Circuit Court for Cecil County
Case No: 07-K-10-1849

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1344

September Term, 2019

ASHLEY LORENZO GREEN

v.

STATE OF MARYLAND

Graeff,
Berger,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 5, 2020

*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 2011, Ashley Lorenzo Green, appellant, appeared in the Circuit Court for Cecil County and pled guilty to possession with intent to distribute a controlled dangerous substance and illegal possession of a firearm and was sentenced to a total term of 14 years' imprisonment, with all but seven years suspended, to be followed by a three-year term of probation. In 2019, Mr. Green filed a Rule 4-345(a) motion to correct an illegal sentence in which he asserted that his sentence was illegal because, although the plea agreement had provided for a cap of ten years "active time," no mention was made of suspended time and, therefore, a reasonable person in his position would have understood that his total sentence, including any suspended time, would not exceed 10 years. The circuit court denied the motion. Mr. Greens appeals that ruling. For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND

Plea Hearing

Mr. Green was charged with two counts of possession with intent to distribute, two counts of possession of a controlled dangerous substance, possession of a firearm in relation to a drug trafficking crime, possession of a firearm after conviction for a felony, and wearing, carrying, and transporting a handgun. On May 26, 2011, he appeared in court for a plea hearing. The parties agreed that the presiding judge, the Honorable Keith Baynes, would accept the plea, but because Judge Baynes (before his appointment to the bench) had "prosecuted [Mr. Green] in a prior case involving in a similar charge," sentencing would be imposed at a later date by Judge Joseph McCurdy, Jr.

The prosecutor informed the court that Mr. Green would plead guilty to possession with intent to distribute Klonopin (Count 1) and possession of a firearm after conviction for a felony (Count 6). As for sentencing, the agreement was placed on the record as follows:

> PROSECUTOR: **The State has agreed to cap its recommendation of time to serve at ten years. The defense is free to argue for less**. The other charges will be nol prossed. And again, I think it was a consideration of the defense that that was agreeable because they thought Judge McCurdy would probably be taking the plea.
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> DEFENSE COUNSEL: That's correct, Your Honor.
>
> THE COURT: All right. So it's going to be guilty pleas to Counts 1 and 6. **The State is agreeing to cap the active incarceration at ten years** and then nol pros remaining counts, right?
>
> PROSECUTOR: That's correct.
>
> DEFENSE COUNSEL: That's correct. **That's our understanding**. And we understand - - we're not certain of the guidelines, and obviously, if the State wants to request less than that, then by all means request less, but that puts him further at ease as well with the cap, Your Honor.
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> ***
>
> THE COURT: All right. Mr. Green, you've heard what the plea agreement is here this morning. You're going to plead guilty to Counts 1 and 6, possession with intent to distribute and also possession of a firearm. **The State has agreed to cap its recommendation for time to serve as active incarceration at ten years**, and then they are going to nol pros all remaining counts with the sentencing portion being transferred to Judge McCurdy. Is that your understanding of the plea agreement?
>
> You and your attorney obviously when it comes time for sentencing can ask Judge McCurdy to impose a lesser sentence, but **that's the maximum that the State is going to be asking for as far as active incarceration.** Do you understand that? Is that your understanding of the plea agreement?

MR. GREEN: Yes.

(Emphasis added.)

In its continued examination of Mr. Green, the court elicited that he was then on probation and confirmed that he understood that "this guilty plea could violate that probation[.]" Then after reviewing the rights he would be waiving by pleading guilty, Mr. Green was asked by the court whether he had "any questions about the plea agreement," and he replied: "No, sir." The court then asked whether he had "any questions whatsoever" for the court or defense counsel, and he answered: "No sir." When asked whether there was "anything about these proceedings that [he] didn't understand[,]" Mr. Green again replied: "No, sir." At the conclusion of the examination, the court announced its finding that "Mr. Green is pleading guilty voluntarily and with a full understanding of the nature of these two charges and the consequences of this plea[.]"

Sentencing Hearing

On August 5, 2011, nearly 12 weeks after he had entered the plea, Mr. Green appeared before Judge McCurdy for sentencing. The court noted that the Presentence Investigation Report reflected that "the State was asking for ten years to serve." The prosecutor confirmed that that was the agreement and further noted that the State had agreed to "withdraw any mandatory penalty so that the defense would be free to argue for less." Defense counsel did not disagree.

The prosecutor related that the distribution offense was "defendant's fourth distribution case" and "his eleventh conviction." The controlled dangerous substance in

this case "was 22 pills of Klonopin," which the prosecutor stated is "a narcotic similar to Xanax." The fact that Mr. Green "was also carrying a handgun" was of "great concern" to the State, as was the fact that Mr. Green committed the offenses while on probation. For those reasons, the prosecutor informed the court that "the State's recommendation is 14 years, four years suspended, ten years to serve[.]"

Defense counsel informed the court that, after considering the State's evidence and "through talking with the State and whatever plea negotiations and things that would happen should we win or should we lose the [suppression] motions hearing, we determined that it was in [Mr. Green's] best interest to take the plea." With regard to the distribution offense, defense counsel asserted that, "[n]otwithstanding the circumstances that we have, his intent was for possession, for simple possession," claiming that Mr. Green had "an addiction to pills." Counsel did acknowledge, however, that Mr. Green "pled what he pled to and *he understands what the potential penalty can be for that case.*" (Emphasis added.) The defense advocated for a "three years to serve sentence here locally and get work release." Defense counsel clarified that he was "addressing the active component of his sentence" and was "not concerned" with the amount of "time suspended."

The court sentenced Mr. Green to 14 years' imprisonment, with all but seven years suspended, for the distribution offense and to a concurrently run term of five years for the firearm offense, to be followed by a three-year period of probation. The defense did not

object to the sentence and it does not appear from the record before us that Mr. Green sought leave to appeal.[1]

Motion to Correct an Illegal Sentence

In 2019, Mr. Green filed a Rule 4-345(a) motion to correct an illegal sentence in which he asserted that the "parties had agreed to a cap of 10 years' incarceration, leaving defense counsel to argue for less, with five years' probation." He maintained that the sentence imposed – 14 years' imprisonment, with all but seven years suspended – "exceeded the agreed upon binding cap" and, therefore, was illegal. The circuit court denied the motion.

DISCUSSION

On appeal, Mr. Green asserts that the circuit court erred in denying his Rule 4-345(a) motion. He claims that a reasonable person in his position "would not have understood his plea agreement to mean that the sentencing court could impose more than ten years of total incarceration, so long as unsuspended time did not exceed ten years." He points out that the transcript of the plea hearing "does not show that Mr. Green was ever apprised that the '10 year cap' on his sentence applied only to unsuspended time." And even if "the attorneys and the court may have understood the term 'active' to mean that Mr. Green

[1] After sentencing, Mr. Green filed a motion to withdraw his guilty plea. As grounds, defense counsel claimed that Mr. Green maintained that he had understood the plea agreement to provide for a maximum 10-year sentence, including any suspended time. The court denied the motion.

could receive more than ten years of incarceration so long as any unsuspended portion did not exceed ten years, their understanding was irrelevant."

Mr. Green acknowledges the Court of Appeals' decision in *Ray v. State,* 454 Md. 563 (2017), but maintains that it is distinguishable. In *Ray*, the Court held that a plea agreement that provided for a "cap of four years of any executed incarceration" was not breached when the court imposed a sentence of 10 years' imprisonment, suspending all but four years because the term "executed incarceration" was unambiguous and it would have been "unreasonable to interpret the plain language of the agreement as prohibiting a *total* sentence beyond the cap imposed on *executed* incarceration." *Id.* at 578. Mr. Green claims that *Ray* is distinguishable because in his case the term "active" time was used and the word "active" is "vaguer" than the word "executed." In addition, he points out that in *Ray* the defendant had acknowledged that he was subject to a maximum term of 10 years and six months whereas "there is no indication in the record that Mr. Green was ever apprised of the maximum sentence he could receive." Accordingly, Mr. Green maintains that his sentence is illegal and he urges this Court to vacate the sentence and remand for a new sentencing hearing with instructions that the court, "at most, could only impose a maximum sentence of 10 years of incarceration (including any unsuspended time)."

The State responds that (1) the trial court did not bind itself to any sentencing term and, therefore, the sentence is not illegal because it did not exceed the statutory maximum; (2) even assuming the court had bound itself to impose a sentence capped at ten years of "active time," that term was unambiguous; and (3) even if the sentencing term was

ambiguous, a reasonable lay person in Mr. Green's position would have understood that the ten-year cap applied only to time served as active incarceration.

We hold that the sentencing term here was unambiguous, a conclusion guided by the Court of Appeals' decision in *Ray*. In *Ray,* the defendant agreed to be tried pursuant to an agreed statement of facts to conspiracy to commit theft of property valued between $1,000 and $10,000 and to making a false statement upon arrest. 454 Md. at 566. As for sentencing, the agreement provided for a "cap of four years on any executed incarceration." *Id.* Nothing was said on the record about suspended time. *Id.* at 567-69. At a subsequent sentencing hearing, the prosecutor reminded the court that it had "agreed to a cap of four years of any executed incarceration." *Id.* at 569. The court sentenced the defendant to a total term of 10 years' imprisonment, suspending all but four years, to be followed by a four-year term of probation. *Id.* Several years later, the defendant filed a Rule 4-345(a) motion to correct an illegal sentence in which he asserted that a reasonable lay person in his position would have understood that the agreement provided for a total term of four years' incarceration and, therefore, the 10-year term, suspending all but four years, violated the plea agreement. *Id.* at 569-70. The circuit court denied relief, and on appeal this Court affirmed the judgment after concluding that the language – "cap of four years on any executed incarceration" – was "clear and unambiguous" and meant "four years to be served in jail." *Ray v. State,* 230 Md. App. 157, 186 (2016). Accordingly, we determined that, given the lack of any ambiguity, there was no reason to ask what a reasonable person in Mr. Ray's position would have understood the agreement to mean. *Id.* at 187.

The Court of Appeals granted Mr. Ray's petition for writ of certiorari and affirmed. The Court of Appeals agreed with this Court that the sentencing term was "clear and unambiguous" and that "it is unreasonable to interpret the plain language of the agreement as prohibiting a *total* sentence beyond the cap specifically provided on *executed* incarceration." 454 Md. at 578. And because the "plain language of the disputed provision of the agreement was clear and unambiguous[,]" the Court of Appeals, like this Court, stated that it was "unnecessary to look elsewhere to determine the provision's meaning." *Id.* at 579.[2]

Here, the State agreed to "cap its recommendation of time to serve at ten years," which was repeatedly described as "active incarceration." We find nothing ambiguous about that language. "Active incarceration," just like "executed incarceration," means ten years to be served or spent in prison. "Active" means "characterized by action rather than by contemplation or speculation." *Webster's Third New International Dictionary, Unabridged* (1976, p. 22). Suspended time in the context of sentencing is the opposite of "active time" and "time to serve." It is unreasonable to interpret the disputed provision as prohibiting a total sentence beyond the cap specifically applied to "active incarceration." Finding no ambiguity in the language used here, we need not engage in the "reasonable person" analysis. *Ray,* 454 Md. at 579 (stating that, if the "plain language of the disputed

[2] Although both this Court and the Court of Appeals also found that a reasonable person in Mr. Ray's position would have understood that he could be subject to a sentence exceeding four years so long as it was suspended to no more than four years, that analysis was merely an alternative ground and engaged in solely for the sake of argument. 230 Md. App. at 187-94; 464 Md. at 579-80.

provision of the agreement is ambiguous, *then* we conduct a test to determine what a defendant reasonably understood at the time of his plea." (emphasis added)).

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