

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2279

September Term, 2014

HARRY R. WALKER, JR.

v.

STATE OF MARYLAND

Krauser, C.J.,
Friedman,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: April 29, 2016

*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.

After entering a plea of not guilty, but later agreeing to a stipulated statement of facts, Harry R. Walker, Appellant, was convicted in the Circuit Court for Carroll County of the unlawful taking of a motor vehicle.

The trial court deferred sentencing for four months in order to allow Walker an opportunity to make restitution payments, which he agreed he would do. In deferring sentencing, the court indicated its willingness to consider a suspended sentence if damages were paid in full by the time of sentencing. Ultimately, Walker made no payments toward restitution and was sentenced to five years' imprisonment, all but three years suspended. Restitution was ordered as a condition of probation.

Walker filed a timely appeal, presenting one question for our review:

Did the trial court impose an illegal sentence when it imposed a sentence of active jail time after offering Mr. Walker an opportunity to buy a suspended sentence?

We hold that Walker's sentence was not illegal, and shall affirm the judgment of the circuit court.

BACKGROUND

Walker was charged with the unlawful taking of a motor vehicle, in violation of Section 7-105 of the Criminal Law Article, when he had a tow-truck scrapped without the permission of the owner and kept the proceeds. The owner valued the truck at \$1,500.

On May 31, 2013, Walker entered a not guilty plea on an agreed statement of facts after being advised of the rights he was waiving and of the possible consequences, including the maximum sentence of five years. After the court announced a guilty verdict, Walker's

counsel requested probation before judgment, suggesting that Walker could make some payments toward the \$1,500 restitution amount. The State requested incarceration, citing Walker's prior criminal record.

In response to those positions, the court deferred sentencing until September 26, 2013, and, taking up defense counsel's suggestion, told Walker, "Now, if you pay \$1,500 in restitution by that time, I will give you the benefit of a suspended sentence. If not, all bets are off." Walker was then advised that he could make payments through the State's Attorney's Office, as the Division of Parole and Probation was not yet involved in the case.

The sentencing hearing was finally held the following year on November 25, 2014.¹ By this time, Walker had made no payments of restitution. The State requested "a significant amount of jail time," with some time suspended so that restitution could be ordered as a condition of probation. The court prefaced the sentence, saying "[M]y notes reflect that I said if the restitution was paid by the 26th, September 26th, that would have been in 2013, the Court would impose a suspended sentence. If not, then the Court indicated it would impose jail time." The court imposed a sentence of five years' imprisonment, all but three

¹Walker failed to appear at the originally scheduled sentencing hearing on September 26, 2013, as he was incarcerated in West Virginia on a separate charge from July 17, 2013, to September 29, 2013. The following year, on April 19, 2014, Walker was picked up in West Virginia on local charges as well as a fugitive charge relating to this case; he refused to waive extradition and was eventually released. On August 18, 2014, Walker was again arrested in West Virginia on a fugitive charge relating to this case; he waived extradition and was returned to Maryland on August 28, 2014.

years suspended, and five years' supervised probation with the special condition that Walker make restitution in the amount of \$1,500 to the victim.

DISCUSSION

Walker contends that the court's comment that "... if you pay \$1,500 in restitution by that time, I will give you the benefit of a suspended sentence," was an offer to "buy" a suspended sentence. Walker relies on *Reddick v. State*, 327 Md. 270 (1992), to argue that such a sentence is illegal. He argues further that, pursuant to *Bearden v. Georgia*, 461 U.S. 660 (1983), he was entitled to a hearing to determine whether his failure to pay was wilful.

The State argues that the sentence imposed is not an illegal sentence, as it is within the statutory maximum. The State also contends that the offer does not render the sentence illegal, because this case is factually distinguishable from *Reddick* and *Bearden* in that the offer was not a part of the sentence and Walker affirmatively offered to make payments. Finally, the State asserts that Walker's wilfulness was determined by the court during the sentencing hearing.²

Maryland Rule 4-345 provides for the correction of an illegal sentence at any time. Md. Rule 4-345(a); *see also Chaney v. State*, 397 Md. 460, 466 (2007) (relief under Rule 4-

²The State also contends that Walker's claim of illegality fails because he proposed making payments prior to sentencing, and thus negotiated the arrangement as part of a plea bargain. This is a mischaracterization of the facts, as the parties agreed to a statement of facts, but not to a particular sentence. The parties were free to allocute, and did so; thus, we do not reach the applicability of *Reddick* and *Bearden* to plea agreements with negotiated sentences.

345(a) limited to “those situations in which the illegality inheres in the sentence itself”); *Carlini v. State*, 215 Md. App. 415, 425-27 (2013) (Rule 4-345’s “exemption from the normal procedural qualifiers is a narrow one, available only for a limited species of sentence illegalities”). Rather, we here examine any procedural illegalities or errors in the imposition of the sentence, as well as any in the sentence itself. Accordingly, the State’s argument that Walker’s sentence is legal merely because it is within the statutory maximum is not controlling in answering Walker’s complaint about the “offer to ‘buy’ a suspended sentence.”

However, we find merit in the State’s contention that the sentence is legal because the restitution offer was not a condition of the sentence. In *Reddick*, the trial court sentenced the defendant to 30 years’ imprisonment for second degree murder, but offered to reduce it to 25 years once restitution of \$3,000 was paid to the family of the victim. 327 Md. at 271-72. This offer was docketed as: “Five years to be suspended from the defendant Mr. Reddick’s sentence if he pays \$3000 restitution to the victim’s mother Rosetta Johnson through Parole and Probation by 2-2-91.” *Id.* at 272. Because Reddick was indigent and unable to pay the restitution, the Court of Appeals held that the trial court had sentenced him to five more years of imprisonment than it would have a nonindigent defendant, essentially imprisoning him “for lack of financial resources.” *Id.* at 274. That portion of the sentence – those five years conditioned on the payment of restitution – was illegal, as “Reddick is entitled to the sentence that a defendant with the financial wherewithal to make the payment would have received under the same circumstances.” *Id.*

Similarly, the defendant in *Bearden v. Georgia* was sentenced to probation on the condition that he pay \$750 in fines and restitution; probation was revoked and he was imprisoned when he failed to pay. 461 U.S. at 662-63. Imprisoning a defendant after determining he had made *bona fide* efforts to pay the fines or restitution is “contrary to the fundamental fairness required by the Fourteenth Amendment.” *Id.* at 672-73.

These cases, relied on by Walker, are distinguishable. In contrast to *Reddick* and *Bearden*, the condition complained of here was not an element of Walker’s sentence. Rather, the court advanced the possibility of a suspended sentence in the context of deferring disposition to a later date by which Walker indicated his ability to pay the proposed restitution.

The trial court noted in scheduling the deferred sentencing hearing, “So we will see what materializes,” indicating that payment of all or part of the restitution would be considered at the future sentencing hearing.³ During the sentencing hearing, Walker informed the court that he had not paid any of the proposed restitution, and that he had spent various parts of the previous 18 months in jail on other offenses, as well as fugitive charges arising from this case. The State highlighted Walker’s extensive criminal record, and emphasized that the victim continued to seek restitution. We find nothing in the court’s

³Not coincidentally, this conduct is similar to the State’s theory in *Reddick*. In *Reddick*, the State argued that the 30 year sentence was unconditional, and the trial judge was merely informing Reddick “about what conduct or developments would persuade him to modify the sentence at a later date.” 327 Md. at 272-73. The Court of Appeals rejected this argument as the record made clear that the condition was a part of the sentence. *Id.* at 273.

comments, made from notes taken at the 2013 trial, that supports Walker’s assertions that, in sentencing, the court considered only his failure to pay restitution, to the exclusion of other salient factors.

Restitution is a criminal sanction, and “its predominant and traditional purpose is to reimburse the victim for certain kinds of expenses that he or she incurred as a direct result of the defendant’s criminal activity.” *Chaney v. State*, 397 Md. 460, 470 (2007). A victim is presumed to be entitled to restitution if requested and the State presents competent evidence of the amount. Md. Code Ann., Crim. Proc. § 11-603(b). The victim here never waived his right to restitution, and in fact returned for the sentencing hearing – 18 months later – to pursue restitution. It is clear from the record that Walker had some financial resources from which restitution could be paid. Walker was given an opportunity, created in part by his own proposal – which he did not fulfill – to demonstrate a willingness to pay restitution. The court’s offer was a chance to earn a mitigating factor, not a condition for the guarantee of a suspended sentence.

Finally, citing *Bearden*, Walker requests that we remand for a hearing to determine whether his failure to pay prior to sentencing was wilful, and to reconsider imprisonment if wilfulness is not shown.⁴ As Walker’s imprisonment was not solely conditioned on payment, we decline to remand for further hearing. Walker’s counsel asked him at sentencing whether

⁴The State argues that the requirement for a determination of wilfulness was fulfilled, as at sentencing it was apparent Walker had two months to make payments toward restitution prior to his first incarceration in West Virginia after the trial and made none.

he had a present ability to pay restitution, to which Walker answered, “No, sir.” Walker offered no further explanation in mitigation of his failure to pay.

Further, the court invited both Walker and his counsel to respond to the State’s request for the maximum jail time and restitution as a condition of probation. Neither offered anything that the court might have considered in imposing sentence.

**JUDGMENT OF THE CIRCUIT COURT
FOR CARROLL COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**