

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1007

September Term, 2015

JOHN TEMPLE HAINES

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: August 26, 2016

*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.

At the conclusion of a bench trial in the Circuit Court for Worcester County, the court convicted John Temple Haines, appellant, of second-degree burglary, theft of items valued under \$1,000, malicious destruction of property, and related conspiracy counts. The court sentenced appellant to a term of twelve years' incarceration for second-degree burglary, with all but seven years suspended. The court also sentenced appellant to a concurrent term of twelve years, with all but seven years suspended, for conspiracy to commit second-degree burglary. With respect to the portion of the sentence that appellant contends in this appeal was illegal, the court also imposed a consecutive term of 18 months' incarceration, all suspended, for the theft count. All remaining convictions were merged for sentencing purposes.

In this direct appeal, appellant presents a single question for our review: “Did the lower court err in imposing separate consecutive terms of incarceration for theft and burglary where the only stolen items were those acquired in the burglary?”

For the following reasons, we answer that question “no,” and affirm the judgments entered by the Circuit Court for Worcester County.

BACKGROUND

Because appellant challenges only the trial court's failure to merge certain of the convictions for sentencing purposes, we need not recite the facts of the crime in detail. Suffice it to say that appellant was convicted of breaking into a seasonal rental unit in Ocean City and stealing a television which he later sold to an undercover police officer for \$27.00.

At the time of sentencing, appellant did not argue that the theft conviction should merge into the conviction for second-degree burglary.

DISCUSSION

In this appeal, appellant asserts that the sentencing court should have merged his sentence for theft into his sentence for second-degree burglary, either under the rule of lenity, or, as a matter of fundamental fairness. Appellant concedes that merger was not required under the “required evidence” test, which provides that, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932). Nevertheless, he asserts that the theft of the television was “part and parcel, and integral to, the burglary,” and that, therefore, because the trial court imposed a separate consecutive sentence for the theft conviction, he is being improperly punished twice for the same conduct.

The State responds that the sentences do not merge under the rule of lenity because there is no ambiguity in the statutory language, and the crimes arose out of two separate acts, namely, (1) a breaking and entering, and (2) a theft of a television. The State further contends that appellant’s fundamental fairness argument is not preserved for appellate review because that argument was not presented to the circuit court, but, even assuming it

was preserved, fundamental fairness does not apply because the crimes were not part and parcel of one another, but were separate crimes. We agree with the State that merger was not required.

As the Court of Appeals observed in *Brooks v. State*, 439 Md. 698, 737 (2014):

The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law. *Nicolas v. State*, 426 Md. 385, 400, 44 A.3d 396 (2012). Merger protects a convicted defendant from multiple punishments for the same offense. *Id.* Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other. *Id.* at 400–02, 44 A.3d 396; *State v. Lancaster*, 332 Md. 385, 391, 631 A.2d 453 (1993).

If a trial court is required to merge convictions for sentencing purposes, but, instead, imposes separate sentences for each conviction, the sentence imposed on the offense that should have merged is an illegal sentence. *Britton v. State*, 201 Md. App. 589, 598-99 (2011). Pursuant to Maryland Rule 4-345(a), an illegal sentence may be corrected at any time. Our review of a court’s failure to merge offenses for sentencing purposes is *de novo*. *Pair v. State*, 202 Md. App. 617, 625 (2011) (review of court’s decision regarding merger pursuant to the “required evidence” test or “the rule of lenity” is decided “as a matter of law”), *cert. denied*, 425 Md. 397 (2012).

In *Monoker v. State*, 321 Md. 214 (1990), the Court of Appeals explained the rule of lenity and its application as follows:

Two crimes created by legislative enactment may not be punished separately if the legislature intended the offenses to be punished by one sentence. It is when we are uncertain whether the legislature intended one or more than one sentence that we make use of an aid to statutory interpretation known as the “rule of lenity.” Under that rule, if we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge.

Id. at 222.

The rule of lenity ““is a maxim of statutory construction which serves only as an aid to resolving an ambiguity and it may not be used to create an ambiguity where none exists.”” *Crispino v. State*, 417 Md. 31, 45, n.5 (2010) (quoting *Tribbitt v. State*, 403 Md. 638, 646 (2008)). The rule of lenity does not apply in this case because we perceive no ambiguity or uncertainty as to whether the legislature intended to permit only a single merged sentence when a defendant is convicted of both second-degree burglary and theft.

Burglary in the second degree is defined as follows in Section 6-203 of the Criminal Law Article (“CL”) of the Maryland Code:

Prohibited — Breaking and entering with intent to commit theft, violence, or arson

(a) A person may not break and enter the storehouse of another with the intent to commit theft, a crime of violence, or arson in the second degree.

Prohibited — Breaking and entering with intent to steal firearm

(b) A person may not break and enter the storehouse of another with the intent to steal, take, or carry away a firearm.

Penalties

(c) A person who violates this section is guilty of the felony of burglary in the second degree and on conviction is subject to:

- (1) for a violation of subsection (a) of this section, imprisonment not exceeding 15 years; and
- (2) for a violation of subsection (b) of this section, imprisonment not exceeding 20 years or a fine not exceeding \$10,000 or both.

It is plain from the text of CL § 6-203 that the conduct that is punishable as second-degree burglary is the breaking and entering another's property with the intent to commit a crime. The crime of burglary is complete upon the entry into the property regardless of whether the intended theft (or other crime) is then perpetrated.

In contrast, CL § 7-104 punishes the conduct of willfully or knowingly obtaining unauthorized control over property with intent to deprive the owner of the property. This offense can be accomplished without committing a violation of CL § 6-203. Appellant's theft of a television was not, as he argues in his brief, "part and parcel, and integral to, the burglary." Instead, it was an independent, separate criminal act.

The lack of merit in appellant's argument becomes obvious if we consider hypothetically how it might apply in other cases involving a conviction for second-degree burglary. As noted above, CL § 6-203 prohibits breaking and entering "with the intent to commit theft, a crime of violence, or arson in the second degree." If we accepted appellant's contention that no separate punishment can be imposed for the consummation of the intended crime once the entry is accomplished, a person could, by committing a burglary,

escape a separate punishment for any crime of violence committed after breaking and entering the property. It is absurd to suggest that it was the legislative intent of the General Assembly to permit but a single punishment for these two statutory offenses.

Similarly, even if we assume *arguendo* that the claim of fundamental fairness in this case is reviewable without preservation because the argument here is not fact-intensive, *see Pair, supra*, 202 Md. App. at 645-46, merger is not required by principles of fundamental fairness. As the Court of Appeals has pointed out, “[r]are are the circumstances in which fundamental fairness requires merger of separate convictions or sentences.” *Carroll v. State*, 428 Md. 679, 695 (2012). The *Carroll* Court explained: “In deciding whether fundamental fairness requires merger, we have looked to whether the two crimes are ‘part and parcel’ of one another, such that one crime is ‘an integral component’ of the other.” *Id.* at 695 (quoting *Monoker, supra*, 321 Md. at 22).

For the reasons explained above, we reject appellant’s claim that his two crimes were part and parcel of one another. Here, although the burglary may have facilitated the theft, it was not an “integral component” of the theft, but a separate and distinct offense. The burglary was complete when appellant broke into the rental units with the intent to commit theft. Even if appellant had not been successful in stealing anything, he could still have been convicted of burglary. There is nothing fundamentally unfair about imposing a separate

sentence to punish appellant for successfully stealing the victim's property after committing the burglary.

**JUDGMENTS OF THE CIRCUIT
COURT FOR WORCESTER
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**