Circuit Court for Anne Arundel County
Case No. K-97-1684 and
Case No. K-97-1848

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 253

September Term, 2015

LYE ONG

v.

STATE OF MARYLAND

Krauser, C.J.,
Meredith,
Nazarian,

JJ.

Opinion by Meredith, J.

Filed: March 9, 2017

In August 2000, Lye Ong, appellant, was convicted in the Circuit Court for Anne Arundel County, case number K-97-1684 (hereinafter "1684"), of second degree sexual offense, child abuse, and unnatural and perverted sexual practice, and, at the same time, Ong was also convicted in case number K-97-1848 (hereinafter "1848") of third degree sexual offense. In November 2000, the sentencing court sentenced Ong to a term of 20 years' imprisonment for second degree sexual offense, "to run consecutive to any sentences that have been imposed, whether they be sentences that are being served or any sentences that have been imposed that have not yet been served." The court sentenced Ong to a term of 10 years' imprisonment for child abuse, "to be consecutive to" the sentence for second degree sexual offense. The court merged the conviction for unnatural and perverted sexual practice with the conviction for second degree sexual offense. Finally, the court sentenced Ong to a term of 10 years' imprisonment for third degree sexual offense, to "run concurrent with the sentence" for child abuse.

In 2014, Ong filed a Motion to Correct Illegal Sentence (hereinafter "the motion"), which the court later denied. Ong appeals from that denial, and presented for our review three questions, but, based upon the arguments he made in his briefs, we have expanded the questions to six and rephrase as follows:[1]

[1] Ong's questions presented *verbatim* are:

> 1. Did the Circuit Court err in denying the "Motion to Correct An Illegal Sentence" without specifying any reasons as to why the correct and fair sentence should have been 20 years to be imposed concurrently to the other sentence in Howard County to avoid double jeopardy?

I. Did the sentencing court err in failing to merge the convictions for second degree sexual offense and third degree sexual offense with the conviction for child abuse?

II. Must the sentence for third degree sexual offense be vacated due to errors in the docket entries and commitment record?

III. Did the sentencing court err in ordering that the sentences run consecutive to a sentence previously imposed by the Circuit Court for Howard County?

IV. Did the sentencing court impermissibly increase the sentences for second degree sexual offense and third degree sexual offense?

V. Did the sentencing court err in failing to apply credit against each of the sentences for 60 days of pretrial incarceration?

VI. Did the sentencing court err in failing to apply credit for pretrial incarceration served in the Howard County Detention Center?

We answer "yes, in part" to the first question. Accordingly, as we did in *Twigg v. State*, 219 Md. App. 259, 288 (2014), *rev'd in part on other grounds*, 447 Md. 1 (2016), we shall vacate all sentences and remand the case for re-sentencing on all counts except for second degree sexual offense (which shall merge with child abuse for sentencing purposes). We shall answer "no" to the second, fifth, and sixth questions. But, although we answer "no" to the second question, we direct that the docket entry and commitment record be corrected to correspond to the sentencing transcript and reflect that Ong was

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2. Did the Circuit Court err in awarding credit for time held in custody at the detention center for only one of the charges instead of the whole case or cases?

3. Did the Circuit Court err in denying credit for the time held in custody at the detention center of another county prior to trial?

convicted of third degree sexual offense (rather than attempted third degree sexual offense). And, although our judgment renders the third and fourth questions moot, we shall address the questions to provide guidance to the sentencing court on remand.

FACTS AND PROCEEDINGS

In October 1997, Ong was charged by indictment in case number 1684 with second degree sexual offense, child abuse, and unnatural and perverted sexual practice. Ong was also charged by indictment in case number 1848 with third degree sexual offense, attempted third degree sexual offense, and a related offense. The indictments charged Ong "with having committed the . . . offenses" upon the victim, A.R. (hereinafter "A.") "between 1988 and November 1995, in Anne Arundel County, while the victim was visiting [Ong in] Pasadena, Maryland." The fact that the conduct was alleged to have occurred as early as 1988 is significant because the General Assembly in 1990 enacted an anti-merger provision for multiple sex offenses, but the enactment was not effective until July 1, 1990.

At some time prior to April 1998, Ong was charged by indictment in the Circuit Court for Howard County with five counts of child abuse, one count of second degree sexual offense, and related offenses. The indictment charged Ong with committing the offenses upon A. "on or about the period 07/01/90 - 07/31/92, at Howard County[.]" In April 1998, Ong pleaded guilty in Howard County to two counts of child abuse and one count of second degree sexual offense. In December 1998, the Howard County Circuit Court sentenced Ong to a total term of 20 years' imprisonment, with five years suspended.

The Howard County Circuit Court applied credit against the sentences for 249 days of pretrial incarceration.

Thereafter, the State presented evidence of the following at trial in the Circuit Court for Anne Arundel County (as we summarized in our unreported opinion affirming Ong's convictions):

> A[.] was born on March 11, 1981, and was 19 years old when this case went to trial. A[.]'s parents divorced when she was four or five years old, and her mother remarried when A[.] was seven years old. When A[.] was seven, she began to spend time with her aunt, [Ms. M.], who lived in Pasadena, Maryland, with [Ong]. A[.] visited her aunt and [Ong] every weekend or every other weekend, and would sleep at their house. According to A[.], when she visited her aunt and [Ong] in their home, both of them took responsibility for caring for her.
>
> At trial, A[.] testified that she liked going to her aunt's house but there were some things she did not like about going there. When A[.] first started visiting, [Ong] "started to tell [her] about sex" and would "show [her] like pornographic pictures and then he would start to touch [her] in places that [she] didn't like him touching [her]." Specifically, [Ong] touched A[.] on her chest and in her vagina. At first, [Ong] would touch her vagina with his fingers, his mouth, and his penis. Sometimes, when he did that, a video recorder was running.
>
> A[.] testified that **the events just described occurred at least once every weekend** that she was at her aunt's and [Ong's] house, **from the time she was seven or eight years old** until she was about eleven. She subsequently testified that her "dates get very, kind of confusing sometimes," and that the events continued until she was around 11, 12, or 13 years old. A[.] described waking up in bed at her aunt's house one night when she was 11, 12, or 13, and finding [Ong] next to her. He had been touching her vagina. She yelled at him, punched him in the chest, and he left the bedroom. After that, A[.] stopped going to her aunt's house.

Ong v. State, No. 2544, September Term, 2000 (December 12, 2001), slip op. at 1-2 (emphasis added).

The State also presented testimony from former Howard County police detective Kimberly Ariola, who testified that she seized from Ong's home two videotapes, one titled "20495" or "Q0495" and one titled "1-16 Number 26." Ariola stated that the videotapes depicted A. and Ong. The videotapes were then shown to the jury.

Following the close of the evidence, the court instructed the jury:

> In terms of the charges here, the State of Maryland has charged a second degree sexual offense saying that they are accusing Mr. Ong of a crime of the second degree and in order for the State to have successfully met their burden to you of having proven that Mr. Ong has committed this second degree sexual offense.
>
> The State of Maryland must have introduced, or the evidence that is introduced must prove, beyond a reasonable doubt, that Mr. Ong committed cunnilingus with the victim or alleged victim in this case, that the alleged victim was under the age of 14 years at the time of any such act, and that the Defendant, Mr. Ong, was at least four years older than the victim at the time when any such act would have been committed.
>
> * * *
>
> Mr. Ong is [also] accused of and charged with the crime of child abuse.
>
> Child abuse in the State of Maryland is sexual molestation or exploitation of a child under the age of 18 that is caused by a parent or other person who has permanent or temporary care, custody, or responsibility for the supervision of that child or by any family or any household or family member.
>
> In order to prove Mr. Ong has committed the crime of child abuse, the State of Maryland must prove beyond a reasonable doubt, that Mr. Ong had, at that time, the time of any such incident, temporary care, custody, or responsibility for the victim, alleged victim, that the alleged victim was, at that time, under the age of 18 years of age, and that Mr. Ong sexually molested or exploited the alleged victim. That is what we call child abuse in the State of Maryland.

* * *

> The State of Maryland has also accused Mr. Ong of having committed the crime of what we call third degree sexual offense.
>
> In order for the State of Maryland to be able to convict Mr. Ong of this charge, the State of Maryland must have proven, beyond a reasonable doubt, that Mr. Ong had sexual contact with the alleged victim and that the alleged victim was under 14 years of age at the time of any alleged sexual contact, and that Mr. Ong was, at the time, at least four years older than the alleged victim. Sexual contact means the intentional touching of the victim's or Defendant's genital or anal area or other intimate parts for the purpose of sexual arousal or gratification or the abuse or for abuse of either of the parties.

In closing argument, the prosecutor stated that the videotapes depicted Ong performing cunnilingus and "[s]exual contact" upon A. when she "was certainly under 14 years of age." The prosecutor further stated that the "three elements of sexual child abuse" are "temporary care, custody, and responsibility of the victim," the "victim was under 18," and the "[d]efendant sexually molested or exploited the victim." The jury subsequently convicted Ong of the offenses and he was sentenced as noted above.

In 2014, Ong filed the motion to correct illegal sentence that is the subject of this appeal. Citing *Nightingale v. State*, 312 Md. 699 (1988), he contended that "[s]eparate convictions and sentences for both child abuse and second, third, or fourth degree sexual offense are improper on double jeopardy grounds where the State relies on and proves the sexual offense to sustain the child abuse conviction." Ong further contended that the total sentence in Anne Arundel County "should have been . . . concurrent to the sentence in Howard County." Ong also contended that the court was required to apply credit for time served against the sentences for the periods from September 10, 1997, to November 10,

1997, when Ong was incarcerated in the Anne Arundel County Detention Center, and from April 6, 1998, to December 11, 1998, when Ong was incarcerated in the Howard County Detention Center. The motion court agreed that the "time spent in custody from September 10, 1997 through November 10, 1997 should be credited," and ordered "that 60 days of time served . . . be credited to" the sentence for second degree sexual offense. The motion court otherwise denied the motion.

DISCUSSION

I.

We interpret Ong's briefs to argue that the sentences for second degree sexual offense and third degree sexual offense "should be vacated." He cites, *inter alia*, *Nightingale v. State*, 312 Md. 699 (1988), and *Twigg, supra*, 219 Md. App. 259. (The Court of Appeals had not issued its opinion in *Twigg* by the time Ong's reply brief was filed.)

In *Nightingale*, there were two petitioners before the Court of Appeals; each had been convicted of child abuse as well as sexual offenses that formed the predicate for the child abuse conviction. On appeal to the Court of Appeals, "Nightingale and Myers argue[d] that for double jeopardy purposes, their convictions and sentences for child abuse and sexual offenses cannot stand because the crimes are the same under the required evidence test[.]" *Id.* at 702. Holding that the Court of Special Appeals erred in failing to vacate the sentences for the sexual offenses, the Court of Appeals ruled that Nightingale was entitled to relief:

> Under these circumstances, we believe that each jury could have found the defendant before it guilty of child abuse based solely on evidence

> of a sexual offense in some degree. If that were done, then **the sexual offense became, in effect, a lesser included offense of sexual child abuse, and . . . the offenses are the same for double jeopardy purposes**. Indeed, with respect to criminal information No. 7319 in Myers's case, the jury must have found a sexual offense as the basis of the child abuse verdict, because that information involved but a single incident of sexual contact. But as to the other charges against both defendants, they involved numbers of incidents over periods of time, some relatively minor, some not. With respect to them, a jury could have reached various decisions as to child abuse and sexual offenses, all of which were reflected in general verdicts of guilty.
>
> The problem, then, is that we cannot tell whether these general verdicts of guilty were based on the use of sexual offenses as lesser included offenses (or elements) of child abuse, or whether the child abuse verdicts were based on other reasons (*e.g.*, some sort of sexual molestation which the juries thought did not rise to the level of a sexual offense in any degree). **In these circumstances we resolve the ambiguity in favor of the defendants and set aside the judgments on the sexual offense counts**.

Id. at 708 (emphasis added) (citations omitted).

In *Twigg, supra*, 219 Md. App. 259, we were confronted with similar convictions for sexual child abuse and related offenses of second degree rape, third degree sexual offense, and incest. We concluded that the predicate sexual offenses should have merged into the child abuse conviction. We ordered all sentences vacated and remanded the case for resentencing on the entire package of convictions. *Id.* at 285-88.

The Court of Appeals generally affirmed our ruling in *Twigg*, with one important modification. Consistent with the Court of Appeals's holding in *State v. Johnson*, 442 Md. 211 (2015) (concluding that only one predicate felony merges into a conviction for felony murder), the Court of Appeals held in *Twigg* that only one of the predicate sexual offenses merged into Twigg's conviction for sexual child abuse. 447 Md. at 17-19. The Court of Appeals agreed with us that, upon resentencing, the court should consider the child abuse

conviction and related sexual offense convictions as a "package." *Id.* at 26-27. And the Court of Appeals explained that the Maryland statutory prohibition against vindictive resentencing --- *i.e.*, Maryland Code (1988, 2013 Repl. Vol.), Courts and Judicial Proceedings Article, § 12-702(b) --- would be offended "only if the total sentence imposed . . . on remand is greater than the originally imposed sentence." *Id.* at 30. "[A]ny new sentence, *in the aggregate*, cannot exceed the *aggregate* sentence originally imposed." *Id.* at 30 n.14 (emphasis added).

We reach a similar conclusion here. In light of the court's instructions and the prosecutor's argument, the jury could have found Ong guilty of child abuse based solely on evidence of a second or third degree sexual offense, or perverted sexual practice. The charges against Ong involved a number of incidents over a period of time, and with respect to them, the jury could have reached various decisions as to child abuse and sexual offenses, all of which were reflected in general verdicts of guilty. As the Court of Appeals observed in *Nightingale*, we cannot tell whether these general verdicts of guilty were based on the jury's finding of a sexual offense as a lesser included offense, or element, of child abuse, or whether the child abuse verdict was based on other independent acts of abuse. In these circumstances, we must resolve the ambiguity in favor of Ong. *Id.*, 312 Md. at 708.

The State contends that the merger rationale of *Nightingale* "does not apply in this case because legislative changes to the sexual abuse of a minor statute, effective July 1, 1990, allowed for separate punishments for Ong's separate convictions for second degree sex[ual] offense and sexual abuse of a minor." *See* Md. Code (1957, 1987 Repl. Vol., 1990

Supp.), Art. 27 § 35A(b)(2) (a "sentence imposed [for sexual abuse of a child] may be imposed separate from and consecutive to or concurrent with a sentence for any offense based on the act or acts establishing the abuse"), *recodified as* Md. Code (2002), § 3-602(d) of the Criminal Law Article. The State contends that "there is little doubt that the act of cunnilingus for which the jury found Ong guilty occurred after the effective date of the anti-merger provision," because the videotapes introduced into evidence "depict[] Ong committing second and third degree sex[ual] offenses upon" A., and "the State presented portions of Ong's 1997 statement to police wherein he stated that 'everything between him and [A.] had started approximately five years' prior, when [A.] would have been eleven or twelve years old." But A. testified that the abuse began when "she was seven or eight years old," which would have been prior to March 11, 1990, and that "a video recorder was [sometimes] running" during the abuse.

Notwithstanding the evidence that some acts occurred after July 1, 1990, the jury was not asked to make a finding as to whether some specific sexual offense committed subsequent to July 1, 1990, was the sole basis of the child abuse verdict. We have observed that "the legislative history of the 1990 amendment to Art. 27, § 35A reveals no language evidencing the General Assembly's intent to make the amendment apply retroactively." *Twigg, supra*, 219 Md. App.at 278. The Court of Appeals did not disagree with our analysis regarding prospective application. 447 Md. at 11 n.6. Although it is possible (and perhaps even probable) that the jury's verdict was based on conduct that occurred after July 1, 1990, the ambiguity in the evidence must be resolved in favor of the defendant.

Nightingale, supra, 312 Md. at 708. We conclude, therefore, that the merger requirements of *Nightingale* and *Twigg* are applicable (as modified by the Court of Appeals in *Twigg*).

Ong was convicted of child abuse and three predicate sexual offenses. Because the jury did not unambiguously designate a specific sexual offense to serve as the predicate sexual offense, the conviction for the sexual offense with the greatest maximum sentence merges for sentencing purposes. Therefore, Ong is entitled to merger of the conviction for second degree sexual offense with the conviction for child abuse. *Twigg, supra*, 447 Md. at 18-19.

As we did in *Twigg*, 219 Md. App. 287-88, we conclude that a remand for a new sentencing hearing on the entire package of convictions is appropriate. Rule 8-604(d)(1) provides that an appellate court may remand a case if the court "concludes that . . . justice will be served by permitting further proceedings," and the Court of Appeals "has recognized, with at least tacit approval [in *Jones v. State*, 414 Md. 687, 692 (2010)], the propriety of resentencing on a greater offense upon merger for sentencing purposes of a lesser included offense." *Twigg*, 447 Md. at 20. And, in *Twigg*, 447 at 28, the Court of Appeals also said that it "agree[s] with those courts that [have held that, a]fter an appellate court unwraps the package and removes one or more charges from its confines, the sentencing judge, [himself or] herself, is in the best position to assess the effect of the withdrawal and to redefine the package's size and shape (if, indeed, redefinition seems appropriate)." (Internal quotations and citations omitted.) We conclude that, in light of the rulings in *Twigg*, justice will be served by permitting further proceedings, and we vacate

all sentences and remand both cases for resentencing consistent with the guidance offered in *Twigg*, 447 Md. at 30.

II.

Following the close of the evidence, the prosecutor told the trial court that, in case number 1848, she "would abandon" the count of *attempted* third degree sexual offense. Ong was subsequently convicted of, and sentenced for, third degree sexual offense. Nevertheless, the docket entries and commitment record reflect that Ong was convicted of, and sentenced for, *attempted* third degree sexual offense.

Ong contends that, due to the errors in the docket entries and commitment record, the sentence in case number 1848 "should be vacated . . . and the case be dismissed with prejudice." We disagree. We have stated that, "[w]hen there is . . . a discrepancy between the transcript and the docket entries, absent any evidence that there is error in the transcript, the transcript controls." *Turner v. State*, 181 Md. App. 477, 491 (2008) (citation omitted). *Accord Douglas v. State*, 130 Md. App. 666, 673 (2000). Here, the transcript reflects that Ong was convicted of, and sentenced for, third degree sexual offense, and Ong has provided no evidence that there is error in the transcript. Because the transcript controls, we direct the circuit court to correct the errors in the docket entries and commitment record.

III.

Ong contends that, because he was prosecuted in Anne Arundel County and Howard County for offenses against "the same alleged victim" and during, in part, the same time period, the "offenses in Howard County should not be considered a separate crime," and

the sentencing court erred in ordering that the sentences run consecutive to the Howard County sentence. We disagree. The Anne Arundel County indictments explicitly charged Ong with committing certain offenses in Anne Arundel County, and the Howard County indictment explicitly charged Ong with committing additional offenses in Howard County. The offenses committed in Howard County are separate from the offenses committed in Anne Arundel County, and therefore, the sentencing court did not err in ordering that the sentences run consecutive to the Howard County sentence.

IV.

Following sentencing, the sentencing court issued in each case a commitment record. In case number 1684, the commitment record first stated that the sentence for second degree sexual offense was "concurrent," but later corrected the commitment record to reflect that the sentence was to run "[c]onsecutively to the last sentence to expire of all outstanding and unserved Maryland sentences." (Capitalization omitted.) In case number 1848, the commitment record first stated that the sentence for third degree sexual offense was "concurrent," but later was corrected to reflect that the sentence was to run "consecutive with any sentence now serving or to be served" and "concurrent with [the] sentence in Count #2 in case K-97-1684." (Capitalization omitted.) The sentencing court issued in each case an amended commitment record, in which the sentencing court corrected the initial designations of "concurrent" to correspond to the sentencing transcript's record. (Capitalization omitted.)

Ong contends that the sentencing court impermissibly increased the sentences. We disagree. The transcript reflects that the sentencing court intended for the sentence for second degree sexual offense to run consecutive to the Howard County sentence, and the sentence for third degree sexual offense to run consecutive to the sentence for second degree sexual offense. In issuing the amended commitment records, the sentencing court merely corrected errors in the initial commitment records, and did not impermissibly increase the sentences that had been imposed.

V.

Ong contends that, because he "was held in custody [in Anne Arundel County] not for just one count, . . . but for two cases," the motion court was required to apply "60 days [of] credit to the sentence of all the charges of both cases." We disagree. We have stated that a "defendant is entitled to a single credit [for pretrial incarceration] against [an] aggregate sentence, not to multiple credits against each and every constituent segment of that aggregate." *Blankenship v. State*, 135 Md. App. 615, 618-19 (2000). Here, Ong was entitled to, and received, a single credit of 60 days against the aggregate sentence. He was not entitled to multiple credits against each segment of the aggregate sentence.

VI.

Ong contends that the motion court erred in failing to apply credit against the sentence for the period from April 6, 1998, to December 11, 1998, when he was incarcerated in the Howard County Detention Center, because "the time spent in custody in either count[y] should be . . . credit[ed] to the sentence in both counties, so long as [he]

was not under any sentence." We disagree. Although a "court *may* apply credit against a sentence for time spent in custody for another charge or crime," Maryland Code (2001, 2008 Repl. Vol., 2013 Supp.), § 6-218(b)(3) of the Criminal Procedure Article (emphasis added), the court is not *required* to apply the credit. The fact that the motion court did not apply the credit in this instance did not make the sentence illegal.

SENTENCES FOR ALL CONVICTIONS VACATED; ALL CONVICTIONS OTHERWISE AFFIRMED; DOCKET ENTRY AND COMMITMENT RECORD TO BE CORRECTED TO REFLECT CONVICTION WAS FOR THIRD DEGREE SEXUAL OFFENSE (RATHER THAN ATTEMPTED THIRD DEGREE SEXUAL OFFENSE). CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR RESENTENCING AND FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID FOUR-FIFTHS BY APPELLANT AND ONE-FIFTH BY ANNE ARUNDEL COUNTY.