UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 152

September Term, 2013

JERMAINE A. MORRIS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: February 3, 2015

The Circuit Court for Washington County denied a motion to correct illegal sentence filed by Jermaine A. Morris, the appellant. He challenges that decision on appeal. The State has moved to dismiss the appeal. We shall deny the motion to dismiss and affirm the court's order.

FACTS AND PROCEEDINGS

On May 14, 2009, a jury found the appellant guilty of distribution of cocaine, conspiracy to distribute cocaine, and cocaine possession. The court ordered a "pre-sentence investigation."

On May 28, 2009, the State filed a "Subsequent Offender Notice," which stated in pertinent part:

> **NOTICE OF 40 YEAR MANDATORY SENTENCE FOR FOURTH OFFENSE**
>
> The [appellant] is . . . advised and put on notice that pursuant to Md. [Code (2002, 2008 Supp.),] § 5-608(d) [of the Criminal Law Article ("CL")],[1] that:

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[1]CL § 5-608(d) states:

> *Fourth time offender.* – (1) A person who is convicted under subsection (a) of this section . . . shall be sentenced to imprisonment for not less than 40 years . . . if the person previously has served three or more separate terms of confinement as a result of three or more separate convictions:
>
> (i) under subsection (a) of this section . . . ;
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> (ii) of conspiracy to commit a crime included in subsection (a) of this section . . . ;
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> (iii) of a crime under the laws of another state or the

(continued...)

a. on or about October 20, 1998, the [appellant] was convicted in the Circuit Court [for] Washington County, Maryland in Criminal Case # 22929 of Possession with Intent to Distribute Cocaine; and

b. on or about November 17, 1989, the [appellant] was convicted in the Supreme Court of the State of New York, Queens County, in Case # N12143-88 of Criminal Sale of a Controlled Substance 3rd Degree PL [in violation of N.Y. Penal Law § 220.39;[2] and

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[1](...continued)

United States that would be a crime included in subsection (a) of this section . . . if committed in this State; or

(iv) of any combination of these crimes.

(2) The court may not suspend any part of the mandatory minimum sentence of 40 years.

(3) Except as provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole during the mandatory minimum sentence.

CL § 5-608(a) states:

In general. – Except as otherwise provided in this section, a person who violates a provision of §§ 5-602 through 5-606 of this subtitle with respect to a Schedule I or Schedule II narcotic drug is guilty of a felony and on conviction is subject to imprisonment not exceeding 20 years or a fine not exceeding $25,000 or both.

[2]N.Y. Penal Law § 220.39 states:

Criminal sale of a controlled substance in the third degree

A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells:

(continued...)

c. on or about November 17, 1989, the [appellant] was convicted in the Supreme Court of the State of New York, Queens County, in Case # N12585-88 of Criminal Sale of a Controlled Substance 3rd Degree PL; and

d. on or about April 27, 1994, the [appellant] was convicted in the Supreme Court of the State of New York, Queens County, in Case # N13128-93 of Criminal Sale of a Controlled Substance 5th Degree PL (Cocaine) [in violation of N.Y. Penal Law § 220.31;[3] and

e. on or about April 27, 1994, the [appellant] was convicted in the Supreme Court of the State of New York, Queens County, in Case # N-12633-92 of Criminal Sale of a Controlled Substance 5th Degree PL (Cocaine),

and, consequently, is subject to a mandatory sentence of not less then [sic] forty (40) years imprisonment no portion of which may be suspended.

The State attached to the Subsequent Offender Notice a "Certificate of Disposition Indictment" of the Supreme Court of the State of New York for Queens County for each of

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[2](...continued)

1. a narcotic drug . . . .

* * *

Criminal sale of a controlled substance in the third degree is a class B felony.

[3]N.Y. Penal Law § 220.31 states:

Criminal sale of a controlled substance in the fifth degree

A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance.

Criminal sale of a controlled substance in the fifth degree is a class D felony.

the New York convictions listed in the Notice. In each Certificate, the Clerk of that Court "certif[ied] that it appears from an examination of the records on file in [her] office that" the appellant was convicted of the aforementioned offenses. (Capitalization omitted.) Also, the Certificate for the conviction in Case # N12143-88 reflects a date of arrest of October 13, 1988, and the Certificate for the conviction in Case # N12585-88 reflects a date of arrest of November 16, 1988.

On July 23, 2009, the Division of Parole and Probation submitted to the court a "Pre-sentence Investigation" report, which states in pertinent part:

- The appellant's date of birth is February 18, 1972.
- The appellant's race is African-American.
- The appellant served a term of imprisonment following each of the convictions listed in the Subsequent Offender Notice.
- The appellant's 1989 convictions were for the sale of cocaine.

The sentencing hearing took place on August 18, 2009. Defense counsel asked the court to disregard the 1989 convictions on the ground that the State had failed to prove that the appellant "was not in fact charged as a juvenile, that he was in fact charged as an adult on both counts for both events." Following allocution, the court found "beyond a reasonable doubt" that the appellant was "the person that was sentenced in" the cases listed in the Subsequent Offender Notice, and that the appellant was "sentenced as a result of three separate convictions and treated as an adult in the cases." The court then "sentence[d the appellant] for distribution of cocaine as mandated by the statute . . . to forty (40) years in the

Division of Corrections," to "be served without parole except as provided by Section 4-305 of the Correctional Services Article." (Italics omitted.) The court merged the remaining convictions for sentencing.

In January of 2012, the appellant filed a Petition for Post Conviction Relief. His counsel in that case filed a supplement to the Petition, in which she argued that the appellant's "enhanced sentence is illegal . . . because the State did not prove that [the appellant] served the requisite incarcerations on the predicate offenses which were not committed in Maryland." Following a hearing, the court filed a "Statement of Reasons and Order" denying the Petition.

In October of 2012, the appellant filed the motion to correct illegal sentence that is the subject of this appeal. In support, he argued that his sentence "is illegal because the State offered no proof of requisite incarcerations for [the] predicate offenses committed in the State of New York." Following a hearing, the court filed a memorandum opinion and order denying the motion. The appellant noted this appeal.

MOTION TO DISMISS

The State has moved to dismiss this appeal on three grounds. We do not find merit in any of them, and shall deny the motion to dismiss.

The State first contends the appeal "is not allowed by law" because the appellant's "claim, even if true, does not make his enhanced sentence illegal, and . . . he failed to raise the sufficiency of the evidence to support the enhanced sentence before the sentencing

court." We have made clear, however, that "an enhanced penalty imposed improperly is an illegal sentence," and "a claim of an illegal sentence should ordinarily be reviewed . . . even if no objection was made in the trial court." *Nelson v. State*, 187 Md. App. 1, 11 (2009) (internal citations and quotations omitted). "Thus, a defendant who fails to object to the imposition of an illegal sentence does not waive forever his right to challenge that sentence." *Id.* (internal citation and quotations omitted).

Second, the State contends this appeal must be dismissed under the holding in *Bryant v. State*, 436 Md. 653 (2014). Bryant "was convicted of distribution of cocaine and conspiracy to distribute cocaine." *Id.* at 656-57. "Pursuant to [CL] § 5-608(c),[4] the State filed a notice of intent to seek a mandatory, enhanced sentence of 25 years without the possibility of parole based on [Bryant's] alleged prior drug convictions." *Id.* at 657. "At sentencing, in order to prove the qualifying prior convictions, the State submitted certified copies of docket entries involving two separate cases." *Id.* The sentencing judge found that "Bryant has been convicted twice previously under the requisite statute and . . . was incarcerated at least one term of confinement . . . longer than 180 days in a correctional institution." *Id.* at 658 (quotations omitted). On that basis, the sentencing judge "imposed

[4] CL § 5-608(c) requires imprisonment for not less than 25 years without the possibility of parole for a person who is convicted under CL § 5-608(a) and previously "has served at least one term of confinement of at least 180 days in a correctional institution as a result of a conviction" under CL § 5-608(a) and "has been convicted twice" under CL § 5-608(a).

a mandatory, enhanced sentence of 25 years without the possibility of parole for each offense, to be served concurrently." *Id.*

Bryant appealed to this Court. We held that the sentencing court had properly imposed one subsequent offender sentence, but had erred by imposing two. Bryant applied for a *writ of certiorari*, which was granted. In the Court of Appeals, he argued that the enhanced sentence was illegal because "the State failed to prove that the predicate convictions belonged to" him. *Id.* at 656, 659. The State countered that Bryant had "waived any challenge to the imposition of his sentence because he failed to object during the sentencing proceeding." *Id.* at 659. Affirming the judgment of this Court, the Court 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. . . . Accordingly, our inquiry in this case is whether [Bryant's] sentence itself is inherently illegal.

* * *

> [I]n the instant matter, the two underlying convictions did satisfy the requirements of the enhanced sentencing statute. At issue here is not whether there existed the necessary predicate convictions to meet the statutory requirements for an enhanced sentence. The issue is whether there was sufficient evidence of [Bryant's] identity to prove beyond a reasonable doubt that the predicate convictions are connected to [Bryant], where there was some discrepancy in the record as to [Bryant's] birth date and incarceration dates.
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> . . . [Bryant's] complaint relates to the sufficiency of the evidence. . . . [T]he challenge here is to an alleged procedural flaw, subject to the normal preservation rules. Thus, we conclude that there is no "inherent illegality" within the meaning of Rule 4-345(a).
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> . . . Therefore, [Bryant's] complaint is not properly before this Court.

Id. at 662-66 (internal citations, quotations, and footnote omitted).

Here, unlike in *Bryant*, the appellant is arguing that the proof offered at sentencing was insufficient to establish that there were predicate convictions that satisfied the requirements of the enhanced sentencing statute. The issue is not whether there was sufficient evidence of the appellant's identity to prove beyond a reasonable doubt that the predicate convictions are connected to him, but whether the predicate convictions necessary to meet the statutory requirements for an enhanced sentence existed. Hence, the holding in *Bryant* is inapposite.

Finally, the State argues that the appellant "has not provided a proper and complete record for review by this Court," because he "failed to provide" transcripts of the hearings on the motion to correct illegal sentence and the petition for post-conviction relief. The record contains the transcript of the sentencing hearing, the court's opinion denying the

motion to correct illegal sentence, and the court's opinion denying post-conviction relief. This information is sufficient to enable us to review the question presented. Hence, we deny the State's motion to dismiss.

DISCUSSION

The appellant advances several arguments to support his contention that the court erred in denying his motion to correct illegal sentence. None of them have merit.

First, the appellant argues that his 1989 convictions were not qualified predicates for the enhanced sentence because they were "juvenile offenses." The State counters that "the sentencing court . . . properly concluded that [the appellant] was tried as an adult for the New York conviction[s]." (Italics omitted.) We agree with the State. In New York, a person who is 16 years old or older is criminally responsible for his conduct. *See* N.Y. Penal Law § 30.00 (except in rare circumstances, "a person less than sixteen years old is not criminally responsible for conduct"). The appellant was 16 years old at the time of his arrests for the offenses of which he was convicted in 1989. Accordingly, he was convicted as an adult in those criminal cases.

The appellant next argues that the "New York convictions were not proven to the point of being validly considered enough to enhance [his] sentence to . . . forty (40) years," because "[t]here was no representative or professional to testify as to the records" and "no proof of the time actually served in prison or home detention." The State counters that this

argument "is not preserved," or, in the alternative, "[t]he evidence was sufficient to support the enhanced penalty." (Italics omitted.)

The issue is properly before us for the reason discussed in our denial of the motion to dismiss. We agree with the State that the evidence supported the application of the enhanced penalty. "[A] presentence investigation report given to the defendant's attorney at [a sentencing] hearing is competent evidence sufficient to prove the factual predicate in order to impose enhanced punishment, provided counsel does not object to the accuracy of the record." *Sutton v. State*, 128 Md. App. 308, 328-29 (1999) (citations and quotations omitted). Here, defense counsel received the pre-sentence investigation report, and challenged only whether the appellant had been charged as an adult for the offenses of which he was convicted in 1989. The otherwise unchallenged report was sufficient to sustain the State's burden of proving the New York convictions beyond a reasonable doubt.

Moreover, the Certificates of Disposition Indictments also were sufficient to prove the New York convictions beyond a reasonable doubt. "[U]nless the issue of the constitutional invalidity of a prior conviction is generated by the defendant, on the face of the documents offered to prove the conviction, or by the circumstances," a "certified record is sufficient to permit the trial judge to find beyond a reasonable doubt the predicate convictions mandated by" statute. *Middleton v. State*, 67 Md. App. 159, 178 (1986), *overruled on other grounds by Fairbanks v. State*, 331 Md. 482 (1993). Here, the "Disposition Indictments" submitted by the Supreme Court of the State of New York for

Queens County were certified, and the appellant did not generate an issue of the constitutional invalidity of the convictions as to the offenses or terms of imprisonment. The Certificates were sufficient to permit the sentencing judge to find the convictions beyond a reasonable doubt.

The appellant next argues that, because the 1989 New York convictions "did not . . . show drug crimes . . . , just controlled substance crimes," and the 1994 New York convictions of a "fifth degree" offense do not have a Maryland equivalent, the evidence was legally insufficient to show that the New York convictions "would be . . . crime[s] . . . if committed in" Maryland. CL § 5-608(d). The State responds that "[t]he New York convictions were for the sale of cocaine, which if committed in the State of Maryland, are [sic] illegal." (Quotations omitted.) Again, we agree with the State.

The presentence investigation report stated that the appellant's 1989 convictions were for the sale of cocaine, a Schedule II narcotic drug, the sale of which is prohibited in Maryland. *See* CL §§ 5-101(r) (classifying "a compound, manufactured substance, salt, derivative, or preparation of . . . coca leaf" as a "narcotic drug") and 5-403(b)(3)(iv) (classifying cocaine as a Schedule II controlled dangerous substance). Also, the Certificates of Disposition Indictments for the 1994 convictions state that the appellant was again convicted of the sale of cocaine. Accordingly, the evidence was legally sufficient to show that the New York convictions were for acts that would be crimes if committed in Maryland.

Next, the appellant argues that "making [his] first introduction to enhanced penalties the harshest is contrary to the very legislative intent of enhanced penalties." *Nelson*, *supra*, is instructive. Nelson was convicted of "possession of cocaine with intent to distribute and simple possession." 187 Md. App. at 3. He "was sentenced . . . to an enhanced penalty of 25 years without parole, pursuant to Article 27, § 286(d)," the predecessor statute to CL § 5-608(c). *Id.* at 2-3 (footnote omitted). Nelson subsequently filed a motion to correct illegal sentence, in which he "contend[ed] . . . that he was illegally sentenced as a three-time felony drug offender, because he had never been sentenced as a second-time offender under Article 27, § 286(c)," the predecessor statute to CL § 5-608(b).[5] *Id.* at 3. The court denied the motion.

On appeal, Nelson argued that "the 25-year sentencing enhancement under § 286(d) is reserved only for repeat drug offenders who were previously sentenced, as second offenders, to the 10-year, no parole enhancement under § 286(c)." *Id.* at 3 (footnote omitted). Rejecting this argument, this Court affirmed the judgment, stating:

> If the Legislature had intended to make a 10-year sentencing enhancement a prerequisite for the 25-year enhancement, it would have expressly required a previous term of confinement of 10 years (or something close to it), rather than a mere 180 days which is significantly less.
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> . . . Moreover, when we look to the statutory scheme as a whole, as well as its purpose, we are satisfied that [Nelson] was clearly afforded the opportunity

[5]CL § 5-608(b) mandates a prison sentence of not less than 10 years without the possibility of parole for a person "who is convicted under" CL § 5-608(a) and previously "has been convicted once" under CL § 5-608(a).

> to reform that the Legislature intended, and which the Court of Appeals has recognized as integral to the statutory scheme.
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> * * *
>
> When [Nelson] committed the underlying crime, it was at least his third offense, and it occurred after he had served the requisite period of incarceration. Sentencing [Nelson] as the third-time offender that he is fulfills the Legislature's intent of punishing more harshly recidivist felony drug offenders.

Id. at 23-24.

Likewise, if the General Assembly had intended to make a 10-year or 25-year sentence enhancement a prerequisite to a 40-year sentence enhancement, it would have expressly required a previous term of confinement of 10 or 25 years. It did not do so. The appellant was afforded the opportunity to reform that the legislature intended, and that the Court of Appeals has recognized as integral to the statutory scheme. Sentencing the appellant as a fourth-time offender fulfilled the legislature's intent to punish more harshly recidivist felony drug offenders.

The appellant also argues under *Taylor v. State*, 175 Md. App. 153 (2007), he was not advised, when sentenced for his earlier convictions, that a subsequent conviction could expose him to an enhanced sentence; and therefore the enhanced sentence is illegal.[6] In *Taylor*, we read CL section 5-608 to mean that the legislature intended that a defendant

[6]As the appellant points out, his New York convictions took place before Article 27, section 286, was enacted, and therefore he could not have been advised of the risk of an enhanced sentence for a future conviction.

convicted of a drug crime be advised at the time of sentencing that any future drug crimes would be punished more severely. *Id* at 171 (stating that "the phrase 'if the person previously has been convicted,'" as used in CL § 5-608, "describes persons who continue to offend, despite being advised as a result of an initial conviction that any future drug crimes will be punished more severely").

The appellant misreads *Taylor*. In *Booze v. State*, 140 Md. App. 402 (2001), we held

> that the enhanced penalty provisions of Article 27, § 286[] are applicable without explicit warning of the potential consequences of a subsequent conviction at the time [of conviction]. The enhanced penalty is not a direct consequence of the [conviction] itself, but rather a consequence of the person's future conduct. The prior conviction itself should constitute adequate warning that continuation of the same conduct will potentially result in a more harsh punishment. It is not essential that a defendant have conscious knowledge of a statutory provision because . . . every person is presumed to know the law.

Id. at 411 (citations omitted). Nothing in *Taylor* overruled our *Booze* decision.

Next, the appellant argues that the enhanced sentence is "disproportionately harsh," because he was convicted of selling only "a few small rocks of cocaine." The State counters that the appellant "ignores the plain language and intent of the law." (Italics omitted.)

State v. Stewart, 368 Md. 26 (2002), is instructive. Stewart was convicted of "possession and distribution of crack cocaine." *Id.* at 28. "[T]he State argued that Stewart should be sentenced as a subsequent offender under Article 27, § 286(d)," to 25 years without the possibility of parole. *Id.* "The trial court found that the State proved beyond a reasonable doubt the predicate facts necessary to support the mandatory sentence under §

286(d)." *Id.* But, the court "held that . . . the mandatory sentence . . . was cruel and unusual as applied to . . . Stewart," because he was convicted of "distribution of [only] 3.5 grams of cocaine[.]" *Id.* at 28, 34 (footnote omitted). "The court sentenced Stewart to ten years without parole." *Id.* at 28. "The State noted a timely appeal to" this Court, but the Court of Appeals "granted certiorari on [its] own motion prior to consideration by" this Court. *Id.* at 30 (citation omitted).

In the Court of Appeals, Stewart "argue[d] that his conduct [was] not serious enough to justify the punishment mandated by § 286(d) because he did not possess or distribute a large amount of drugs." *Id.* at 35. Reversing the circuit court's judgment, the Court of Appeals stated:

> [Stewart] has been convicted of distribution of a controlled substance, or possession with intent to distribute, on three separate occasions. He served three and a half years in prison before his most recent conviction. These facts weigh heavily against a finding that the mandatory sentence under § 286(d) is grossly disproportionate to his crime.
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> The Legislature has made it clear that recidivist criminals are to receive harsher punishment than first-time offenders. . . .
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> As his criminal record reflects, [Stewart] has been accorded a fair chance at rehabilitation in the prison system and had not responded.
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> * * *
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> In light of the foregoing, we find that the sentence of twenty-five years without parole is not grossly disproportionate to [Stewart's] crime[.]

Id. at 36-38 (internal citations and quotations omitted).

We reach a similar conclusion here. Like Stewart, the appellant has been accorded a fair chance at rehabilitation in the prison system and has not responded. The legislature has made it clear that criminals like the appellant are to receive harsher punishment than first-time offenders. Hence, the sentence is not grossly disproportionate to the appellant's crime.

Finally, the appellant maintains that a "Caucasian [would not] have received this degree of enhancement." This argument is meritless. When a defendant is convicted under CL section 5-608(a), and the State submits evidence sufficient to show beyond a reasonable doubt that the defendant has served three or more separate terms of confinement as a result of three or more separate convictions under CL section 5-608(a), CL section 5-608(d) ***requires*** the court to sentence the defendant to a term of 40 years' imprisonment without the possibility of parole. The defendant's race is not an issue, and cannot be an issue.

ORDER AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.