Circuit Court for Baltimore City
Case No. 110082010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2050

September Term, 2019

STATE OF MARYLAND

v.

RUSSELL MURRAY

Graeff,
Beachley,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.
Dissenting Opinion by Graeff, J.

Filed: May 13, 2021

In this appeal, we must decide whether a circuit court may exercise its fundamental jurisdiction to grant a timely-filed motion for modification of sentence after the five-year deadline set forth in Maryland Rule 4-345(e)(1) has lapsed. Relying on binding precedent, we conclude that a sentencing court may exercise fundamental jurisdiction in such a case, and, accordingly, affirm the judgment of the circuit court, which granted such a motion beyond the five-year period prescribed by the Rule.

BACKGROUND

In January 2011, in the Circuit Court for Baltimore City, appellee Russell Murray entered an *Alford* plea[1] to second-degree assault of his then wife, Cindy Murray. The circuit court sentenced him to a suspended term of five years' imprisonment, followed by two years' probation. Appellee, through counsel, thereafter filed a timely motion for modification and asked the court to hold the matter *sub curia*. The court agreed, but neither appellee nor his counsel ever requested a hearing on the motion during the five-year period following the imposition of sentence, as prescribed by Rule 4-345(e)(1), and the court therefore took no further action on the motion during that time period.

In 2019, eight years after he had been sentenced in this case, appellee changed employment and discovered, after a background check by his new employer, that his 2011

[1] Named after *North Carolina v. Alford*, 400 U.S. 25 (1970), an *Alford* plea has been characterized as "a guilty plea containing a protestation of innocence." *Bishop v. State*, 417 Md. 1, 19 (2010) (quoting *Marshall v. State*, 346 Md. 186, 189 n.2 (1997)).

assault conviction would interfere with the performance of his work duties.[2] Appellee thereafter contacted his former counsel, who sent a letter to the Clerk of the Circuit Court requesting a hearing to consider his lapsed motion for modification. The court granted that request and scheduled a hearing.

At the ensuing hearing, the State opposed appellee's request, asserting that Maryland Rule 4-345(e), which provides that a court "may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant," was a jurisdictional bar requiring dismissal of the motion for modification. The court rescheduled the hearing so that it could research the jurisdictional issue, and it invited the parties to file briefs.

At the rescheduled hearing, the court relied upon *Schlick v. State*, 238 Md. App. 681 (2018) ("*Schlick I*"), *aff'd on other grounds*, 465 Md. 566 (2019) ("*Schlick II*"), and determined that it had the authority to exercise its jurisdiction to consider the motion. The court emphasized that, under the circumstances of this case—a timely motion had been filed, the court could discern no "nefarious reason on the part of [appellee]" in failing to request a hearing, there was "a possibility" that trial counsel had provided ineffective assistance in allowing the motion to lapse, and this was a case "warrant[ing] consideration"—it believed that it was appropriate to exercise jurisdiction. Then, after

[2] Appellee's new employer performed work at correctional facilities and military bases, and the flag raised by his 2011 assault conviction resulted in him being denied entry to such facilities.

hearing argument of the parties, the circuit court, declaring that it was persuaded by appellee's "self-reflection," successful completion of probation, lack of criminal history, and that appellee was "otherwise conducting [himself] in a dignified manner," vacated appellee's prior sentence and granted probation before judgment pursuant to Md. Code (2001, 2018 Repl. Vol.), § 6-220(b) of the Criminal Procedure Article ("CP"). The State then noted this appeal pursuant to Md. Code (1973, 2020 Repl. Vol.), § 12-302(c)(3)(ii) of the Courts & Judicial Proceedings Article ("CJP"), which permits the State to appeal from the modification of a sentence in violation of the Maryland Rules.[3]

DISCUSSION

The State argues that the circuit court lacked jurisdiction to modify appellee's sentence upon expiration of the applicable five-year period. Because we are bound by our earlier precedent in *Schlick I*—where we held that a circuit court retains and has the authority to exercise its fundamental jurisdiction to rule on a timely filed motion for modification even after the expiration of the five-year revisory period set forth in the Rule—we reject the State's argument.

We begin our discussion with Rule 4-345(e). That Rule governs a sentencing court's authority to modify a sentence and provides in pertinent part:

> (1) Generally. Upon a motion filed within 90 days after imposition of a sentence (A) in the District Court, if an appeal has not been perfected or has been dismissed, and (B) in a circuit court, whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not

[3] Although we cite to the 2020 Replacement Volume, CJP § 12-302 has not been amended since 2014.

> revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.[4]

In *Schlick I*, this Court was tasked with deciding whether the Circuit Court for Baltimore City erred when it dismissed Schlick's motion for modification of sentence under Rule 4-345 for lack of jurisdiction. 238 Md. App. at 683. There, on September 20, 2005, the circuit court sentenced Schlick to sixteen years' imprisonment, all but eighteen months suspended, with five years' probation for distribution of cocaine. *Id*. at 684. Schlick later violated the terms of his probation, and on September 15, 2008, the court revoked Schlick's probation and ordered him to serve the previously suspended fourteen years and six months from his 2005 sentence.[5] *Id*.

In 2012, Schlick sought postconviction relief related to the sentence he received in 2008 stemming from his probation violation. *Id*. Recognizing that Rule 4-345(e) requires the party to file a motion for modification within 90 days after imposition of sentence, Schlick successfully established that in 2008, he had asked his counsel to timely file the

[4] We note that in 2004, the Standing Committee on Rules of Practice and Procedure considered an amendment to Rule 4-345 as it existed at the time which would have applied the five-year revisory power time limit only where the defendant was convicted of a crime of violence. *See* Md. Standing Committee on Rules of Practice and Procedure, Minutes of Rules Meeting, at 7 (Jan. 9, 2004). The Committee ultimately voted not to pass this amendment. *Id*. at 27.

[5] Though not relevant to our decision, Schlick received a ten-year sentence for the conviction which formed the basis for his violation of probation. *Schlick I*, 238 Md. App. at 684. Schlick's fourteen-year-and-six-month sentence ran concurrent with his ten-year sentence. *Id*.

motion for modification of sentence, and that his counsel had failed to do so. *Id*. at 684-85.

On March 20, 2013, the circuit court granted Schlick the right to file a belated motion for modification of sentence within 90 days of its order. *Id*. at 685. On May 24, 2013, with the assistance of counsel, Schlick filed his belated motion for modification. *Id*. Six days later, without the assistance of counsel, Schlick filed a belated motion for modification in which he asked the court to hold the motion *sub curia*. *Id*. at 685-86. Although the court attempted to schedule a hearing on the motion for February 2014, Schlick successfully moved to postpone that hearing, and the court subsequently agreed to hold the modification *sub curia*. *Id*. at 686.

In July 2014, Schlick filed a line requesting a hearing on the motion for modification, but in December 2015, the court issued a show cause order asking why it should not dismiss the motion for modification pursuant to Rule 4-345(e) because five years had passed from the date the sentence was originally imposed in 2008. *Id*. In the court's view, the five-year expiration date occurred on September 16, 2013,[6] which was five years after the September 15, 2008 imposition of Schlick's sentence for violating his probation. *Id*. Following a hearing, the circuit court dismissed the motion for modification, finding that it lacked jurisdiction as the five-year revisory window for modifying Schlick's sentence had expired under Rule 4-345(e). *Id*. at 686-87, 689-90.

[6] The opinion notes that September 16, 2013, was a Monday.

On appeal, Schlick argued to this Court that "when a belated Motion for Modification of Sentence is timely filed, Rule 4-345 cannot divest the court of its authority to modify the sentence even if a modification hearing is not held within five years of the original sentencing date." *Id*. at 689. We agreed, holding that "the trial court retained fundamental jurisdiction to rule on the belated Motion for Modification of Sentence." *Id*. at 690. Writing for this Court, Judge Irma Raker explained that,

> In the case before us, a strong factor is that appellant timely filed a belated motion for modification, but the lower court did not set an initial hearing date on the motion until after the expiration of five years from the imposition of the original sentence. In a perfect world, a court should set the hearing within the five-year period, but we know courts are busy, and if a court fails to do so, the consequence should not be held against the defendant. On the other hand, the defendant and counsel have an obligation once the motion is filed within the five-year period, to make best efforts to ensure the hearing is heard in a timely manner. *All we are saying is that the court has jurisdiction over the motion, but it is within the discretion of the trial court to consider the totality of the circumstances and determine whether to hear the motion on its merits.*
>
> *The conflict in the five-year rule for hearing the matter in regard to Rule 4-345 does not remove the court's power to entertain the motion.* The fundamental jurisdiction of a court is "the power residing in such court to determine judicially a given action, controversy, or question presented to it for decision." *Fooks' Executors v. Ghinger*, 172 Md. 612, 621, 192 A. 782 (1937).

Id. at 693 (emphasis added). We therefore remanded the case "[b]ecause the court had fundamental jurisdiction and discretion, which it did not exercise[.]" *Id*. at 694.

Following our decision, the State sought review in the Court of Appeals. *Schlick II*, 465 Md. at 573. Rather than rely on the rationale in *Schlick I* regarding the court's authority to exercise its fundamental jurisdiction, the Court of Appeals instead held that:

> [T]o meaningfully restore Mr. Schlick's rights under [Rule 4-345], not only must Mr. Schlick be permitted to file a belated motion within 90 days of the postconviction court's order, but it follows that implicit in the postconviction court's grant of relief was the ability of the circuit court to exercise its revisory power over Mr. Schlick's motion for five years from the date of the postconviction court's order. Applying the aforesaid principles to the facts of the present case, Mr. Schlick was granted postconviction relief on March 20, 2013. In compliance with the postconviction court's order, he filed a motion for modification on May 24, 2013. Therefore, the trial court had revisory power over Mr. Schlick's sentence until March 20, 2018.

Id. at 585.

Notably, in a footnote, the Court expressly stated that it would not decide the issue of "indefinite fundamental jurisdiction," the precise issue presented in the instant appeal:

> Given that we hold that the circuit court's revisory power was ongoing when it dismissed Mr. Schlick's motion, *it is not necessary for us to decide whether, as the Court of Special Appeals concluded, the circuit court retains indefinite fundamental jurisdiction to modify a sentence outside of the five-year period set forth in Maryland Rule 4-345(e). See* [*Schlick I,* 238 Md. App. at 693-94].

Id. at 586 n.7 (emphasis added).[7] Accordingly, the Court affirmed, albeit on other grounds,

[7] Despite the Court's express language that it would not reach the issue of "indefinite fundamental jurisdiction," the Court may have tipped its hand by stating that "the trial court had revisory power over Mr. Schlick's sentence until March 20, 2018[,]" *Schlick II*, 465 Md. at 585, and that "[t]he court, in fact, had revisory power over Mr. Schlick's sentence for an additional 224 days, or until March 20, 2018[,]" *id.* at 587. In holding that the court had revisory power over Schlick's sentence until March 20, 2018—five years after the date of the postconviction court's order granting Schlick the right to file a belated motion for modification—the Court of Appeals applied the five-year limitation set forth in Rule 4-345(e)(1). Had a majority of the Court accepted our view in *Schlick I* that the court retains the authority to exercise "indefinite fundamental jurisdiction" beyond five years, there seemingly would have been no need to confirm that the court only had revisory power until March 20, 2018. Nevertheless, the Court of Appeals clearly did not reach that issue as it was immaterial to the Court's ultimate resolution of the case.

our decision to vacate the circuit court's dismissal of Schlick's motion for modification of sentence.[8]

That *Schlick I* was affirmed on other grounds is significant to the outcome of this case. Because the Court of Appeals did not decide whether a circuit court retains the authority to exercise indefinite fundamental jurisdiction to consider a timely filed motion for modification of sentence, our holding in *Schlick I* remains binding precedent.[9] Accordingly, we are compelled to hold that, because appellee timely filed his motion for modification of sentence, the circuit court retained the authority to exercise its fundamental jurisdiction to rule on his motion beyond the Rule's five-year revisory power limitation. *Schlick I*, 238 Md. App. at 693. Applying that principle here, we conclude that it was within the circuit court's discretion whether to exercise that fundamental jurisdiction and

[8] In a footnote, the Court of Appeals acknowledged the argument that, under *Rosales v. State*, 463 Md. 552 (2019), Rule 4-345(e) could be construed as a claim-processing rule rather than a jurisdictional rule. *Schlick II*, 465 Md. at 578 n.4. The Court chose not to resolve this issue, stating, "whether the Rule is properly classified as 'jurisdictional' or 'claim processing' is immaterial to our disposition of Mr. Schlick's case." *Id*.

[9] We routinely treat as precedential authority cases which have been affirmed on other grounds. *See Redkovsky v. State*, 240 Md. App. 252, 261-62 (2019) ("We have recognized, however, that a motion for judgment of acquittal may be sufficient to preserve an issue where the acquittal argument generally includes the issue raised on appeal. *See* . . . *Shand v. State*, 103 Md. App. 465, 488-89 (1995)[,] . . . *aff'd on other grounds*, 341 Md. 661"); *see also Riggins v. State*, 223 Md. App. 40, 61 (2015) ("Resisting arrest is a statutory crime that encompasses 'the well-defined parameters of Maryland common law concerning resisting arrest.' *McNeal v. State*, 200 Md. App. 510, 528, 28 A.3d 88 (2011), *aff'd on other grounds*, 426 Md. 455, 44 A.3d 982 (2012)." (footnote omitted)).

consider the merits of appellee's motion.[10] *Id.* Because the State does not argue that the circuit court erred or abused its discretion with regard to its decision to modify appellee's sentence, we affirm.[11]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.

[10] We acknowledge our assertion in *Folk v. State* that a circuit court's right to exercise its fundamental jurisdiction may be "interrupted . . . by (i) *statute or Maryland Rule*, (ii) the posting of authorized appeal bond, or bail following a conviction and sentence, or (iii) a stay granted by an appellate court, or the trial court itself, in those cases where a permitted appeal is taken from an interlocutory or final judgment." 142 Md. App. 590, 596-97 (2002) (emphasis added) (quoting *Pulley v. State*, 287 Md. 406, 417 (1980)). Nevertheless, *Schlick I* did not rely on this principle.

[11] In its brief, the State alternatively argues that the motion for modification should have been denied for mootness. In a footnote, the State concedes that it failed to raise the issue before the circuit court, but nevertheless argues that this Court may resolve the issue because mootness impacts the "justiciability" of the case. Although we accept the State's proposition that we may generally consider mootness when raised for the first time on appeal, whether appellee's motion for modification was moot should have been raised in the circuit court to allow the development of a factual record regarding appellee's potential collateral consequences. *See generally Adkins v. State*, 324 Md. 641, 651-56 (1991) (holding that challenge to violation of probation was not mooted by having completed the term of probation if defendant would face collateral legal consequences as a result of the violation of probation judgment). In any event, we note that appellant's second-degree assault conviction will carry at least one collateral consequence—his inability to lawfully possess a regulated firearm. *See* Md. Code (2003, 2018 Repl. Vol.) § 5-133(b)(1)) of the Public Safety Article ("PS"). We therefore reject the State's mootness argument.

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Respectfully, I dissent. Maryland Rule 4-345(e) provides that a court "may not revise [a] sentence after the expiration of five years from the date the sentence originally was imposed on the defendant." The circuit court here vacated appellant's sentence in 2019, more than eight years after his initial sentence was imposed. For the reasons explained below, I would reverse that judgment.

As the Majority notes, this Court and the Court of Appeals, in *Schlick v. State*, 238 Md. App. 681, 693 (2018), *aff'd*, *State v. Schlick*, 465 Md. 566, 586 (2019), held that, in the circumstances of that case, the circuit court retained revisory power over Mr. Schlick's sentence, even though it had been imposed more than five years earlier. That case, however, was decided in the situation where a defendant was granted postconviction relief to file a belated motion for modification of sentence. *Schlick*, 465 Md. at 569. In that context, there was "tension between the five-year period during which a circuit court retains revisory power over a sentence and the ten-year period during which a defendant may obtain postconviction relief." *Id.* at 580. *Accord Schlick*, 238 Md. App. at 691.

Given that context, and the determination that a postconviction court's order granting the right to file a belated motion for modification implicitly provided the circuit court authority to exercise its revisory power over the motion for five years from the date of the postconviction court's order, the Court of Appeals held that the circuit court had revisory power to consider the motion, even though more than five years had passed since imposition of the initial sentence. *Schlick*, 465 Md. at 585. The Court made clear, however, that the holding was "limited to these situations where a defendant is deprived of the

opportunity to timely file or otherwise obtain consideration by the court of a motion for modification under Maryland Rule 4-345(e) as a result of ineffective assistance of counsel." *Id.* at 586–87.

This case is not in the same procedural posture as *Schlick*. The rationale of that case does not justify a modification more than five years after imposition of the sentence.

To be sure, this Court stated in *Schlick*, 238 Md. App. at 689–90, that a court retains fundamental jurisdiction to modify a sentence more than five years after imposition of the original sentence. The circuit court relied on this reasoning in its ruling. Even where a court retains fundamental jurisdiction over a matter, however, that does not mean that the court has the right to exercise its jurisdiction. For example, although a court has jurisdiction to decide a motion for new trial while an appeal is pending, it may not "*exercise* that jurisdiction in a manner that affects either the subject matter of the appeal or the appellate proceeding itself—that, in effect, precludes or hampers the appellate court from acting on the matter before it." *Jackson v. State*, 358 Md. 612, 620 (2000) (emphasis in original). A ruling that has that effect is subject to reversal on appeal. *Id.*

Moreover, we have explained that a court's right to exercise its power may be "interrupted" by, among other things, "statute or Maryland Rule." *Folk v. State*, 142 Md. App. 590, 596 (2002) (quoting *Pully v. State*, 287 Md. 406, 417 (1980)). Here, the circuit court's right to exercise its power to revise appellant's sentence was "interrupted" by Rule 4-345(e), which specifically precludes a court from revising a sentence more than five years after imposition of the original sentence. Thus, subject to the exception set forth in

Schlick, I would hold, pursuant to the plain language of the Rule, that the circuit court "may not" revise a sentence after five years from the imposition of the sentence.

Appellant argues on appeal that the circuit court should be affirmed because it had the authority to extend the five-year deadline pursuant to Rule 1-204(a), which provides that, when the rules "require or allow an act to be done at or within a specified time," the court may, "on motion filed after the expiration of the specified period, permit the act to be done if the failure to act was the result of excusable neglect." I am not persuaded for several reasons: (1) this argument was not raised below; (2) Rule 1-204(a) goes on to provide that the court may not extend the time for taking action expressly prohibited by rule, and Rule 4-345(e) expressly prohibits a judge from revising a sentence after five years; and (3) the judge did not find excusable neglect, stating rather that there was a "possibility" that counsel was deficient in failing to follow up on the motion.

For these reasons, I would reverse the judgment.