Circuit Court for Prince George's County
Case No: CT991906X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2586

September Term, 2019

MONEY R. CUMMINGS

v.

STATE OF MARYLAND

Fader, C.J.,
Kehoe,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: January 5, 2021

In 2000, a jury sitting in the Circuit Court for Prince George's County found Money R. Cummings, appellant, guilty of first-degree rape, two counts of first-degree sexual offense, second-degree rape, two counts of second-degree sexual offense, first-degree burglary, and false imprisonment. The court sentenced him to three consecutively run life sentences for the first-degree rape and the first-degree sexual offenses; 20 years' imprisonment for the burglary, to run consecutively to the life sentences; and three years' imprisonment for false imprisonment, to run concurrently with the other sentences. The second-degree sexual offenses merged for sentencing purposes. This Court affirmed the judgments. *Cummings v. State*, No. 1325, Sept. Term, 2000 (filed June 27, 200l).

In 2019, Mr. Cummings, representing himself, filed a Rule 4-345(a) motion to correct an illegal sentence and requested a hearing on the motion. The circuit court denied the motion, without a hearing. Mr. Cummings appeals that ruling. For the reasons to be discussed, we shall affirm the judgment.

DISCUSSION

Rule 4-345(a)

Rule 4-345(a) provides that a court "may correct an illegal sentence at any time," but the Rule is very narrow in scope and is "limited to those situations in which the illegality inheres in the sentence itself[.]" *Chaney v. State*, 397 Md. 460, 466 (2007). An inherently illegal sentence is one in which there "has been no conviction warranting any sentence for the particular offense," *id.*, where "the sentence is not a permitted one for the conviction upon which it was imposed," *id.*, where the sentence exceeded the sentencing terms of a binding plea agreement, *Matthews v. State*, 424 Md. 503, 519 (2012), or where

the court lacked the power or authority to impose the sentence. *Johnson v. State,* 427 Md. 356, 368 (2012). Notably, however, a "'motion to correct an illegal sentence is not an alternative method of obtaining belated appellate review of the proceedings that led to the imposition of judgment and sentence in a criminal case.'" *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Wilkins v. State*, 393 Md. 269, 273 (2006)). We review *de novo* a circuit court's ruling on a motion to correct an illegal sentence. *Bratt v. State*, 468 Md. 481, 494 (2020).

The Contentions

Failure to Hold a Rule 4-345(a) Hearing.

Mr. Cummings first asserts that circuit court erred in denying his motion without holding a hearing. A hearing, however, was not required and, therefore, we hold that the court did not err in ruling without holding a hearing. *Scott v. State*, 379 Md. 170, 191 (2004) (Rule 4-345(a) "does not require a hearing in open court.").

Defective Indictment/Double Jeopardy.

Next, as he did in his motion before the circuit court, Mr. Cummings asserts that his sentence is illegal because he was "punished twice for a crime he was officially charged for once[.]" He points out that Counts 2 and 3 both charged him with first-degree sex offense of the same victim, but neither count specified "which variety of first-degree sex offense Mr. Cummings was being accused of violating." Relying on *State v. Boozer*, 304 Md. 98 (1985), he maintains that he could not have been convicted and sentenced for both counts of first-degree sex offense and, accordingly, claims that the sentence for Count 3 is illegal and must be vacated.

The State responds, first, that "this is an issue with the charging document, not with Cummings's sentence" and that he waived "any challenge to a defect in the charging document for multiplicitous charges" when he failed to raise the issue in a timely-filed pretrial motion. *See* Rule 4-252(a)(2). But in any event, the State maintains that Mr. Cummings is wrong because "charging and punishing a defendant for multiple criminal acts under the same degree of sexual offense is permissible" and, here, the convictions for first-degree sex offense were based on distinct acts against the victim. Citing the trial transcript, the jury instructions, the verdict sheet, and the sentencing transcript, the State asserts that "Count 2 was first-degree sexual offense for the cunnilingus Cummings performed on the victim" and "Count 3 was first-degree sexual offense for Cummings forcing the victim to perform fellatio on him."[1]

Mr. Cummings was charged with two counts of first-degree sexual offense using the "short form" indictment, as permitted by Article 27, § 461C (1987 Repl. Vol. of the Md. Code) (now codified as § 3-317 of the Criminal Law Article of the Md. Code). That provision provided:

> (a) In any indictment, information, or warrant charging rape or a sexual offense, it shall be sufficient to use a form substantially to the following effect: "That A-B on the . . . day of . . . . . 19 . . , in the County (City) aforesaid did unlawfully commit a rape or sexual offense upon C-D, in violation of Article 27, Section (here state section violated), of the Annotated Code of Maryland, contrary to the

[1] In our decision affirming the convictions on direct appeal, we noted that the "intruder forced [the victim] to perform fellatio, then, against her will, he performed cunnilingus and had vaginal intercourse with her three times." *Slip* op. at 2. In that appeal, we rejected Mr. Cummings's argument that "the evidence was insufficient to prove the elements necessary to convict him for either first degree rape or the first degree sexual offenses." *Id.* at 9-12.

> form of the Act of Assembly in such case made and provided and against the peace, government and dignity of the State."
>
> (b) In any case in which this general form of indictment, information, or warrant is used to charge a rape or a sexual offense, the defendant is entitled to a bill of particulars specifically setting forth the allegations against him.

Here, counts 2 and 3, using identical language, charged that Mr. Cummings "on or about the 8th day of October, nineteen hundred and ninety-nine, at Prince George's County, aforesaid, did commit a sexual offense upon [D.W.], in violation of Article 27, Section 464 of the Annotated Code of Maryland . . . . (First degree sex offense)". Mr. Cummings is correct that neither count specified the specific sexual conduct on which the charge was based. But he does not claim that he sought a bill of particulars, as he could have pursuant to Article 27, § 461C(b). Rather, he seizes on language in *Boozer, supra,* for the general proposition that when the State elects to use the short-form indictment when charging a sexual offense, it "limits the State to a single conviction and punishment for conduct within the section specified, even though more than one offense embraced by that section may have been committed." 304 Md. at 112.

In *Boozer,* the issue before the Court of Appeals was

> whether a defendant once placed in jeopardy on a charge of committing a fourth degree sexual offense may be subjected to a second prosecution for attempted fourth degree sexual offense when both charges arose out of the same criminal conduct but the State alleged separate acts by the defendant in each charging document.

304 Md. at 99.

The defendant in *Boozer* was charged with engaging in a "sexual act" with an underage victim in violation of Article 27, § 464C, which prohibited the commission of a

fourth-degree sexual offense that could be accomplished in several ways. *Id.* at 100. The State later *nol prossed* the charge, for reasons not relevant here, and filed a new statement of charges alleging that the defendant had attempted to commit a fourth-degree sexual offense by attempting to have vaginal intercourse with the victim. *Id.* at 100-01. The defendant argued that the State could not bring more than "one charge of sexual offense in the fourth degree as a result of a single criminal transaction" and moved to dismiss the new charge as violative of double jeopardy protections. *Id.* at 101. The trial court agreed and granted the motion. *Id.* The Court of Appeals reversed. The Court noted that the separate charges were authorized by Article 27, § 464C and under the facts of the case it was "constitutionally permissible to charge" the defendant with separate offenses under the same statute. *Id.* at 102. The Court further noted that the various sexual acts constituting a fourth-degree sexual offense "historically and customarily have been considered sufficiently separate and distinct from each other to justify separate punishment, even though occurring in close temporal proximity and within the same criminal episode." *Id.* at 104.

Relevant here, the Court in *Boozer* discussed the use of the short-form indictment in charging a sexual offense that may be committed in various ways. *Id.* at 111-13. As Mr. Cummings notes, the Court stated that when the State elects to use the short-form indictment when charging a sexual offense, it "limits the State to a single conviction and punishment for conduct within the section specified, even though more than one offense embraced by that section may have been committed." 304 Md. at 112. The Court continued:

> Because the effect of the use of the short form is to conjunctively charge every crime embraced by the specified section, *the State could not charge a violation of the same section against a defendant once placed in jeopardy for an offense charged by the short form*. In a case involving two or more criminal acts that have been classified within the same degree of sexual offense (*e.g.*, sequential acts of nonconsensual cunnilingus, fellatio, anal intercourse, and penetration of the vagina by an object, all occurring during the same criminal episode) the State must elect whether to charge each offense separately and specifically, or whether to use the short form. *If separate charges are brought there may be separate convictions and punishment, but if the short form is used and a particular offense is not specified there may be but one conviction and punishment for those offenses.* As a further protection to the defendant charged by the short form the Legislature has established the right to a bill of particulars as a matter of law. Art. 27, § 461B(b).

Id. at 112-13 (emphasis added; footnote omitted).

It appears that the position of Mr. Cummings is that, because the State used the short-form indictment to charge him with the sexual offenses in the first degree and did not specifically characterize the act, under *Boozer*, he could only be convicted of one first-degree sexual offense. If Mr. Cummings had been indicted with a single count of first-degree sexual offense, his argument would be persuasive. But he was charged with two counts of first-degree sexual offense in the same indictment and was convicted of first-degree sexual offense based on cunnilingus (count 2) and first-degree sexual offense based on fellatio (count 3). As the Court of Appeals noted in *Boozer*, various sexual acts "historically and customarily have been considered sufficiently separate and distinct from each other to justify separate punishment, even though occurring in close proximity and within the same criminal episode." 304 Md. at 104.

Moreover, because Mr. Cummings failed to challenge the sufficiency of the indictment in the trial court, he waived any challenge to the indictment, other than a

challenge based on jurisdictional grounds. Rule 4-252(a)(2)&(b) (As a general matter, a defendant must raise "[a] defect in the charging document" by filing a motion in the circuit court "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court."). *See also Shannon v. State*, 468 Md. 322, 328 (2020) (A defect in the charging document is waived if not timely challenged pursuant to Rule 4-252, unless the alleged defect deprives the trial court of jurisdiction to render a judgment of conviction.). Given that Mr. Cummings was charged with two counts of first-degree sexual offense in the same indictment, we perceive no jurisdictional issue here.

Failure to Announce & Award Pre-Trial Credit

Mr. Cummings also asserts that his sentence is illegal because he claims that the sentencing court failed to award him the proper credit for time served pre-trial. He appears to be complaining that the court shorted him one day of credit by running his sentence from October 20, 1999 instead of October 19, 1999, the day he was arrested. The State responds that a Rule 4-345(a) motion to correct an illegal sentence is not the proper vehicle for challenging a credit issue. We agree with the State. *See Bratt, supra*, 468 Md. at 508.

Mr. Cummings further asserts that the sentencing court failed to announce in open court the amount of credit he was awarded. Even if true, that would not render his sentence inherently illegal because, if error, it was procedural in nature. *State v. Wilkins*, 393 Md. 269, 273 (2006) ("'[A] sentence, proper on its face,'" does not become an *illegal* sentence "'because of some arguable procedural flaw in the sentencing procedure.'") (quoting *Corcoran v. State*, 67 Md. App. 252, 255 (1986)).

Amendment of Charging Document

Finally, Mr. Cummings maintains that his sentence is illegal because the State amended the charging document during trial to reflect that the crimes occurred in 2000, when in fact they occurred in 1999 and, therefore, he maintains that the court "lost jurisdiction because no crimes occurred in 2000." The State responds that Mr. Cummings is factually incorrect and points to the trial transcript which reflects that, at the conclusion of the evidence, the defense renewed its motion for judgment of acquittal and argued that the indictment stated that the crimes occurred "on or about October 8, 1999" but the State's evidence was that the crimes took place on October 18, 1999. The prosecutor claimed that it was a scrivener's error and moved to "amend all counts in the indictment to remove the 8th of October and to change the date from the 8th to the 18th of October." The motion was granted. Having reviewed the transcript, we agree with the State that the indictment was amended to reflect that the crimes occurred on or about October 18, 1999.

In sum, because Mr. Cummings did not establish that his sentences are inherently illegal, the circuit court did not err in denying his Rule 4-345(a) motion and in doing so without holding a hearing.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.