Circuit Court for Montgomery County
Case No. 119064

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1494

September Term, 2016

AKINFEMIWE OYEBODE ALABI

v.

STATE OF MARYLAND

Woodward, C.J.,
Leahy,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: November 6, 2017

*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 2012, Akinfemiwe Alabi, appellant, was convicted by a jury in the Circuit Court for Montgomery County, of sexual abuse of a minor (two counts) and attempted second-degree rape. He was sentenced to a total term of twenty years' imprisonment, with all but ten years suspended, and to a five-year period of supervised probation upon release. This Court affirmed the judgments. *Alabi v. State*, No. 1334, September Term, 2012 (filed October 8, 2013).

Alabi later filed a petition for post-conviction relief. He noted that the transcript of the jury's announcement of their verdict reflected that, when polled, Juror No. 142 failed to respond when asked whether her verdict was the same as the verdict the foreperson had announced. Alabi argued that his trial counsel was ineffective for failing to object to Juror No. 142's non-response, and he claimed that his conviction was a nullity because the jury's verdict was not unanimous. At a hearing on that petition, Alabi's trial counsel testified that he, in fact, heard Juror No. 142 state "yes" when asked whether her verdict was the same verdict the foreperson had just announced. The post-conviction court found that trial counsel's testimony was "credible because, in the context of trial, when the jurors are being polled, all of the attention in the courtroom focuses on that individual juror" and if Juror No. 142 had not answered the poll or had responded "no," "someone would have, in fact, said something," but no one did. The post-conviction court also listened to the audio recording of the proceeding and found that when Juror No. 142 was polled, a "thump" was heard "just at the time that the person would answer and then they went on to the next juror." The post-conviction court denied relief. Alabi sought appellate review of that

decision, but this Court denied his application for leave to appeal. *Alabi v. State,* No. 1234, September Term, 2015 (filed February 11, 2016.)

Alabi then filed a motion to correct an illegal sentence pursuant to Rule 4-345(a) raising the same polling issue he had raised before the post-conviction court. The circuit court's denial of that motion is the subject of this appeal.

The State moves to dismiss the appeal because the alleged defect in the polling process is a procedural claim not cognizable in a Rule 4-345(a) motion. If addressed, the State contends the judgment should be affirmed. The State maintains that the verdict was valid because it was hearkened before polling and, moreover, there is nothing to suggest that Juror No. 142 in fact dissented to the verdict announced by the foreperson.

We agree with the State. "An illegal sentence, for purposes of Rule 4-345(a), is one in which the illegality inheres in the sentence itself, *i.e.,* there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason is intrinsically and substantively unlawful." *Colvin v. State,* 450 Md. 718, 725 (2016) (quotation omitted). "A sentence does not become an illegal sentence because of some arguable procedural flaw in the sentencing procedure." *Id.* (quotation omitted).

Alabi's claim is a procedural challenge to the polling process which does not implicate the legality of his sentence and, for that reason, it is not cognizable under Rule 4-345(a). *Id.* at 450 Md. 728 (holding that Colvin's claim that the failure to poll the jury foreperson resulted in a defective verdict, was a procedural challenge to the polling process,

not a substantive challenge to the sentence, and hence the claim could not be raised in a Rule 4-345(a) motion to correct an illegal sentence).

In any event, we find no merit to Alabi's claim that his verdict was not unanimous. The transcript reflects that, immediately after the foreperson announced the jury's verdict, the verdict was hearkened. The clerk repeated the verdict as to each count and then asked the jury, "And so you all say?" The jury responded, "Yes." Although the verdict would have been final following the hearkening, the jury was then polled. *See State v. Santiago*, 412 Md. 28, 38-39 (2009) ("A verdict is not final until after the jury has expressed their assent in one of [two] ways, by hearkening or by a poll.") (alteration in original) (quotation omitted); *Colvin, supra,* 450 Md. at 728 ("[O]ur jurisprudence does not require that both polling and hearkening are required to ensure unanimity." (citation omitted)).

The lack of a recorded response by Juror No. 142 to the polling question does not, without more, support Alabi's claim that the verdict was not unanimous. The jury had just hearkened its verdict, thereby unanimously confirming its agreement to the verdict as delivered by the foreperson and restated by the clerk. After Juror No. 142 was polled, the polling continued without interruption. Immediately after the final juror was polled, the court thanked and dismissed the jury. No one questioned the polling process nor the verdict as rendered. In short, even though the transcript does not reflect a response from Juror No. 142, given that the clerk continued to poll the next six jurors and the defense remained silent after the poll was concluded, it is clear to us that the verdict was unanimous.

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.