UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2563

September Term, 2014

ERIC ALLAN RUSSELL

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Krauser, C.J.

Filed: October 23, 2015

*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 in the Circuit Court for Carroll County, on an agreed statement of facts, to second degree burglary, Eric Allan Russell, appellant, was convicted of that offense and the State *nolle prossed* the remaining charges of fourth degree burglary and theft of property valued between $1,000 and $10,000. Russell was thereafter sentenced to a term of five years of imprisonment and ordered to pay restitution, in the amount of $7,650, for the damage done to the property by Russell during the burglary. This appeal followed, presenting one question for our review:

> Did the trial court err in entering a judgment for $7,650 in restitution where no competent evidence to support the award was admitted and there was no inquiry into the ability to pay?

Because this issue has not been preserved for appellate review, we shall affirm the judgment of the court below.

PROCEEDINGS BELOW

Russell agreed to enter a plea of not guilty to second degree burglary based upon the foregoing statement of facts, as articulated by the prosecutor:

> Your Honor, had the State proceeded to trial today we would have proven through various witnesses, His Honor, that on or about May 21, 2014, at 2636 Groves Mill Road, which is in Westminster, Carroll County, Maryland, an individual who would have been identified as Eric Allen Russell, the defendant seated before Your Honor today, did unlawfully break and enter the storehouse of Iris Myra Frock, located at 2636 Groves Mill Road, Westminster, Carroll County, Maryland with the intent to commit a theft.
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> In support of that charge, Your Honor, on the date in question, at approximately 8:00 p.m., Carroll County Sherriff's Department responded to the address in question for report of a burglary. Upon Deputy Tragesser's arrival, he made contact with Jacob Hollingshead

(sic) who advised that he is a neighbor in the area and he was walking along the property at 2636 Groves Mill Road when he observed a black truck backed up to the basement door of the residence.

Mr. Hollinshead described the truck as spray painted, a 2003-2004 Chevrolet pick up truck and the paint seemed to be flaking off with white paint showing through under neath [sic]. Mr. Hollingshead advised that he knew that the house had been vacant and for sale and called another neighbor due to there having been burglaries that have occurred in the area in the past.

Mr. Hollingshead further advised that he observed a white male subject, approximately 40-50 years of age – approximately 6 feet tall wearing blue jeans and a blue "mechanic shirt" and baseball hat. Mr. Hollingshead observed the individual proceed out of the residence and when the individual saw Mr. Hollingshead, the individual entered his truck and fled the area.

Reed Fauntleroy (sic) who was another witness – neighbor who had responded to the area in question advised that he had observed a black pick up truck passing him at a high rate of speed on Groves Mill Road and turned southbound on Route 27 towards Westminster at a very high rate of speed. Prior to that vehicle proceeding past him, Mr. Fauntleroy had observed the individual in question, standing outside the residence holding what appeared to be copper piping in his hands.

Deputy Tragasser then entered the residence and observed copper piping throughout the house, missing from the residence. The right floor bedroom, the top left floor bedroom, the top floor bathroom, the main floor living room, and the kitchen all had copper piping missing from the residence. Along with that, there were approximately two radiators taken from the residence.

The copper piping through the ceiling was taken from the residence as well. Deputy Tragasser then contacted the owners [sic] of the residence, Iris Frock. Ms. Frock advised that the residence had been vacant for two to three years but that no one should have been in the house and no one had permission to remove anything from the house and the house had been secured prior to the date in question.

On the next date, May 22, Mr. Hollingshead contacted Deputy Tragasser and advised that he observed the suspect vehicle parked in the area of 135 Solomon Road. Deputy Tragasser responded to that

> area and observed the truck. The truck was identified as a 2006 Chevrolet, matching the description that Mr. Hollingshead had given.
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> The registered owner of that truck was identified as Eric Allen Russell, defendant seated before Your Honor today. Based upon that information, Deputy Tragasser completed a photographic line up. On May 23, 2014, he was able to meet with Mr. Hollingshead. Mr. Hollingshead was shown six photographs of like individuals with similar descriptions and builds.
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> Mr. Hollingshead was shown those individuals and asked if he recognized anyone. Mr. Hollingshead was able to pick out the photograph known to be number 4, indicating that that looked like the suspect that he saw at the residence of Groves Mill Road on May 21, 2014. That photograph was of Eric Allen Russell, the defendant seated before Your Honor today.
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> Deputy Tragasser continued his investigation and found that on May 27, 2014, Mr. Russell had sold scrap metal at Carroll Scrap Metals. The scrap metals sale including [sic] 20 pounds of copper, and two pounds of "radiators". These items would have been consistent with the items taken from the Groves Mill Road residence.
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> All witnesses would have identified Eric Allen Russell as defendant seated before Your Honor today. All events occurred in Carroll County, Maryland and that would have been the State's case.

After the aforesaid statement of facts was accepted by the court, without any additions or corrections to that statement by Russell, the court, as previously noted, convicted Russell of second degree burglary, whereupon the State *nolle prossed* the remaining charges.

DISCUSSION

Russell contends that the court erred in ordering restitution, in the amount of $7,650, for two reasons. First, there was no evidence the damage to the property in question

equaled that amount of money, and, second, the court failed to inquire into Russell's ability to pay the restitution. The State responds that, because Russell did not object to the order of restitution below and because that order does not constitute an inherently illegal sentence under Rule 4-345(a), Russell has failed to preserve this issue for appellate review.

A court may, under, Section 11-603(a) of the Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CPA"), "enter a judgment of restitution that orders a defendant or child respondent to make restitution when, as a direct result of the crime or delinquent act, property of victim was stolen, damaged, destroyed, converted, or unlawfully obtained, or its value substantially decreased." In fact, a victim is presumed to have a right to restitution if the State or victim requests restitution, and the court is presented with competent evidence . . . that the victim suffered direct out-of-pocket expenses. *Id.* at § 11-603(b). But, if the court finds that the defendant does not have the ability to pay the judgment of restitution, then the court may decline to enter such a judgment. *Id.* at § 11-605(a)(1).

At sentencing, the State submitted a victim impact statement documenting $7,650 in damages to the residence Russell purportedly burglarizing. Then, during that proceeding, the State requested that Russell be "incarcerated for a longer period of time than to have him placed on probation with restitutions." It specifically stated:

> The victims in this case indicate that there was about $7,600 worth of damage done to the house. From the State's perspective, Mr. Russell is before the Court, he is 44 years of age. He is not someone who is really going to ever pay any restitution. So from the State's perspective, we would rather see him being incarcerated for a longer period of time than to have in him on probation with restitution. So that is why we are asking for the five years of incarceration on the

> [case]. . . . And that a civil judgment be entered for the $7,650 for the victims in this case.

Russell challenged the State's speculation that he would be unable to pay restitution, asserting: ". . . I heard the State's Attorney [say] that there is no chance that I am ever going to pay the restitution and I couldn't disagree with that more. I would like an opportunity to pay restitution." Thus, Russell, not only did not object to restitution, but actively sought it.

Pursuant to Rule 8-131(a), "the appellate court will not decide any other issue [except for jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." Plainly, appellant did not challenge the court's award of restitution during the sentencing proceeding and thus waived his right to challenge that award on appeal, which is precisely what we held in *McDaniel v. State*, 205 Md. App. 551 (2012). In that case, McDaniel claimed that the circuit court had erred in ordering restitution, without inquiring into his ability to pay it. But, we held that, because McDaniel had failed to raise this issue in the circuit court, it was not preserved for appellate review. In so holding, we stated: "When a court orders a defendant to make restitution to a crime victim, and the defendant believes that the court either fails to inquire into his ability to pay or errs in determining his ability to pay, **the defendant must make a timely objection to the order, else the issue is waived**." *Id.* at 566 (emphasis added) (citing *Reiger v. State*, 170 Md. App. 693, 699-701 (2006)). We reach the same conclusion here.

Of course, we concede that, if the court's order of restitution is an "illegal sentence," as appellant suggests, then lack of preservation would not bar appellate review of his sentence.

But, as the Court of Appeals has explained:

> There are limited grounds on which a sentence may be properly reviewed by this Court despite the failure to object at the time of the proceedings. One such avenue for review, relevant to this case, is Md. Rule 4-345(a), which provides that a "court may correct an illegal sentence at any time." This exception is a limited one, and only applies to sentences that are "inherently" illegal. "We have consistently defined this category of 'illegal sentence' as limited to those situations 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."
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> The distinction between those sentences that are "illegal" in the commonly understood sense, subject to ordinary review and procedural limitations, and those that are "inherently" illegal, subject to correction "at any time" under Rule 4-345(a), has been described as the difference between a substantive error in the sentence itself, and a procedural error in the sentencing proceedings. As aptly stated by Judge Charles E. Moylan, Jr., speaking for the Court of Special Appeals in the recent case, *Carlini v. State*, 215 Md. App. 415, 419-20, 81 A.3d 560, 563 (2013), "[t]here are countless illegal sentences in the simple sense . . . [and] [t]here are, by contrast, illegal sentences in the pluperfect sense . . . there is a critically dispositive difference between a procedurally illegal sentencing process and an inherently illegal sentence itself," and "only the latter [] is grist for the mill of Maryland Rule 4-345(a)[.]"

Bryant v. State, 436 Md. 653, 662-64 (2014) (internal citations omitted). In sum, a sentence is an "illegal sentence" only if it is "inherently" illegal.

In support of his claim that the restitution order is an "illegal sentence," Russell cites two cases: *Coles v. State*, 290 Md. 296 (1981) and *Chaney v. State*, 397 Md. 460 (2007).

Russell, then, quotes *Coles*, *supra*, 290 Md., for the proposition that a trial court "must conduct a 'reasoned inquiry' into a person's ability to comply with an order of restitution," (citing *Coles*, *supra*, 290 Md. at 306), and then insists that failure to conduct such inquiry renders the ensuing order of restitution an illegal sentence. But, Russell fails to note that the Court of Appeals, in *Coles*, went on to state that "failure to make such an inquiry [into a defendant's ability to pay restitution], even if mandatory, does not render the sentence illegal within the meaning of Rule 774 a [the predecessor to Rule 4-345(a)]." *Coles*, *supra*, 290 Md. at 307. Thus, the lack of such an inquiry in the instant case does not render the circuit court's order of restitution an illegal sentence, and, consequently, the issue of the propriety of that order was not preserved for appellate review.

Although, in *Chaney*, the second of the two cases cited by Russell, the Court of Appeals admittedly engaged in a plain error review of a trial court's order of restitution as a condition of probation, it did so because there was no discussion of restitution during sentencing, nor presentation of the victim's damages, until the court announced restitution as a condition of probation. Thus, the order that Chaney pay restitution in the amount of $5,000, observed the Court of Appeals, appeared to have been "pulled entirely out of thin air." 397 Md. at 473. Consequently, the Court of Appeals found the defendant, "was never given the opportunity prior to its entry, to contest or defend against it." *Id.*

In contrast, Russell was given ample opportunity to challenge the State's evidence as to the amount of restitution and his ability to pay that amount of restitution. And, as noted earlier, not only did Russell not challenge the court's decision to order restitution, but he actually sought restitution as a part of his sentence. Accordingly, appellant's

challenge to the restitution order was clearly not preserved for appeal. *See also Reiger*, *supra*, 170 Md. App. at 701 (noting that defendant who failed to object when trial court invited discussion about issue that defendant challenged on appeal, did not preserve the issue for review).

Because the court's order of restitution is not an illegal sentence and because appellant has failed to preserve this issue for our review, we affirm the judgment of the circuit court.

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