Circuit Court for Baltimore City
Case Nos. 198146011, 198146013, 198146015, 198146017

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1365

September Term, 2020

WILLIAM BATES

v.

STATE OF MARYLAND

Graeff,
Ripken,
Alpert, Paul E
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: December 7, 2021

In 1998, a jury sitting in the Circuit Court for Baltimore City found appellant, William Bates, guilty of first degree felony murder, use of a handgun in the commission of a crime of violence, attempted armed robbery, and conspiracy to commit armed robbery. The court sentenced Bates to life imprisonment for felony murder, a concurrent 15-year term for conspiracy, and a consecutive 15-year term for unlawful use of a handgun (the first five without the possibility of parole), merging the conviction for attempted armed robbery into that for felony murder for sentencing purposes. Those judgments were affirmed on direct appeal in a reported opinion. *Bates v. State*, 127 Md. App. 678 (1999).[1]

Bates subsequently filed pro se a motion to correct an illegal sentence. In that motion, Bates contended that his sentence for felony murder is illegal because he was convicted and sentenced on a "defective, improperly amended indictment[.]" The circuit court rejected that contention and denied his motion. He now appeals. We shall affirm.

BACKGROUND

We quote our opinion in Bates's direct appeal for context:

> The victim in this case, Clayton "Hank" Culbreth, owned a beauty salon on East 36th Street in Baltimore. He was also a drug dealer who was known in the neighborhood to deal in large quantities. Culbreth lived in an apartment upstairs from his salon. At about 10:00 PM on December 27, 1997, Culbreth was shot to death just outside the salon's front door.

[1] Bates was tried jointly with a co-defendant, Beharry. We reversed Beharry's conviction of felony murder because the jury had acquitted him of both possible predicate felonies, *Bates*, 127 Md. App. at 685, but that is immaterial to Bates's present appeal. (*Bates* was overruled on other grounds by *Tate v. State*, 176 Md. App. 365 (2007), which in turn was vacated and remanded for reconsideration in light of *Price v. State*, 405 Md. 10 (2008), but ultimately reaffirmed. *Tate v. State*, 182 Md. App. 114 (2008).)

A witness for the State, who was sitting in a car parked just across the street from the salon when the shooting occurred, testified that she heard a loud bang, then saw the front door to the salon swing open. Culbreth appeared to fall backwards out the door and down the steps. Another man, whom the witness identified as Bates, stepped out the door after Culbreth and shot Culbreth several times as he lay on the ground. Bates then stepped over Culbreth's body and walked away. Moments later a second man, whom the witness identified as Beharry, came out of the salon. Beharry also stepped over the victim's body, then walked up the street and caught up with Bates. The two left the scene together.

Beharry's nephew, Andre Davis, who occasionally stayed at Beharry's house, testified that Beharry sometimes bought drugs from Culbreth. One night before the shooting, Davis overheard a conversation at Beharry's house between Beharry and two men whom Davis knew as Damien and Shawn. The men left, but returned the next night around 10:00 with a third man, appellant Bates. At that time, Davis's girlfriend was visiting him at Beharry's house. Davis testified that, because he had overheard the conversation the night before, and because he was on parole, he did not want to be present with Bates, Shawn, Damien, and Beharry. He explained: "I'm not part of that anymore. I've been to prison. I did my time and I'm trying to better myself." Davis therefore left the room with his girlfriend.

Davis testified that a few minutes later, when his girlfriend decided to go home, he walked her to the door. At that time, Bates, Beharry, Shawn, and Damien were leaving the house as well. Beharry returned 10 to 15 minutes later. According to Davis, Beharry was "real frantic and panicky." Beharry was "crying, sweating, and real jittery." Within five minutes, Bates returned to Beharry's house. Bates, however, was "nonchalant." Davis testified that Bates pulled out a black, semi-automatic handgun and tried to put a magazine of ammunition in it.

Cynthia Horton, the girlfriend of the victim, Culbreth, testified that at 9:00 PM on December 27, 1997, about one hour before the shooting, Culbreth had stopped by the store where she worked. The two had made plans to go out that evening when she got off work, and Culbreth had given her $100.00. When Culbreth gave Horton the money, she saw that he had two rolls of cash on his person. Horton testified that one of the rolls consisted of $1.00 bills, and the other roll consisted of $100.00, $20.00, and $10.00 bills. She estimated that Culbreth had about $1,200.00 in that roll. Horton called Culbreth at his home at 9:30 PM, then again at 10:00 to tell him she was on her way over. When she arrived, however, the police were on the

> scene and Culbreth was dead. A medical examiner testified that Culbreth had been shot once in the left shoulder and once in the upper right area of his chest.
>
> Detective Homer Pennington, the primary investigator in the case, testified that $4.75 and a small amount of suspected crack cocaine was recovered from Culbreth's person. Police went through Culbreth's beauty salon and apartment and found nothing in disarray. They did not recover the cash that Horton saw in Culbreth's possession. Pennington acknowledged, however, that the officers did not go through drawers and closets in the salon and apartment, nor did they look in the salon's cash register. According to Pennington, the officers were simply looking for "anything that would jump out at us."

Bates, 127 Md. App. at 685-87.

Eight indictments were returned, by the Grand Jury for Baltimore City, two for each defendant. Indictment 198146011 ("011") charged Bates with first degree murder; use of a handgun in the commission of a felony or crime of violence; and wearing, carrying, and transporting a handgun on the person. Indictment 198146013 ("013") charged Bates with robbery with a dangerous weapon; first degree assault; wearing, carrying, and transporting a handgun on the person; and use of a handgun in the commission of a felony or crime of violence. Indictment 198146015 ("015") charged Bates with attempted robbery with a dangerous weapon; first degree assault; second degree assault; wearing, carrying, and transporting a handgun on the person; and use of a handgun in the commission of a felony

or crime of violence.[2] Indictment 198146017 ("017") charged Bates with conspiracy to commit robbery with a dangerous weapon.[3]

During a pretrial motions hearing, counsel for Bates and Beharry challenged the sufficiency of the indictments charging attempted armed robbery (respectively, No. 015 and 016), contending that they were too "vague" because they failed to describe the property the defendants allegedly attempted to take. Unlike the indictments charging armed robbery (respectively, No. 013 and 014), which included attachments (Exhibit A) indicating that the property allegedly taken was U.S. currency in an amount greater than $300, the indictments charging attempted armed robbery merely stated that each defendant "feloniously did attempt with a dangerous and deadly weapon to rob the aforesaid Complainant [Culbreth] and violently did attempt to steal from the said Complainant, goods, chattels, Mo[nies] and properties of the said Complainant," without further specifying the property at issue.

In response, the prosecutor acknowledged the drafting error in Indictments 015 and 016 but admonished defense counsel for what she deemed to be feigned uncertainty about the property alleged to be the object of the indictments, which, she declared, was the same

[2] As the prosecutor acknowledged during the pretrial motions hearing, several of these charges were duplicative, and only one count of each was presented to the jury as to each defendant. Thus, the following charges went to the jury as to each defendant: murder (first degree premeditated, first degree felony, and second degree), use of a handgun in the commission of a crime of violence, robbery with a deadly weapon, attempted robbery with a deadly weapon, and conspiracy to commit robbery with a deadly weapon.

[3] Beharry was charged identically in Indictments 198146012, 198146014, 198146016, and 198146018.

for both the attempted armed robbery and armed robbery counts. To solve the problem, she offered to proceed only on the indictments alleging armed robbery and, should it become necessary to submit attempted armed robbery to the jury, to rely on the fact that it is a lesser included offense of armed robbery, as charged in Indictments 013 and 014. The court denied the motion to dismiss Indictments 015 and 016 in part and granted it in part, declaring

> that although the indictment stays, it will not proceed in the broad or vague manner that it is. It is based on the affidavit, or Exhibit A attached to indictment number 014, so that we know that we're dealing with the same property described there, that is, money in excess of $300.

At the ensuing trial, as to each defendant, the following charges were submitted to the jury: first degree premeditated murder, first degree felony murder, second degree murder, use of a handgun in the commission of a crime of violence, robbery with a deadly weapon, attempted robbery with a deadly weapon, and conspiracy to commit robbery with a deadly weapon. The trial court instructed the jury that

> to convict the defendants of first degree felony murder, the State must prove that the defendant or another participating in the crime with the defendant, committed the murder in question, and that, in fact, the defendant, or another participating in the crime with the defendant, killed the victim in question, Clayton Culbreth, and that the act resulting in the death of Clayton Culbreth occurred during the commission or attempted commission of the robbery with which the defendants have been charged. It is not necessary for the State to prove that the defendants intended to kill the victim.

The court did not give any instruction about attempted robbery or attempt generally. Neither defendant objected.[4] Subsequently, the jury presented a note to the court, asking it to "explain the difference between first degree felony murder and second degree murder." After conferring with counsel, the court re-instructed the jury on second degree murder, and it gave the following instruction on first degree felony murder:

> In order to convict the defendant of first degree felony murder, the State must prove that the defendant or another participating in the crime with the defendant, committed a robbery with a deadly or dangerous weapon, that the defendant killed the victim,[5] and that the act resulting in the death of the victim occurred during the commission of the robbery with the deadly or dangerous weapon. It is not necessary for the State to prove that the defendant intended to kill the victim.

Shortly thereafter, the jury reached a verdict, finding Bates guilty of first degree felony murder, use of a handgun in the commission of a crime of violence, attempted robbery with a deadly weapon, and conspiracy to commit robbery with a deadly weapon. It acquitted him of first degree premeditated murder and robbery with a deadly weapon.[6]

[4] In his direct appeal, Bates asked that we recognize plain error because of these omissions, but we declined his request. *Bates*, 127 Md. App. at 700-01.

[5] The prosecutor objected to this instruction because it failed to clarify that a defendant could be found guilty of felony murder without himself having taken the victim's life, but the court overruled her objection.

[6] No verdict was entered in open court on second degree murder, although the verdict sheet stated, "Not Guilty." The jury found Beharry guilty of first degree felony murder and conspiracy to commit armed robbery but acquitted him of all other charges. On appeal, we vacated his conviction of felony murder because he had been acquitted of the only possible predicate felonies. *Bates*, 127 Md. App. at 692-700.

As noted previously, the court sentenced Bates to aggregate terms of life imprisonment plus 15 years.

In 2019, Bates filed pro se a motion to correct an illegal sentence. Subsequently, counsel from the Office of the Public Defender entered an appearance on his behalf, and ultimately a virtual hearing was held on Bates's motion. The circuit court ruled that, because no sentence had been imposed for attempted armed robbery (that charge merged into the conviction for first degree felony murder for sentencing purposes), none of the sentences imposed were illegal, and it denied Bates's motion to correct. This timely appeal followed.

DISCUSSION

Standard of Review

Whether a sentence is inherently illegal is a question of law subject to *de novo* review. *Bailey v. State*, 464 Md. 685, 696 (2019). A sentence is inherently illegal within the meaning of Maryland Rule 4-345(a) and thus subject to correction "at any time" if, as relevant here, it "never should have been imposed[.]" *Johnson v. State*, 427 Md. 356, 367-69 (2012).

Parties' Contentions

Initially, Bates maintains that his claim is cognizable under *Johnson* because it alleges illegality of a conviction upon which his sentence was based. Then, relying upon *Hagans v. State*, 316 Md. 429 (1989), Bates maintains that Indictment 013 (charging armed robbery) was "drawn so as necessarily to exclude the lesser included offense" of attempted armed robbery. *Hagans*, 316 Md. at 455. Therefore, he asserts, his conviction of attempted

armed robbery is illegal "because the robbery indictment did not charge attempted robbery and/or . . . the robbery indictment was improperly amended to include attempted robbery." Consequently, he claims that "his felony murder conviction and sentence" are "likewise illegal." Bates further cites, as an additional ground for the purported invalidity of his conviction of attempted armed robbery, that the jury never was instructed on attempt, and we therefore should vacate that conviction, which, in turn, would require us to vacate his conviction and sentence for felony murder.

The State counters that at most, there may have been an improper amendment of the indictment but that, in any event, no sentence was imposed for attempted armed robbery. Therefore, it maintains, the circuit court properly denied Bates's motion because it could not correct a sentence that never had been imposed. The State further asserts that *Johnson* does not apply because there, the defendant had been convicted and sentenced on a charge that was not contained in the indictment, which, it claims, did not happen here.

Analysis

"The court may correct an illegal sentence at any time." Md. Rule 4-345(a). That seemingly simple sentence has vexed Maryland courts for decades. "If a sentence is 'illegal' within the meaning of that section of the rule, the defendant may file a motion in the trial court to 'correct' it, even if the defendant did not object when the sentence was imposed, purported to consent to it, or failed to challenge the sentence on direct appeal." *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)) (cleaned up). But the scope of that privilege, '"allowing collateral and belated

attacks on the sentence and excluding waiver as a bar to relief, is narrow."' *Id.* (quoting *Chaney*, 397 Md. at 466).

Generally, there are three categories of "intrinsically" or "inherently" illegal sentence that are subject to correction under Rule 4-345(a): a sentence that either exceeds the maximum provided by statute, *Carlini v. State*, 215 Md. App. 415, 427 (2013), or is less than a mandatory minimum, *Hoile v. State*, 404 Md. 591, 620 (2008); a sentence that "never should have been imposed[,]" *Johnson*, 427 Md. at 369 (2012); and a sentence that either exceeds the cap established under a binding plea agreement, *Matthews v. State*, 424 Md. 503, 518-19 (2012), or falls below the floor established by such an agreement. *Smith v. State*, 453 Md. 561, 580 (2017). *See Juan Pablo B. v. State*, __ Md. App. __, No. 2614, Sept. Term, 2019, slip op. at 17-18 (filed Sept. 29, 2021), *cert. filed*, Pet. No. 331, Sept. Term, 2021 (Nov. 8, 2021). The claim before us is of the second type, a sentence that purportedly "never should have been imposed[.]" *Johnson*, 427 Md. at 369.

Johnson recognized a narrow category of "illegal" convictions (not merely sentences) that cannot support a sentence of any kind. In *Johnson*, the illegality centered on the fact that the defendant had been convicted of an offense that had never been charged, either expressly or impliedly, in the indictment. The concept of "illegal" conviction also has been recognized where a defendant is convicted under an "inapplicable statute," *Moosavi v. State*, 355 Md. 651, 662 (1999), or where a defendant contends that he has been convicted of a non-existent crime. *Fisher v. State*, 367 Md. 218, 239-40 (2001). *Cf. Hallowell v. State*, 235 Md. App. 484, 506 (2018) (granting plain error review to

unpreserved claim of instructional error where the defendant may have been convicted of a non-existent crime).

In *Johnson*, the defendant had been charged by indictment with attempted murder, common law assault, wearing, carrying, or transporting a handgun, and use of a handgun in the commission of a felony or crime of violence. *Id.* at 362. A jury trial ensued. During jury instructions, in addition to the charges in the indictment, the court instructed the jury on assault with intent to murder and included that charge on the verdict sheet provided to the jury. *Id.* at 363.

The jury acquitted Johnson of attempted murder but found him guilty of assault with intent to murder, common law assault, wearing, carrying, or transporting a handgun, and use of a handgun in the commission of a felony or crime of violence. *Id.* The court sentenced him to 30 years' imprisonment for assault with intent to murder and a consecutive 20-year term for use of a handgun in the commission of a felony or crime of violence, merging the other offenses. *Id.*

Johnson did not object to the charge of assault with intent to murder being presented to the jury, nor did he challenge the conviction for that offense on direct appeal. *Id.* Sixteen years later, however, he filed a motion to correct an illegal sentence, contending that the trial court had lacked subject matter jurisdiction over the offense and that his sentence was therefore illegal. *Id.* The circuit court denied his motion, and we affirmed in a reported opinion, holding that Johnson had not raised a jurisdictional defect and that, therefore, his failure to raise the issue at trial and on direct appeal had resulted in a waiver. *Johnson v. State*, 199 Md. App. 331, 344-46, 348 (2011), *rev'd*, 427 Md. 356 (2012).

The Court of Appeals reversed. Although the Court declined to state whether Johnson had presented a jurisdictional challenge, 427 Md. at 366-67, it nonetheless concluded that, because assault with intent to murder was not charged in the indictment either expressly or impliedly (because it was not a lesser included offense of any charged offense[7]), *id.* at 375, the trial court had imposed a sentence where none should have been imposed. *Id.* at 378. Accordingly, the Court vacated both the conviction and sentence for assault with intent to murder. *Id.*

Here, by contrast, Bates was not convicted of an uncharged offense. He was found guilty of felony murder and attempted armed robbery. Felony murder was charged in Indictment 011, and attempted armed robbery is a lesser included offense of armed robbery, which was charged in Indictment 013. As Bates concedes, the general rule is that a charge of a greater offense supports a conviction of a lesser included offense. *Hagans*, 316 Md. at 455. Any quibble he may have with the manner in which the State was allowed to proceed on the indictments was, at most, a mere procedural error that had no effect on the trial court's authority to try him on the charges.

Bates's reliance upon *Hagans* in support of his contention that Indictment 013 was drawn "so as necessarily to exclude the lesser included offense" of attempted armed robbery is unavailing. In *Middleton v. State*, 238 Md. App. 295 (2018), we examined this language in detail and concluded that it referred to whether the greater and lesser included

[7] Specifically, the former crime of assault with intent to murder was not a lesser included offense of attempted murder in the first degree. *State v. Holmes*, 310 Md. 260, 272 (1987).

offenses were based upon the same act or acts.[8] *Id.* at 307. That is, if a count of a charging document is drawn "so as necessarily to exclude [a] lesser included offense," it means that the offenses at issue are alleged to be based upon different acts. That was not the case here. The State never alleged, at any time, that the attempted armed robbery and the armed robbery were based upon different acts. The quoted language from *Hagans* does not apply in this case.

Nor is there any merit to Bates's contention that the trial court's failure to instruct the jury on attempt somehow fatally invalidated his conviction of attempted armed robbery. Generally, the omission of a jury instruction on an element of a crime is a trial error, subject to the contemporaneous objection rule. *Neder v. United States*, 527 U.S. 1, 8-15 (1999). Here, there was no objection to the trial court's failure to instruct on attempt. *Bates*, 127 Md. App. at 700-01. An unpreserved claim of instructional error does not render a conviction "illegal" in the narrow sense of *Johnson*.

There is nothing inherently illegal about Bates's sentence, and the circuit court did not err in denying his motion to correct.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[8] See *Thompson v. State*, 119 Md. App. 606 (1998), for a detailed discussion of the structure of an indictment and how it relates to whether merger applies to charges that may be the same under the required evidence test.