UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0699

September Term, 2013

DOMINIC GIVENS

v.

STATE OF MARYLAND

Krauser, C.J.,
Wright,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: September 22, 2015

Appellant Dominic Givens was indicted, in the Circuit Court for Prince George's County, on charges of first-degree murder, robbery, attempted robbery, conspiracy to commit robbery, and various handgun offenses. The jury found Givens guilty of felony murder and of conspiracy to commit robbery, but found him not guilty of any other offenses, including robbery.

About an hour after the jury had returned its verdict and had been discharged, Givens filed a written motion to strike the guilty verdict on the charge of felony murder. He argued that the verdict was legally inconsistent with the jury's decision to acquit him of any statutory felony on which a felony murder conviction can be based. *See* Md. Code (2002, 2012 Repl. Vol., 2015 Supp.), § 2-201(a)(4) of the Criminal Law Article. The circuit court denied the motion, and Givens took a timely appeal.

QUESTION PRESENTED

Givens presents one question on appeal: "Did the trial court err in refusing to strike the verdict for felony murder?" We shall not consider the merits of the appeal because Givens failed to preserve that question when he failed to move to strike the inconsistent verdict before the court discharged the jury. *Price v. State*, 405 Md. 10, 40 (2008) (Harrell, J., concurring) ("a defendant must note his or her objection to allegedly inconsistent verdicts prior to the verdicts['] becoming final and the discharge of the jury"); *Hicks v. State*, 189 Md. App. 112, 129 (2009) ("the issue of possible inconsistencies among the verdicts was not preserved for appeal as the defense did not object to the allegedly inconsistent verdicts at trial"); *Tate v. State*, 182 Md. App. 114,

136-37 (2008) (defendant failed to preserve objection to inconsistent verdicts when he "did nothing by way of objecting to the reception of the verdicts or by way of asking that the jury be sent back to resolve any alleged inconsistency"); *see also McNeal v. State*, 426 Md. 455, 460-61 (2012) (defendant preserved challenge to factually inconsistent verdict by requesting that case be sent back to jury to resolve inconsistency before jury harkened to verdict).

ANALYSIS

Before 2008, the common law of Maryland contained an array of confusing and inconsistent rules and exceptions concerning when a criminal defendant could and could not challenge inconsistent verdicts. *Price v. State*, 405 Md. at 18-22. *Price* changed the common law to create a uniform rule. *Id.* at 29. "[I]nconsistent verdicts," the Court declared, "shall no longer be allowed." *Id.*

In *Price* the Court stated that it would consider appellate challenges to inconsistent verdicts "where the issue was preserved" (*id.* at 29), but did not discuss what Price had done to preserve his objection or what other defendants would have to do. In a concurring opinion, however, Judge Harrell set forth his understanding of what preservation would require.

Judge Harrell began with the premise that "[t]he jury may render a legally inconsistent verdict to show lenity to the defendant." *Id.* at 40 (Harrell, J., concurring). He agreed that "[t]he defendant should not be foreclosed from accepting the jury's

lenity." *Id.* "Nevertheless," he asserted, "we should not permit the defendant to accept the jury's lenity in the trial court, only to seek a windfall reversal on appeal by arguing that the jury's verdicts are inconsistent." *Id.* "Accordingly," he concluded, "a defendant must note his or her objection to allegedly inconsistent verdicts prior to the verdicts[']becoming final and the discharge of the jury." *Id.* "Otherwise, the claim is waived." *Id.*

Judge Harrell explained that, when a defendant does make a timely objection to inconsistent verdicts before the court discharges the jury, "the trial court should instruct or re-instruct the jury on the need for consistency and the range of permissible verdicts." *Id.* at 41-42. "The jurors then should be permitted to resume deliberation." *Id.* at 42. The jury may resolve the inconsistency either in the defendant's favor (by acquitting on both charges), in the State's favor (by convicting on both charges), or in neither side's favor (by deadlocking). *Id.*; *see also McNeal*, 426 Md. at 466.

In summary, under Judge Harrell's concurrence, the defendant must choose between accepting the inconsistent verdicts (and waiving an appellate challenge to them) or challenging the inconsistent verdicts (and risking a worse result). In addition, under the concurrence, the defendant must make that choice before the jury harkens to its verdict and is discharged.[1]

[1] In addition to its statements about preservation and waiver, the *Price* concurrence drew a distinction between "factually" and "legally" inconsistent verdicts. *Price*, 405 Md. at 35-38 (Harrell, J., concurring). "[A] legally inconsistent verdict occurs where a jury acts contrary to a trial judge's proper instructions regarding the law," *id.* at 35, as when the jury finds the defendant guilty of one offense, but not guilty of another offense

(continued...)

Although only two other members of the Court joined that section of Judge Harrell's concurring opinion, this Court has treated that opinion as though it is authoritative on the issue of preservation and waiver. In *Tate*, 182 Md. App. at 138, this Court rejected a challenge to inconsistent verdicts in part because the defendant "was obviously content to stand pat." Similarly, in *Hicks*, 189 Md. App. at 129, this Court declined to consider a challenge to inconsistent verdicts because the defendant did not object at trial. More recently, in *Travis v. State*, 218 Md. App. 410 (2014), this Court undertook an extensive review of the developments since *Price*, including the adoption of the concurrence's precepts concerning preservation and waiver.

Despite this Court's decisions in *Tate*, *Hicks*, and *Travis*, Givens argues that he has preserved his objection because, he says, he did what Price did. To the contrary, it is not entirely clear what Price did or did not do, because neither the majority opinion nor the concurrence discussed that subject. The omission is unsurprising, as the State's briefs in *Price* appear to have made no mention of preservation or waiver. The *Price* majority,

[1] (...continued)
that is an essential element of the other. *Id.* at 37-38. "A factually inconsistent verdict is one where a jury renders 'different verdicts on crimes with distinct elements when there was only one set of proof at a given trial, which makes the verdict illogical.'" *Id.* at 35 (quoting Ashlee Smith, Comment, *Vice-A-Verdict: Legally Inconsistent Jury Verdicts Should Not Stand in Maryland*, 35 U. Balt. L. Rev. 395, 397 n.16 (2006)). A verdict might be illogical" or "factually inconsistent" if, for example, the jury found the defendant guilty of possessing a handgun in the course of drug trafficking, but not guilty of being a felon in possession of a handgun. *Id*. at 37. In this case, both sides agree that the verdicts were "legally" inconsistent, in that a conviction on the underlying felony of robbery or attempted robbery was a necessary condition for a conviction of felony murder.

therefore, did not consider, much less hold, that defendants could challenge inconsistent verdicts on appeal even if they failed to challenge the inconsistency before the trial court discharged the jury.

Meanwhile, in *McNeal*, 426 Md. at 462, the Court of Appeals expressly adopted another section of Judge Harrell's concurrence – the section in which he distinguished "legally inconsistent" verdicts, which a defendant may challenge, from "factually inconsistent" verdicts, which a defendant may not. *See supra* note 1. Additionally, the *McNeal* Court not only reiterated the *Price* concurrence's statements about the procedure for challenging legally inconsistent verdicts (*id.* at 466), but made a point of observing that McNeal had followed that procedure by making a timely objection before the jury had harkened to its verdict and asking that the case be sent back to the jury. *Id.* at 460-61. Even if we were free to disregard this Court's published opinions in *Tate*, *Hicks*, and *Travis* (which we are not), it is quite clear from *McNeal* that the Court of Appeals has now implicitly endorsed the *Price* concurrence's statements about the procedure for challenging legally inconsistent verdicts and the consequences of failing to follow that procedure.

Givens observes that there is some tension between the conceptual underpinnings of the opinion of the Court in *Price* and Judge Harrell's concurrence. In asserting that a defendant must challenge inconsistent verdicts before the court discharges the jury, Judge Harrell started from the premise that inconsistent verdicts "quite often" reflect "the jury's

lenity." *Price*, 405 Md. at 40 n.9 (Harrell, J., concurring). By contrast, the opinion of the Court quoted *DeSacia v. State*, 469 P.2d 369, 377 (Alaska 1970), in which the court saw "no basis to assume . . . that inconsistent verdicts are the product of a jury's disposition toward treating the accused leniently." Since *Price*, however, the unanimous Court of Appeals has subtly criticized *DeSacia* by observing that Alaska "is the sole state to take a position rejecting both factually and legally inconsistent verdicts." *McNeal*, 426 Md. at 468. In these circumstances, we see no basis to conclude that the Court of Appeals would reject the *Price* concurrence's statements about the procedure for challenging legally inconsistent verdicts.

In summary, since *Price* this Court has consistently held that to preserve an objection to inconsistent verdicts a defendant must object before the jury harkens to its verdict. Under that line of authority, we are constrained to hold that Givens failed to preserve his objection in this case.[2]

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

[2] Although the *Price* concurrence and this Court's subsequent opinions frame the issue in terms of waiver, it would be just as accurate to say that the circuit court did not err in denying the motion to strike the inconsistent jury verdicts. As far as the circuit court was concerned, the motion was untimely, because Givens did not assert it until after the court had discharged the jury.