

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2182

September Term, 2012

DYON DAVENPORT

v.

STATE OF MARYLAND

Krauser, C. J.,
Graeff,
Leahy,

JJ.

PER CURIAM

Filed: September 6, 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.

Dyon Davenport, appellant, was convicted of attempted distribution of heroin and possession of heroin, in the Circuit Court for Baltimore City, and sentenced to a five year term of imprisonment for the attempted distribution conviction and a two year term of imprisonment for the possession conviction. The terms of imprisonment were to run consecutive to each other. Davenport’s sole argument on appeal is that the trial court erred in imposing consecutive sentences because it amounted to multiple punishments for the same criminal activity.

To the extent Davenport argues that his consecutive sentences violate the Double Jeopardy Clause of the Fifth Amendment, we disagree as the offenses of possession of a controlled substance and attempted distribution of a controlled substance cannot be deemed to be the same under the “required evidence test.” Specifically, the offense of possession of a controlled substance does not require proof of an intent to distribute a controlled substance and, unlike the completed offense of distribution of a controlled substance, an attempt to distribute a controlled substance does not require proof of possession of a controlled substance. *See Kyler v. State*, 218 Md. App. 196, 225-26 (2014) (“The required evidence test focuses upon the elements of each offense . . . [I]f each offense contains an element which the other does not, there is no merger under the required evidence test even though both offenses are based upon the same act or acts.” (internal quotation marks and citations omitted)).

Davenport, also contends, however, and the State concedes, that his sentences should merge under the rule of lenity because his convictions for both offenses arose out of the same act or transaction. *See State v. Smoot*, 200 Md. 159, 169 (2011) (“The rule of

lenity is a principle of statutory interpretation, which provides that doubt or ambiguity as to whether the legislature intended that there be multiple punishments for the same act or transactions will be resolved against turning a single transaction into multiple offenses.” (internal quotation marks and citations omitted)). Because the State’s theory at trial was that Davenport was guilty of attempted distribution of heroin based solely on the manner in which he possessed the heroin, we agree with the parties that, under the facts of this case, it is unclear whether the legislature intended appellant’s crimes to be punished by one sentence or more. *Accord Stallard v. State*, 225 Md. App. 400, 417-18 (2015) (merging convictions for manufacturing methamphetamine and possessing plastic bottles adapted to produce methamphetamine, under the rule of lenity, where the plastic bottles recovered were all used in some phase of the appellant’s methamphetamine manufacturing process). Accordingly, we vacate Davenport’s consecutive two year sentence for possession of heroin.

SENTENCE FOR POSSESSION OF HEROIN VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.