4-243 plea proceeding.").

As noted above, at the outset of the plea hearing, the prosecutor informed the court that Mr. Gunther would proceed on a not guilty statement of facts for two of the charged offenses and as to sentencing, he stated: "At sentencing the State will be seeking *10 years of incarceration*. The Defense is free to argue for any alternative. That is the sum and substance of the plea agreement." (Emphasis added.) Defense counsel then reminded the court that, "Your Honor bound yourself to a *cap of 10 years*." (Emphasis added.) The agreed upon sentencing term was mentioned thereafter by both the prosecutor and defense counsel as a "*cap of 10*." (Emphasis added.) When examining Mr. Gunther before the court

accepted the plea, defense counsel informed him of the maximum penalties for the offenses and stated: "*the judge agreed that you would not get any more than 10 years on both cases*." (Emphasis added.) Counsel further confirmed that Mr. Gunther understood that "*the State is asking for two 10-year sentences concurrent on these two cases*." (Emphasis added.) Accordingly, the issue here is the meaning of the sentencing term, described variously on the record as "ten years of incarceration," "cap of 10," "10 years on both cases," and "10-year sentences."

Both Mr. Gunther and the State on appeal maintain that the language at issue can only be interpreted—either plainly or from the perspective of a reasonable person in Mr. Gunther's position—as a total aggregate sentence not to exceed 10 years' incarceration. We agree. As the parties point out, the language used to describe the agreed upon sentencing term, that is –"ten years of incarceration" (mentioned a single time), "cap of 10" (mentioned several times), "ten years on both cases" (mentioned once), and "two 10-year sentences concurrent on these two cases" (mentioned once)—was never modified by the word "active" or "executed" or "hard time" or by any other term which would have limited the meaning to jail or prison time. And, as noted, the terms "suspended time" and "probation" were not mentioned until the moment the court pronounced sentence. As such, the language used to describe the sentencing deal can only be interpreted as a flat 10-year sentence.

Accordingly, pursuant to the terms of the binding plea agreement, the court was bound to impose a total aggregate sentence not exceeding 10 years' imprisonment, *inclusive of any suspended time*. The court's imposition of a sentence of 15 years, all but 3

years suspended for distribution, and a consecutively run sentence of 12 years, all but 18 months suspended, for possession with intent to distribute, are inherently illegal and must be corrected.

We shall reverse the court's denial of the Rule 4-345(a) motions in both cases, vacate the sentences, and remand for resentencing in accordance with this opinion. Upon remand—as both Mr. Gunther and the State indicate in their briefs—the court shall award Mr. Gunther credit for the time initially served on both sentences; time served pending the violation of probation hearings; and time served since probation was revoked.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY DENYING MOTION TO CORRECT ILLEGAL SENTENCES REVERSED. SENTENCES VACATED. CASES REMANDED FOR RESENTENCING IN ACCORDANCE WITH THIS OPINION.

COSTS TO BE PAID BY CARROLL COUNTY.