Circuit Court for Cecil County
Case No.: C-07-CR-17-000849

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 907

September Term, 2018

SARAH LYNN THODOS

v.

STATE OF MARYLAND

Meredith,
Shaw Geter,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: May 22, 2019

Appellant, Sarah Lynn Thodos, was indicted in the Circuit Court for Cecil County, Maryland, and charged with second-degree child abuse and neglect of a minor. Appellant pleaded guilty to neglect of a minor. She was subsequently sentenced to three years, all suspended, to be followed by three years supervised probation. Approximately four months after entering her guilty plea, appellant filed a motion to correct illegal sentence. After that motion was denied without a hearing, appellant filed this timely appeal, asking us to address the following question:

> Did Appellant plead guilty under a statute that is inapplicable to her conduct, making her sentence illegal?

For the following reasons, we shall affirm.

BACKGROUND

On January 8, 2018, appellant agreed to plead guilty to neglect of a minor and the State agreed, that upon acceptance of that plea, it would nol pros the second-degree child abuse charge. After she was examined by the court and defense counsel on the record, which included a discussion of the pending charges, the possible sentences, the terms of the proffered guilty plea, and her constitutional rights, including the right to a jury trial, the court found that appellant voluntarily and knowingly waived her right to a jury trial and freely and voluntarily entered a guilty plea to neglect of a minor. The court then heard the following factual basis for the plea:

> Your Honor, on 3/13/2017 the Department of Social Services received a referral from Union Hospital after this defendant, Sara Thodos, gave birth to a male child by the initials of A.S. on 3/12/2017 at Union Hospital. At birth the child was -- the newborn was tested and tested positive for heroin as well as unprescribed Suboxone.

> He was then sent immediately to A.I. DuPont Children's Hospital because he was having respiratory issues at that point. He was also experiencing withdrawal symptoms, which included sneezing, muscle tone issues, respiratory issues. He was placed on antibiotics and morphine as a result to help get him through that withdrawal period.
>
> When asked about -- when Ms. Thodos was asked about the fact that he had tested positive and was experiencing withdrawal, she indicated that she didn't see it as a big deal and that it wasn't that bad.
>
> She remained in contact with the hospital, calling to check on him for a few days, but the last time she called to check on him was 3/18/2017. And any time that she had visited the baby or called to check on him, she had been asking hospital staff for food, money, or money for cigarettes, and needed assistance with transportation. After the 18th she did not have any further contact with the hospital.
>
> As of 3/22/17 the hospital -- or, excuse me, the child was discharged thereafter to the Department of Social Services. All events occurred in Cecil County. That would be the State's case for purposes of the plea.

Defense counsel noted that appellant disagreed that she ever stated that "it wasn't a big deal," but otherwise had no additions or corrections to the statement of facts. The court then examined appellant on the record and appellant agreed that the child tested positive for heroin and Suboxone upon birth, and that she ingested these drugs prior to giving birth. The court then ruled as follows:

> Very well. The Court is satisfied then that there is a sufficient factual basis to support the plea. And I do find that Sara Lynn Thodos on or about March the 10th, 2011 (sic),[1] did in fact neglect her child, whose name is A.S., and that she had ingested heroin and/or Suboxone prior to delivering her child on March the 10th, 2011. [sic] That event took place here -- I think it was at Union Hospital here in Cecil County, Maryland, and I so find.

[1] The record establishes that the child was born on March 10, 2017.

Approximately four months later, appellant filed a motion to correct illegal sentence. Appellant alleged "that the allegations in the instant matter do not rise to facts sufficient to satisfy the elements of Neglect of Minor." Appellant recognized the following facts:

> The facts alleged in District Court Application for Statement of Charges (attached hereto as Supporting Document #1) can be summarized as follows: On March 12, 2017 at Union Hospital in Elkton, Maryland, Defendant gave birth to a child who tested positive for heroin and Suboxone, making him a Substance Exposed Newborn ("SEN"). The child, who was in need of specialized care, was sent to A.I. DuPont Children's Hospital in Wilmington, Delaware. Both child's father and Defendant admitted to using unprescribed controlled dangerous substances prior to the child's birth. Finally, as of March 22, 2017, neither parent had visited the child at A.I. DuPont or called the hospital to inquire about the child's well-being. Charges were lodged by Detective Ziegenfuss of the Elkton Police Department on April 12, 2017.

Appellant argued that the reasoning of *Kilmon v. State*, 394 Md. 168 (2006), which held that a potential injury to a fetus due to the mother's ingestion of cocaine would not form the basis for a reckless endangerment conviction when the child is born alive, applied to cases of criminal neglect. *See also Hall v. State*, 448 Md. 318 (2016). Appellant continued that "although Defendant pled guilty, under the facts alleged in the Application for Statement of Charges, an actual crime was not committed because all the alleged criminal activity occurred before the birth of the child, and the crime alleged requires a person in being." Therefore, appellant contended that "an illegal sentence was imposed, because no crime was committed given the erroneous application of facts to the law, and as such, the sentence imposed in the above-captioned matter is de facto, illegal."

In its written response to the motion, the State alleged that the conviction for neglect "was based on the Defendant abandoning baby at hospital, necessitating Department of Social Services to take over parental duties, i.e. making decisions regarding the child's medical care in the Defendant's absence" and that "[o]n March 20, 2017, the Defendant completely abandoned the baby and the child was Discharged to Foster Care on March 24, 2017." The motion was denied without a hearing on June 18, 2018. This appeal followed.

DISCUSSION

"[C]hallenges to sentencing determinations are generally waived if not raised during the sentencing proceeding," *Bryant v. State*, 436 Md. 653, 660 (2014) (internal citations omitted), but there is, however, a limited exception to the rule. A petitioner can, under Maryland Rule 4-345(a), challenge his or her sentences without raising the challenge during the sentencing proceeding, because it allows the circuit court to "correct an illegal sentence at any time." In other words, a convicted criminal defendant can evade "the normally foreclosing effect of finality" and challenge his or her sentence even if "'(1) no objection was made when the sentence was imposed, (2) the defendant purported to consent to it, or (3) the sentence was not challenged in a timely-filed direct appeal.'" *Carlini v. State*, 215 Md. App. 415, 423-24 (2013) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). In this manner, Rule 4-345(a) protects against the "'intrinsically and substantively unlawful'" sentences, *Bryant*, 436 Md. at 663 (quoting *Chaney*, 397 Md. at 466), that result from the trial court imposing "sentence[s] or other sanction[s] upon . . . criminal defendant[s] . . . where no sentence or sanction should have been imposed." *Alston v. State*, 425 Md. 326, 339 (2012) (citing *Matthews v. State*, 424 Md. 503, 512-13 (2012)).

But "the scope of this privilege, allowing collateral and belated attacks on the sentence and excluding waiver as a bar to relief, is narrow." *Colvin v. State*, 450 Md. 718, 725 (2016) (citation omitted). It applies only to "sentences that are 'inherently' illegal." *Bryant*, 436 Md. at 662 (citing *Chaney*, 397 Md. at 466). A sentence is inherently illegal where "'there either has been no conviction warranting any sentence for [a] 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). *Accord Colvin*, 450 Md. at 725. And, the distinction between an "illegal" sentence, which is subject to ordinary review and procedural impediments, and those that are "inherently illegal" subject to correction at any time under Rule 4-345(a), is "the difference between a substantive error in the sentence itself, and a procedural error in the sentencing proceedings." *Bryant*, 436 Md. at 663. We review questions of illegal sentences under a *de novo* standard. *State v. Crawley*, 455 Md. 52, 66 (2017).

To be clear, "a motion to correct an illegal sentence is not an alternative method of obtaining belated appellate review of the proceedings that led to the imposition of judgment and sentence in a criminal case." *State v. Wilkins*, 393 Md. 269, 273 (2006). Such a claim is not cognizable in a motion to correct an illegal sentence. *Bryant*, 436 Md. at 665-66 (holding that, where appellant's "complaint relate[d] to the sufficiency of the evidence" to prove that he had been convicted of predicate crimes, his appellate challenge to enhanced sentence was not cognizable under Rule 4-345(a)). And, "[t]he Rule simply grants the trial court limited continuing authority in the criminal case to revise the sentence." *Fuller v.*

State, 397 Md. 372, 386 (2007) (quoting *State v. Kanaras*, 357 Md. 170, 184 (1999)); *accord Barnes v. State*, 423 Md. 75, 84 (2011).

Here, appellant is not challenging her sentence. Indeed, there appears to be no dispute that her suspended sentence of three years was lawful under Section 3-602.1(c) of the Criminal Law Article, which provides for a maximum sentence of five years or a fine not exceeding $5,000 or both. *See* Md. Code (2002, 2012 Repl. Vol.) § 3-602.1(c) of the Criminal Law Article ("Crim. Law"). Instead, appellant argues that her conduct, "giving birth to a baby who tested positive for drugs, and leaving that baby in the care of a hospital and the Department of Social Services" does not amount to "neglect" under the statute and that her sentence was therefore illegal. This is a challenge to the sufficiency of the evidence and, as the aforementioned cases make clear, a motion to correct an illegal sentence is not the proper vehicle to make such a claim.

Apparently recognizing that she is attempting to challenge the underlying basis of her conviction, and not her sentence, appellant cites *Moosavi v. State*, 355 Md. 651 (1999). There, Moosavi unsuccessfully had been attempting, by telephone and in writing, to obtain from a bank a credit on his credit card account with that bank. Ultimately, he spoke to the supervisor of the credit card division, and, as he became more agitated in the conversation, said that "he would blow up Chevy Chase Bank if [it] didn't do . . . what he wanted done." *Id*. at 654. He was charged with violating former Article 27 § 151(a) which provided:

> A person is guilty of a misdemeanor if, knowing the statement or rumor to be false, he circulates or transmits to another or others, with intent that it be acted upon, a statement or rumor . . . concerning the location or possible detonation of a bomb or other explosive.

Upon conviction, Moosavi appealed to this Court and we observed that Moosavi had been convicted under the wrong statute, and that the charges should have been brought under Article 27 § 9, which criminalized threatening to "explode a destructive device . . . in, on, or under a structure." *Moosavi v. State*, 118 Md. App. 683, 696 (1998). This Court, nevertheless, affirmed because the variance had not been argued on appeal. *Id*. at 706-07.

The Court of Appeals reversed, holding that the issue could be considered by it because it had been considered by this Court, and because the Court of Appeals, independently, has discretion to consider an issue that was not raised. *Moosavi*, 355 Md. at 661. In addition, because Moosavi would be entitled to relief on post-conviction, judicial economy made review on direct appeal appropriate. *Id*. at 662.

As an additional reason, the Court held that

> where a defendant has been charged and convicted under an entirely inapplicable statute, but has not raised the issue on appeal, this Court has reviewed the issue on the theory that the resulting sentence under the inapplicable statute is an illegal sentence which may be challenged at any time.

Id. at 662.

Moosavi can be read to support the general proposition that, where a defendant has been sentenced for a crime that has not been charged, an illegal sentence has been imposed. *See Johnson v. State*, 427 Md. 356, 376-78 (2012) (vacating an "inherently illegal" sentence imposed for a crime for which the defendant had never been indicted); *Campbell v. State*, 325 Md. 488, 509 (1992) (holding that Campbell was illegally sentenced because he had been charged under the wrong statute). This Court has since explained this "exception" to be "limited to situations in which the illegality of the conviction exists

because the trial court lacked the 'power or authority' to convict." *Rainey v. State*, 236 Md. App. 368, 381 (discussing *Johnson, supra*, 427 Md. at 371), *cert. denied*, 460 Md. 23 (2018). Accordingly, the question before us is whether the trial court had the "power or authority" to convict appellant of neglect of a minor in this case.

Section 3-602.1(b) of the Criminal Law Article provides that "[a] parent, family member, household member, or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not neglect the minor." Crim. Law § 3-602.1(b). "Neglect" is defined as follows:

> (i) "Neglect" means the intentional failure to provide necessary assistance and resources for the physical needs or mental health of a minor that creates a substantial risk of harm to the minor's physical health or a substantial risk of mental injury to the minor.
>
> (ii) "Neglect" does not include the failure to provide necessary assistance and resources for the physical needs or mental health of a minor when the failure is due solely to a lack of financial resources or homelessness.

Crim. Law § 3-602.1(a)(5).

There are few cases that interpret this section. In *Hall v. State*, 448 Md. 318 (2016), the Court of Appeals held that the evidence was insufficient to sustain a conviction for neglect of a minor where a mother left her three-year-old son in the care of his fourteen-year-old sister overnight, and the younger child slipped out of the house and was nearly stuck by a passing truck while in the middle of a six-lane roadway. *Id*. at 325. In considering the claim, the Court explained that "[i]t is not conjecture about potential harm, however, that governs, but rather whether the conduct at issue, evaluated objectively, created a substantial risk of harm." *Id*. at 328. The Court further explained that:

> The standard to be utilized, then, is whether the parent intentionally failed to provide necessary assistance and resources for the physical needs of the child by acting in a manner that created a substantial risk of harm to the child, measured by that which a reasonable person would have done in the circumstances.

Id. at 331.[2]

The parties have not cited, and we have not found, a Maryland case directly on point to the question whether ingestion of a controlled dangerous substance by a pregnant woman, resulting in the presence of that substance in her newborn, amounts to neglect of a minor under Criminal Law Section 3-602.1. Instead, appellant relies on *Kilmon v. State*, 394 Md. 168 (2006), where the Court of Appeals held that the intentional ingestion of cocaine by a pregnant woman does not establish reckless endangerment of the later-born child. *Kilmon*, 394 Md. at 170.

In that case, the mother, Regina Kilmon, was originally charged with second-degree child abuse, contributing to conditions that render a child delinquent, reckless endangerment, and possession of a controlled dangerous substance. *Kilmon*, 394 Md. at 170. She agreed to enter a plea to the reckless endangerment charge, with the remaining counts nol prossed, on the following agreed facts:

> "On June the 3rd, 2004, the Defendant . . . gave birth at the Easton Memorial Hospital to a baby boy subsequently named Andrew W. Kilmon. At the time of the birth the baby weighed 5.5 pounds. The baby was tested through a drug screen which at the hospital which showed the presence of cocaine at the level of 675 nanograms per milliliter . . . [T]he minimum sensitivity level for

[2] The *Hall* Court acknowledged that there was evidence that the younger child was "admittedly, difficult to handle," with a history of leaving the house unattended, but ultimately held that leaving the child in the care of his fourteen year old sister was objectively reasonable considering that "statutorily a thirteen year-old is deemed an appropriate caretaker for a child under eight years of age." *Hall*, 448 Md. at 336.

> cocaine is 300 nanograms per milliliter. The State would have produced expert testimony that the result of using cocaine by a pregnant woman . . . is as follows: that they are more likely to experience premature separation of the placenta, spontaneous abortion and premature delivery. That cocaine may cause blood clots to develop in the brain of the fetus. May also interfere with the development of the fetus. And that low birth weight in bab[ies] born with cocaine in their system may lead to many health problems versus normal size babies. There would be further testimony that the only source of cocaine in the baby's system would have been that as derived from the blood stream of the mother prior to birth. . . . These events occurred in Talbot County."

Kilmon, 394 Md. at 170-71.

Kilmon filed an application for leave to appeal from the guilty plea in the Court of Special Appeals, which was granted. *Kilmon*, 394 Md. at 171. The Court of Appeals issued a writ of certiorari before any further proceedings in this Court. *Id*.[3]

As a companion to Kilmon's case, the Court simultaneously considered a case involving Kelly Lynn Cruz. Similar to Kilmon, Cruz was originally charged with second-degree child abuse, contributing to conditions that render a child delinquent, and possession of a controlled dangerous substance. *Kilmon*, 394 Md. at 171. Upon agreement by the State to nol pros the remaining charges, Cruz entered a not guilty plea on the following agreed statement of facts:

> "On January 13th, 2005, the Defendant . . . was admitted to the Easton Memorial Hospital . . . which is located in Easton, Talbot County, Maryland. She was complaining of stomach pains. She then delivered a 3 pound 2 ounce baby boy. According to hospital records she was approximately 29 weeks

[3] The State notes that the Court of Appeals subsequently recognized that it did not have jurisdiction over such cases until this Court has had a chance to address the issues. *See Stachowski v. State*, 416 Md. 276, 298 (2010) ("The statutory language and the opinions by this Court make it clear that this Court has certiorari jurisdiction over the types of cases set forth in [Courts and Judicial Proceedings] § 12-202 only when the Court of Special Appeals rendered a decision on the merits or the viability of the appeal or the status or rights of a party").

> pregnant at the time. . . . Toxicology screening test was administered to the baby who tested positive for cocaine. The baby was then transported to Mercy Hospital in Baltimore which confirmed the toxicology results. Subsequently and while still at Easton Memorial Ms. Cruz was likewise tested for cocaine. She too tested positive . . . Ms. Cruz denied that she used cocaine and indicated that she had recently been around people who had used cocaine, which is why she believed she would have tested positive. All these events took place in Talbot County."

Kilmon, 394 Md. at 171-72.

Following Cruz's conviction and sentencing on the not guilty plea on an agreed statement of facts, Cruz appealed to this Court, and the Court of Appeals granted certiorari of its own accord prior to resolution "to consider the common issue of whether ingesting cocaine while pregnant constitutes a violation of CL § 3-204(a)(1)." *Kilmon*, 394 Md. at 172.

Judge Wilner delivered the opinion for the Court and began by recognizing that "recklessness, not intention to injure, is the key element of the offense[.]" *Kilmon*, 394 Md. at 311. With that in mind, the Court continued that "[u]nquestionably, the proscription against recklessly endangering conduct is, and was intended to be, a broad one." *Kilmon*, 394 Md. at 174. However, the Court was concerned whether that breadth included "conduct of a pregnant woman that might endanger in some way the child she is carrying[.]" *Id*. Not finding any express provisions in the statute or any implicit indication of legislative intent on the issue, *id*. at 177, the Court considered other attempts by the General Assembly to enact legislation concerning the ingestion of controlled dangerous substances by pregnant mothers, as well as the expansion of the murder and manslaughter

law to cover the death of a viable fetus, *id*. at 178-182, and came to the following conclusion:

> This sixteen-year history, from 1989 to 2005, shows rather clearly that, although a pregnant woman, like anyone else, may be prosecuted for her own possession of controlled dangerous substances, the General Assembly, despite being importuned on numerous occasions to do so, has chosen not to impose additional criminal penalties for the effect that her *ingestion* of those substances might have on the child, either before or after birth. It has consistently rejected proposals that would have allowed such conduct to constitute murder, manslaughter, child abuse, or reckless endangerment. In doing so, the Legislature obviously gave credence to the evidence presented to it that criminalizing the ingestion of controlled substances—in effect criminalizing drug addiction for this one segment of the population, pregnant women—was not the proper approach to the problem and had, in fact, proved ineffective in other States in deterring either that conduct or addiction generally on the part of pregnant women. It deliberately opted, instead, to deal with the problem by providing drug treatment programs for pregnant women and using the child in need of assistance and termination of parental rights remedies if the women failed to take advantage of the treatment programs and, as a result, were unable to provide proper care for the child.
>
> Given the exemption added to the 2005 legislation, it would be an anomaly, indeed, if the law were such that a pregnant woman who, by ingesting drugs, recklessly caused the death of a viable fetus would suffer no criminal liability for manslaughter but, if the child was born alive and did not die, could be imprisoned for five years for reckless endangerment. A *non-fatal* injury resulting from reckless conduct would be culpable; a *fatal* injury resulting from the same reckless conduct would not be.

Kilmon, 394 Md. at 181-82 (emphasis in original).[4]

The Court then observed that the "overwhelming majority of courts" from other states have concluded that a pregnant woman's ingestion of a controlled dangerous

[4] In the civil context regarding children in need of assistance, there is a presumption that a child less than one year old is not receiving "proper care and attention" if the child was born exposed to, among other substances, heroin. *See* Md. Code (1973, 2013 Repl. Vol.) § 3-818 of the Courts and Judicial Proceedings Article.

substance does not amount to reckless endangerment, child abuse, or distribution of controlled substances. *See Kilmon*, 394 Md. at 182 (noting cases). The *Kilmon* Court then reversed the judgments in both cases on review, holding that the crime of reckless endangerment does not apply to "prenatal drug ingestion by a pregnant woman." *Kilmon*, 394 Md. at 183.

A fair reading of *Kilmon* is that the Court was concerned with the criminalization of certain pre-birth conduct of the mother. More specifically, whether the mother's *ingestion* of a controlled substance during pregnancy amounted to a substantial risk of harm to the child at birth. Even accepting that this risk is analogous to the risk required to prove criminal neglect, *see Hall*, *supra*, 448 Md. at 328 ("'[C]reates a substantial risk' in Section 3-602.1(a)(5)(i) is the same language used in our reckless endangerment statute"), we are persuaded that *Kilmon* is distinguishable because the criminal neglect statute requires additional elements, including proof of intent. *Cf. Kilmon*, 394 Md. at 311 (In discussing reckless endangerment it is "recklessness, not intention to injure, is the key element of the offense"). That intent is the "intentional failure to provide necessary assistance and resources for the physical needs or mental health of a minor" by "acting in a manner that created a substantial risk of harm to the child, measured by that which a reasonable person would have done in the circumstances." *Hall*, 448 Md. at 331 (discussing Crim. Law § 3-602.1(a)(5)(i)). *Cf. Kilmon*, 394 Md. at 174 (2006) ("[G]uilt under the statute *does not depend* on whether the defendant actually intended that his reckless conduct create a substantial risk of death or serious injury, but whether his conduct, viewed objectively, 'was so reckless as to constitute a gross departure from the standard of conduct that a law-

abiding person would observe, and thereby create the substantial risk that the statute was designed to punish'") (emphasis added) (discussing *Minor v. State*, 326 Md. 436, 443 (1992)). The criminal neglect statute also requires that the intentional failure is of "necessary assistance and resources." *See* Crim. Law § 3-602.1(a)(5)(i).

Accordingly, unlike the reckless endangerment charge at issue in *Kilmon*, a conviction for criminal neglect requires that there be a showing of post-birth conduct. In other words, Section 3-602.1 is not just concerned with whether babies are born with a controlled dangerous substance in their system. Unlike *Kilmon*, the statute also requires proof of intent and the failure to provide "necessary assistance and resources."

Those elements were established in this case. Although appellant disputed that she said it "wasn't a big deal" that her child tested positive for controlled dangerous substances and was experiencing withdrawal, there was evidence suggesting that appellant abandoned her child at the hospital:

> She remained in contact with the hospital, calling to check on him for a few days, but the last time she called to check on him was 3/18/2017. And any time that she had visited the baby or called to check on him, she had been asking hospital staff for food, money, or money for cigarettes, and needed assistance with transportation. After the 18th she did not have any further contact with the hospital.
>
> As of 3/22/17 the hospital -- or, excuse me, the child was discharged thereafter to the Department of Social Services.

Based on these facts, including appellant's admission that she ingested heroin and/or Suboxone during pregnancy, the court found that appellant "did in fact neglect her child . . . *and* that she had ingested heroin and/or Suboxone prior to delivering her child[.]" (emphasis added). As the State observes in its brief, the court found appellant guilty for

both neglect and ingesting heroin during her pregnancy. We are not persuaded that appellant was charged under the wrong statute or that the court was without "power and authority" to convict appellant of criminal neglect.

Finally, as for appellant's suggestion that we consider this as an ineffectiveness claim, the general rule is that an ineffective assistance claim is more appropriately resolved in a collateral proceeding initiated under the Post-Conviction Act. *See* Md. Code (2001, 2018 Repl. Vol.), §§ 7-101 through 7-301 of the Criminal Procedure Article. *See Robinson v. State*, 404 Md. 208, 219 (2008) ("[A] claim of ineffective assistance of counsel should be raised in a post-conviction proceeding, subject to a few exceptions"); *accord Mosley v. State*, 378 Md. 548, 558-59 (2003); *see also Washington v. State*, 191 Md. App. 48, 71 ("[T]he appropriate avenue for the resolution of a claim of ineffective assistance of counsel is a post-conviction proceeding"), *cert. denied*, 415 Md. 43 (2010).

We also conclude that appellant's reliance on *Testerman v. State*, 170 Md. App. 324 (2006), *cert. dismissed as improvidently granted*, 399 Md. 340 (2007), is misplaced. This Court elected to review Testerman's claim of ineffective assistance of counsel because we were able to make a determination on the issue of the sufficiency of the evidence based on the record, "since this issue was fully aired at trial." *Id*. at 336. Here, the record regarding trial counsel's strategy and legal theories is not sufficiently developed to permit a fair evaluation of appellant's claim that defense counsel was ineffective. Indeed, we observe that there could have been a legitimate strategic reason to support the plea given that appellant was originally charged with second-degree child abuse, along with neglect of a minor, and the possible penalty for second-degree child abuse is 15 years. *See* Crim. Law

§ 3-601(d). We decline appellant's invitation to consider her claim as an ineffective assistance claim.[5]

JUDGMENT AFFIRMED.

COSTS TO BE ASSESSED TO APPELLANT.

[5] We note that there is no claim that counsel was ineffective for failing to raise Section 5-641 of the Courts and Judicial Proceedings Article, which provides that "[a] person who leaves an *unharmed* newborn with a responsible adult within 10 days after the birth of the newborn, as determined within a reasonable degree of medical certainty, and does not express an intent to return for the newborn shall be immune from civil liability or criminal prosecution for the act." Md. Code (1973, 2013 Repl. Vol., 2018 Supp.) § 5-641(a)(1) of the Courts and Judicial Proceedings Article (emphasis added). COMAR 07.02.27.02 (B) (10), defines "Unharmed" to mean that "there is no evidence of physical injury or failure to give proper care and attention to a newborn." Again, the record in this case establishes that, shortly after birth, appellant's child was treated for respiratory issues and withdrawal symptoms at A.I. Dupont Children's Hospital in Wilmington, Delaware.