

Circuit Court for Baltimore City
Case No: 106209002

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2639

September Term, 2019

DAVID HOFF

v.

STATE OF MARYLAND

Fader, C.J.,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 1, 2021

*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.

David Hoff, appellant, appeals the denial of a motion to correct an illegal sentence which he had filed in the Circuit Court for Baltimore City. In the motion, he had alleged that, upon finding that he had violated his probation, the court erred in ordering him to serve his previously suspended time consecutively to any outstanding sentence because to do so violated the terms of his 2007 plea agreement. For the reasons to be discussed, we shall remand the case, without affirmance or reversal, for further proceedings.

BACKGROUND

In 2007, pursuant to a plea agreement with the State, Mr. Hoff pled guilty to robbery with a deadly weapon (case no. 206153028) and solicitation to commit murder (case no. 106209002). As for sentencing, defense counsel informed the court that the parties had agreed to a “10-year sentence from his incarceration date” for the robbery with a dangerous weapon and to “a 30-year sentence with the first 10 concurrent (inaudible), the balance suspended, three years’ probation” for the solicitation to commit murder. When examining Mr. Hoff before the court accepted the plea, defense counsel asked him: “You understand what we’ve done is asked that the judge and the State give you a 30-year sentence for everything, that all but (inaudible) 10 years will be suspended from the day you were locked up; do you understand that?” Mr. Hoff replied in the affirmative.¹

Later in the proceeding, the court reiterated the terms of the agreement:

[U]nder case number 206153028, Mr. Hoff is going to be pleading guilty to Count 1, robbery with a dangerous or deadly weapon. He will receive a 10-year sentence on that case. Under case number 106209002 he will plead guilty to Count 1, solicitation for murder. He will receive 30 years. I will

¹ When asked whether he remembered the date he was “locked up,” Mr. Hoff said April 11, 2006. No one disputed that answer.

suspend all but 10 years. That will run concurrent to the first case. Upon his release, he will be on three years' supervised probation[.]

The court accepted the plea and sentenced Mr. Hoff, in accordance with the sentencing terms of the agreement, to 10 years for the robbery offense and to 30 years' imprisonment for the solicitation offense, with all but 10 years suspended, to run concurrently with the robbery sentence. The solicitation sentence also included a three-year term of supervised probation upon release from prison.

Mr. Hoff was released from prison in November 2012 and at some point thereafter he was permitted to move to Colorado and his probation was supervised there. In 2014, the State moved to revoke his probation on the grounds that he had violated several conditions of his probation, including “failing to report [to his probation agent] as directed” on March 12, 2014; failing to provide employment verification; and moving his residence without providing the agent with a current address. At a violation of probation hearing held on November 10, 2014, Mr. Hoff “admitted” that he had violated his probation. After examining Mr. Hoff on the record, the court accepted his “admission as a free and voluntary admission and a knowing and intelligent admission.” The State then proffered the following in support of the violation of probation:

Mr. Hoff was released from incarceration on November 19th of 2012. Probation was set to expire on November 19th of 2015. Probation was transferred to Colorado through the Interstate Compact and Mr. Hoff was reporting in Colorado. He subsequently failed to report as directed on March 12 of 2014 or anytime thereafter.

He subsequently was apprehended in the State of Hawaii after he was charged with the new offense in Colorado, thereby violating Rule 3.^[2] That is, he moved from [his Colorado address] without providing [the] agent with his current address, and traveled outside the state of Colorado. All these events happened during the probation period and that would be the State’s case.

After the defense informed the court that it had no “additions, deletions, or modifications,” the court announced that it was “convinced by [a] preponderance of the evidence” that Mr. Hoff had violated his probation “by failing to report March 12, 2014 or anytime thereafter” and “by leaving the state of Colorado . . . without providing his agent with his current address and travel[ing] to Hawaii without permission.”

The State urged the court to impose the full 20 years that had been previously suspended and asked that “any sentence be consecutive.” The State claimed that Mr. Hoff was “pending a parole violation” and that “[i]f the court were not to mention those words of ‘consecutive,’ any parole violation would automatically be concurrent. But by saying ‘consecutive’ the parole then would have to be consecutive to any sentence that this Court would [impose].”³ The State further noted that Mr. Hoff would be returning at some point to Colorado “to face the serious charges that he is facing there”; that the solicitation to

² “Rule 3” is a standard condition of probation requiring the probationer to “get permission from your supervising agent before changing your home address, changing your job, and/or leaving the State of Maryland.” The Supervision Summary, and other documents associated with the violation of probation, are not in the limited record before us, but Mr. Hoff included one page from the Supervision Summary in the appendix to his brief. The record does include the transcript from the November 10, 2014 violation of probation hearing.

³ The prosecutor did not cite any authority for his proposition, and the defense did not respond it.

commit murder in this case was “an extremely serious matter”; and that Mr. Hoff has an “extensive record.” Finally, the State urged the court to consider Mr. Hoff’s “behavior while on probation and his absconding then from the State.”

Defense counsel asserted that “up until this absconding [Mr. Hoff] was doing what he was supposed to on probation,” and claimed that between his release in 2012 and the Hawaii incident in 2014 “the only allegations that we have is that he failed to report after 3/12/14. Prior to that he was reporting.”

The court announced its disposition: “20 years to the Department of Corrections.” And the judge stated that it “is to be consecutive to any sentence you are serving or will be serving that I can make this consecutive to.”⁴ Mr. Hoff did not seek leave to appeal.

Five years later, Mr. Hoff, representing himself, filed a Rule 4-345(a) motion to correct an illegal sentence. He asserted that the only sentence he was serving when the court revoked his probation was “for the violation of parole” of the robbery with a deadly weapon sentence. Because the 2007 plea agreement had provided that the sentences for solicitation of murder and robbery with a deadly weapon would run concurrently, Mr. Hoff asserted that the court, in 2014, had imposed an illegal sentence when it ordered him to serve the 20 years of suspended time for the solicitation consecutively to any outstanding sentence. He claimed that his parole in the robbery case had been revoked “months prior to his probation hearing” and, thus the prosecutor at the violation of probation hearing had “falsely stated” that he “was not presently serving the sentence for his parole violation”

⁴ The commitment record reflects that the 20 years’ is to run “consecutive to the last sentence to expire of all outstanding and unserved Maryland sentences.”

when in fact he was.” In addition to violating the terms of the 2007 plea agreement, he also maintained that the court had illegally increased his sentence by running the violation of probation sentence consecutive to any outstanding sentence, which could only have been the robbery with a deadly weapon sentence. Finally, Mr. Hoff challenged the validity of the probation violation finding, asserting that he had “only missed a single appointment and never was alleged to be willfully evading supervision.” The circuit court denied the motion, without explanation and without holding a hearing.

DISCUSSION

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 *State v. Wilkins*, 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).

Mr. Hoff asserts that the circuit court erred in denying his motion, erred in failing to address his contentions, and erred in ruling without holding a hearing. We will begin with his contention that the court erred in denying relief.

I.

Mr. Hoff asserts that the court violated the plea agreement in 2014 by running the 20-year sentence consecutive to any outstanding sentence. As he did in the circuit court, he maintains that he was serving the robbery with a dangerous weapon sentence when he was sentenced on the probation violation in the solicitation of murder case. He points out that the 10-year robbery sentence began running in 2006 and, hence would not expire until 2016 and that although he had been released in 2012, he was still serving the sentence “outside the prison walls” when his parole was revoked. Moreover, he claims that his parole had been revoked in the robbery case on June 13, 2014, five months prior to the violation of probation hearing, and he attached a one-page document from the Maryland Parole Commission to support his position. The document does indicate that, following a June 13, 2014 hearing, the Parole Commission revoked his “parole/mandatory supervision release” and ordered his return “to the authority from which” he was released, but it does not indicate a circuit court case number, nor the offense or sentence it concerned. Mr. Hoff asserts that parole revocation “was for both his Sol. to Murder and Armed Robbery cases.”

The State assumes that the robbery sentence had been fully served when the court revoked his probation and ordered Mr. Hoff to serve the 20 years on the solicitation sentence, but the State does not support that assumption with any evidence. The State does point out that the court “made no explicit reference to the 10-year robbery sentence” and

did not explicitly make the “suspended sentence consecutive to that sentence.” Moreover, the State asserts that, upon revocation of probation, the court was free to order the previously suspended time to be served concurrent with or consecutive to any sentence Mr. Hoff was then serving. The State does not address Mr. Hoff’s contention that the violation of probation sentence violated the terms of the 2007 plea agreement, presumably because of its position that the robbery sentence had been fully served.

It is generally true that, upon revocation of probation, a court may order the probationer to serve previously suspended time and run that sentence consecutively to any outstanding sentence. *See DiPietrantonio v. State*, 61 Md. App. 528, 535 (1985) (A court has “the unfettered prerogative to make [a] reinstated sentence of incarceration [upon revocation of probation] either concurrent with or consecutive to” an intervening sentence then in effect.); *Nelson v. State*, 66 Md. App. 304, 311 (1986) (“The law in this State is settled, a previously suspended sentence of incarceration, reimposed following a revocation of probation is not modified upward by a direction from the trial judge that it be served consecutively to an intervening sentence of incarceration then actually being served.” (citing, among others, *Kaylor v. State*, 285 Md. 66 (1979))). The issue here, however, is not whether the court could have ordered Mr. Hoff, upon revocation of his probation, to serve the 20 years consecutive to an intervening sentence then in existence – that is, a sentence imposed *after* the 2007 solicitation sentence but *before* the violation of probation disposition. The court certainly would be authorized to do so. The issue before us is whether, upon revocation of his probation, Mr. Hoff’s solicitation sentence could be

ordered to run consecutively to the 2007 robbery sentence. Based on prior precedent, we conclude that the court was not authorized to do that.

In *Nelson, supra*, this Court addressed whether the circuit court erred when, upon revocation of Mr. Nelson’s probation, it ordered that the execution of previously suspended time (18 months for theft and 30 months for uttering) be served consecutively. 66 Md. App. at 306-07.⁵ We first determined that, when originally imposed, the sentences were run concurrently given the sentencing court’s failure to indicate one way or the other. *Id.* at 314. Then, relying on “settled” law, we noted that, “when probation is revoked and the suspension of a previously imposed sentence is stricken, then that sentence goes into effect exactly as it was originally imposed.” *Id.* at 310 (quotation marks and citation omitted). And, therefore, the sentence “may not be modified upward, which occurs when a concurrent sentence is made consecutive.” *Id.* at 310-11 (citations omitted). Accordingly, we vacated the sentences and remanded for resentencing. *Id.* at 314-15.

In *Moulden v. State*, 212 Md. App. 331 (2013), the parties had agreed, that in exchange for the defendant’s plea to robbery in one case and to another count of robbery in a second case, “that any sentence both active and suspended [in the two cases] will be run concurrent to each other.” *Id.* at 347. After accepting the plea, the court sentenced the defendant to 15 years’ imprisonment, with five years suspended, in one case and to 15

⁵ Mr. Nelson raised the issue in a direct appeal from the probation revocation proceeding. The State argued that he had failed to preserve the issue for appellate review. We disagreed and citing *Walczak v. State*, 302 Md. 422 (1985), noted that “an objection below is not required to preserve an appellant’s right to challenge an illegal sentence.” 66 Md. App. at 311-12 n. 4.

years’ imprisonment, all suspended, in the second case. *Id.* at 347-48. After announcing the sentences, the court stated that, “in the event of a violation of probation,” the 15 suspended years would be “served consecutive” to the five years suspended in the other case. *Id.* at 348. The court further commented: “So, essentially, there is an additional 20 years that will be potential incarceration if [the defendant] were to violate probation.” *Id.* The docket entries also reflected that “consecutive” sentences would be imposed upon a violation of probation. *Id.* at n. 6. On appeal, the defendant asserted that the court had imposed an illegal sentence because running the sentences consecutively upon a probation revocation violated the terms of the plea agreement. *Id.* We noted that the State did not dispute that the plea agreement had called for concurrent sentences, and we acknowledged that the sentencing court “did not actually impose a consecutive sentence[.]” *Id.* at 349. We then stated that,

were [consecutive sentences] to be imposed – as indicated it would be in the event of a violation of probation - that sentence would be in violation of the plea agreement. Neither § 6-224(b) of the Criminal Procedure Article^[6] nor the plea agreement itself authorizes a change in the sentence from concurrent to consecutive upon [the defendant’s] failure to abide by the terms of his probation.

Id. at 349. We concluded, therefore, that “that aspect of the sentence must be vacated.” *Id.*

Here, in 2014, the court revoked Mr. Hoff’s probation and ordered him to serve the previously suspended 20 years and ran that time consecutively to “all outstanding and

⁶ Section 6-224(b) of the Criminal Procedure Article provides that, upon violation of probation, the court “may sentence the defendant to: (i) all or any part of the period of imprisonment imposed in the original sentence; or (ii) any sentence allowed by law, if a sentence was not imposed before[.]”

unserved Maryland sentences.” If Mr. Hoff is correct that he was still serving the 2007 robbery with a dangerous weapon sentence when he was ordered to serve the 20 years on the solicitation sentence, running the 20-year term consecutive to the robbery sentence would constitute an illegality in the solicitation sentence given that the two sentences were originally ordered to run concurrent with each other. Because we cannot say for certain given the limited record before us that Mr. Hoff, in fact, was serving the 2007 robbery when his probation was revoked in the solicitation case, we shall remand this case for further proceedings and, if necessary, an amendment to the commitment record to reflect that the 2014 solicitation sentence runs concurrently with the 2007 robbery sentence.

II.

Mr. Hoff also challenges the court’s finding that he had violated conditions of his probation and notes that the “statement of charges” alleged that he had failed to report on a single date, March 12, 2014, but the court found that he had failed to report on that date and “anytime thereafter.” He also asserts that he had understood that he was admitting to “the technical violation of missing a single appointment and not providing a current address.”

The State responds that this issue is not cognizable in a Rule 4-345(a) motion to correct an illegal sentence. We agree with the State. Any challenge to the court’s finding that Mr. Hoff had violated his probation or to the sufficiency of the charging document should have been raised in a timely filed application for leave to appeal. A Rule 4-345(a)

motion is not a substitute means of obtaining belated appellate review of the proceedings that led to the imposition of the judgment in this case. *Colvin, supra*, 450 Md. at 725.⁷

III.

Finally, Mr. Hoff asserts that he was “denied due process of law” when the circuit court denied his Rule 4-345(a) motion without a hearing and without addressing the issues he had raised. The State responds that the circuit court was not required to do either.

We agree with the State that Rule 4-345(a) requires neither a hearing nor a written memorandum or explanation when the court denies a motion to correct an illegal sentence. Given our disposition in this case, we need not address whether, in this instance, the court should have held a hearing or explicitly addressed Mr. Hoff’s contentions.

CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY, WITHOUT AFFIRMANCE OR REVERSAL, FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT BETWEEN APPELLANT AND THE MAYOR AND CITY COUNCIL OF BALTIMORE.

⁷ Mr. Hoff’s claim that his violations were only “technical” in nature may also be misplaced. Although violations of probation are presently characterized as “technical” (carrying a significantly lesser penalty for a first violation) and “non-technical,” that distinction became meaningful only upon the enactment of the Justice Reinvestment Act, which became effective October 1, 2017 - several years after the court revoked Mr. Hoff’s probation.