

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2913

September Term, 2015

SAMUEL OLIPHANT

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: July 25, 2017

* 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.

Samuel Oliphant was convicted of possession of cocaine and possession of cocaine with the intent to distribute, and two separate counts under Md. Code (2003, 2011 Repl. Vol., 2016 Supp.) § 5-131 of the Public Safety Article (“PS”), which prohibits different categories of felons from possessing regulated firearms. At trial, the State rested and Mr. Oliphant moved for a judgment of acquittal on the charge of possession of a handgun by a person convicted of a drug trafficking felony, asserting that the State failed to prove Mr. Oliphant had such a prior conviction. Over Mr. Oliphant’s objection, the Circuit Court for Prince George’s County permitted the State to reopen its case and present evidence to prove the prior conviction element.

Mr. Oliphant challenges this decision on appeal, but we disagree and affirm his convictions for possession of cocaine, possession with intent to distribute, and possession of a regulated firearm after being convicted of a drug felony. That said, we agree with Mr. Oliphant and the State that Mr. Oliphant committed only one crime by possessing the firearm, and we reverse his conviction for possession by a restricted person. We agree as well with the State that Mr. Oliphant’s sentence for possession of cocaine should merge into his sentence for possession with intent to distribute, and we vacate the former as well.

I. BACKGROUND

On February 2, 2014, police executed a search warrant at Mr. Oliphant’s home and recovered crack cocaine, scales, baggies, mail, and a loaded handgun and ammunition. As a result, he was charged with twelve counts, including possession of cocaine, possession

of cocaine with the intent to distribute, and two counts of illegal possession of a regulated firearm in violation of §5-133(b)(1) and (c)(1) of the Public Safety Article.

At the close of evidence, the trial court granted Mr. Oliphant's judgment of acquittal on a charge of common nuisance and, after deliberating, the jury acquitted him of possession of marijuana, knowingly obliterating an identification number on a firearm, and both counts of second-degree assault. He was convicted of the remaining charges. The circuit court sentenced Mr. Oliphant to twenty years, all but fourteen suspended, for possession of a firearm in relation to a drug trafficking crime; to one year for illegal possession of ammunition; to ten years, all but five suspended, for possession with intent to distribute; to three years for possession of cocaine; to seven years, all but five years suspended, for illegal possession of a regulated firearm in violation of §5-133(c); and to five years for illegal possession of a regulated firearm in violation of §5-133(b).

During the State's case-in-chief, the parties stipulated that Mr. Oliphant "was prohibited from possessing a regulated firearm or ammunition." The State rested, and Mr. Oliphant moved for an acquittal on the count of possession of a regulated firearm by a person convicted of a drug trafficking felony (§ 5-133(c)(1)). Mr. Oliphant's position was that the stipulation established only that Mr. Oliphant was not allowed to possess a regulated firearm, not that he had a prior felony conviction. The circuit court asked the parties to describe their respective understanding of the stipulation. The Court asked the State if it was "under the impression that the stipulation ... covered the felony conviction" for § 5-133(c)(1), and the State said that it was. Mr. Oliphant, on the other hand, replied

that he understood the stipulation as “merely that [he] was not allowed to own a regulated—he was precluded from owning a regulated firearm.”

In light of the impasse, the court granted the State’s request to reopen its case to introduce evidence to prove Mr. Oliphant’s prior drug conviction or to redraft the stipulation to include it. When given the option to redraft the stipulation, Mr. Oliphant chose to “defer to the Court.” The court reminded Mr. Oliphant that a stipulation is an agreement—in other words, that the court couldn’t order him to stipulate to anything. Mr. Oliphant responded that either way the case will have to be reopened and that he would defer to the court, so the court permitted the State to reopen its case.

After a brief discussion of jury instructions, Mr. Oliphant noted a “running objection on the record” and stated that he “would be objecting to any of [his] records being brought in after the defense case has been closed.” The State then introduced evidence from the district and circuit courts of Mr. Oliphant’s prior conviction for possession with the intent to distribute. Mr. Oliphant reiterated his “running objection,” and the court admitted the evidence over the objection. The jury found Mr. Oliphant guilty, and Mr. Oliphant appealed.

I. DISCUSSION

Mr. Oliphant raises several issues on appeal.¹ *First*, he argues that the circuit court abused its discretion in permitting the State to reopen its case to introduce evidence of a

¹Mr. Oliphant phrased the issues in his brief as follows:

prior conviction for possession of a controlled substance with intent to distribute. *Second*, he disputes that he can be convicted and sentenced *both* for possession of cocaine and possession of cocaine with intent to distribute. *Third*, Mr. Oliphant challenges his convictions and sentences for two separate violations of Public Safety Article § 5-133.

A. The Circuit Court Did Not Abuse Its Discretion By Allowing The State To Reopen Its Case And Introduce Evidence Of A Prior Conviction.

Mr. Oliphant argues *first* that the circuit court erred in allowing the State to reopen the case to introduce evidence of his prior conviction, and contends that the prejudice from putting the details of his prior conviction (also for possession with intent to distribute cocaine) before the jury outweighs its probative value. The State responds initially that this objection wasn't preserved, that Mr. Oliphant objected only to the court allowing the State to present its evidence and never argued in the circuit court that the parties should have been ordered to revise their stipulation. But the defense lodged not only a "running objection" to "the Court allow[ing the] State to reopen [the] case," but also a specific objection to "any of [Mr. Oliphant]'s records being brought in after the defense case has

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1. Did the trial court abuse its discretion when it permitted the prosecutor to introduce evidence that Mr. Oliphant had previously been convicted of possession of a controlled dangerous substance with the intent to distribute?
 2. Must Mr. Oliphant's conviction and sentence for possession of cocaine be merged into his conviction and sentence for possession of cocaine with the intent to distribute?
 3. Must one of Mr. Oliphant's convictions and sentences for possession of a regulated firearm in violation of §5-133 of the Public Safety Article be reversed when possession of a single firearm formed the basis for both of the convictions?

been closed.” Defense counsel reiterated the “running objection” when the State offered Mr. Oliphant’s conviction records. That is close enough: we can see, and are comfortable the circuit court understood, that Mr. Oliphant’s objections sought to prevent details of his prior offenses from coming before the jury.

On the merits, Mr. Oliphant asserts that the circuit court erred in allowing the State to introduce evidence of his prior conviction and because this error was not harmless, we must reverse his conviction for possession of a regulated firearm after conviction for a drug felony. Mr. Oliphant relies heavily on *Carter v. State*, 374 Md. 693 (2003), and argues that the court should have ordered a new or corrected stipulation rather than allowing the State to introduce evidence of Mr. Oliphant’s prior drug conviction. The State counters that under Maryland Rule 5-402 and 5-403, “all relevant evidence is admissible” except when the probative value of the evidence is substantially outweighed by unfair prejudice. Md. Rule 5-402. The State disputes that Mr. Oliphant suffered undue prejudice, and argues as well that the court lacked the authority to order the parties to enter into a new or corrected stipulation. We review the court’s weighing of probative value versus unfair prejudice for abuse of discretion. *Wagner v. State*, 213 Md. App. 419, 453-54 (2013) (“A ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling...[r]ather, the ‘decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.’”) (citations omitted).

At the outset, we share the State’s skepticism that the circuit court could, or in any event should, order the parties to enter into stipulations. A stipulation, like a contract, is based on mutual assent and is an agreement between parties. *State v. Broberg*, 342 Md. 544, 559 (1996). Of course, the court was free to suggest, as it did, that a stipulation might solve a problem like the parties faced here. But Mr. Oliphant eschewed the suggestion and opted instead to “defer to the court”:

[DEFENSE COUNSEL]: So would we just redraft the stipulation including saying he’s been convicted of a felony?

[THE COURT]: It’s up to you. We can either let her reopen her case or we can redraft and reenter the stipulation.

[DEFENSE COUNSEL]: Either way she’d have to reopen her case.

[THE COURT]: It’s up to you.

[DEFENSE COUNSEL]: I’m not sure what the alternatives are, Your Honor.

[THE COURT]: You have offered the alternative that we redraft the stipulation and we restate the stipulation. The stipulation is an agreement between both parties, not one party. So we can either redraft – if you believe it’s necessary, we can redraft the stipulation so that there’s no confusion that it covers both counts or we can have the State reopen her case and put the conviction in.

[DEFENSE COUNSEL]: Whatever this Court chooses to do, Your Honor. I will defer the Court.

[THE STATE]: No, but it’s a stipulation.

[THE COURT]: It’s a stipulation.

[DEFENSE COUNSEL]: But I've signed the stipulation, Your Honor. So if you are going to let her reopen her case and provide additional evidence after I provided my motion for judgment – argued my motion for judgment of acquittal to solve one of my arguments, then I will defer to this Court.

[THE COURT]: All right, then we will permit the State to reopen her case. Any other issues on – any other motions?

In that sense, this case is the opposite of *Carter*. There, the defendant was charged with violating former Article 27, §445(d), which provided that “[a] person may not possess a regulated firearm” if that person had a prior conviction prohibited by the statute, and *offered* to stipulate that he had been convicted of a crime of violence. *Carter*, 374 Md. at 698, 701. But the State refused, and instead introduced docket entries showing that he had been convicted of robbery with a deadly weapon. *Id.* at 702. Under those circumstances, the Court of Appeals held, “the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and *it was an abuse of discretion to admit the record when an admission was available.*” *Id.* at 720–21 (quoting *Old Chief*, 519 U.S. at 191–92) (emphasis added). That’s because “the name and nature of a previous conviction, although technically relevant, addresses no detail in the definition of the prior conviction element that would not be covered by the stipulation or admission of that element.” *Carter*, 374 Md. at 720 (citations omitted). So when requested by a defendant, a trial court must accept a stipulation or admission that the defendant was convicted of a prior crime and the nature or name of the offense should not be disclosed to the jury, *id.* at 720–21, because the risk

of unfair prejudice from that information outweighs its probative value *in the face of the alternative*.

This trial court had no such alternative. Mr. Oliphant could have agreed to a stipulation that covered the prior conviction elements of the handgun charges, but he didn't, which left the State to prove its case through other available means. Indeed, the State argued that a revised stipulation would "avoid [Mr. Oliphant's] prior conviction which is a prior possession with the intent to distribute the cocaine into the record." At that point, the court faced the decision whether or not to reopen the case to allow the State to prove that he had previously been convicted of crimes that satisfied an element of the two handgun charges, and we see no abuse of discretion in the court's decision to proceed in that fashion.

B. The Possession Of Cocaine And Possession Of Cocaine With Intent To Distribute Convictions Stay Intact, But The Sentences Merge.

Mr. Oliphant was charged and convicted of possession of cocaine *and* possession of cocaine with the intent to distribute. He argues *second* that the conviction and sentence for simple possession of cocaine should be vacated because both convictions arose from the same act. The State concedes that Mr. Oliphant is entitled to relief, but argues that the sentences, not the conviction, should merge.

We use the required evidence test to determine whether convictions should merge. *Dixon v. State*, 364 Md. 209, 236–37 (2001). "If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one

offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited.” *Wimbish v. State*, 201 Md. App. 239, 272–73 (2011) *cert denied*, 424 Md. 293 (2012) (quoting *Dixon*, 364 Md. at 237). And charges for possession of a controlled dangerous substance and possession of a controlled dangerous substance with intent to distribute pass this identity test. *State v. Woodson*, 338 Md. 322, 328–29 (1995). The State agrees.

The question, then, is the relief to which Mr. Oliphant is entitled. Mr. Oliphant argues that we should vacate his *conviction* for possession of cocaine, while the State contends that the appropriate remedy is to vacate the lesser *sentence*. *Hawkins v. State*, 77 Md. App. 338, 349 (1998), solves this in the State’s favor. There, as the State asks here, we vacated the *sentence* for the possession conviction because it merged into the sentence for possession with the intent to distribute, and affirmed the convictions for both offenses. *Id.* at 349–50. *Accord McCoy v. State*, 118 Md. App. 535, 540 (1997). The same relief is appropriate here.

C. The Trial Court Erred By Entering Two Convictions For Violation Of Illegal Possession Of A Regulated Firearm Under PS § 5-133.

Third, Mr. Oliphant argues that the circuit court erred by entering two separate convictions for illegal possession of the same firearm. The State concedes that the lesser of the two convictions should be vacated, and we agree.

Public Safety Article § 5-133 prohibits certain categories of people from possessing regulated firearms. By virtue of his prior conviction for possession of cocaine with intent to distribute, Mr. Oliphant fits into two of those categories: he has been convicted of a

disqualifying crime, *id.*, (b)(1), and he has been convicted of a listed drug trafficking felony. *Id.*, (c)(1)(ii). The unit of prosecution is “the prohibited act of illegal possession of a firearm,” and “the statute does not support multiple convictions based on several prior qualifying offenses where there is only a single act of possession.” *Melton v. State*, 379 Md. 471, 486 (2004); *see also id.* at 474 (the “Legislature did not intend for a court to render separate multiple verdicts of convictions on an individual for illegal possession of a regulated firearm.”). Put another way, “the underlying prior convictions are not the focus of the statute but merely a classification of persons, *i.e.*, an element of the crime which is satisfied once the defendant falls into any one of the several qualified classifications of persons.” *Id.* at 499-500.

As such, Mr. Oliphant committed only one crime when he possessed a regulated firearm at the time of his arrest. And the proper remedy is to vacate the superfluous conviction, *i.e.*, the one carrying the lower sentence:

When appellant possessed a single regulated firearm, which was illegal under §5-133 for two reasons (his age and his prior conviction for a crime of violence), he committed only one violation of that section. As a result, only one of appellant’s conviction[s] under 5-133 can stand. As the *Melton* Court did, we shall affirm the conviction for the offense with the greater penalty, that is, possession by person previously convicted of a crime of violence, and reverse the conviction for the offense with the lesser penalty

Wimbish, 201 Md. App. at 272. Accordingly, we vacate Mr. Oliphant’s conviction for possession of a regulated firearm by a restricted person, *see* PS 5-133(b)(1), in

favor of his conviction for possession of a regulated firearm by a person convicted of a drug trafficking crime. *Id.*, (c)(1).

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED AS TO APPELLANT'S SENTENCE FOR POSSESSION OF COCAINE AND AS TO APPELLANT'S CONVICTION FOR POSSESSION OF A REGULATED FIREARM PURSUANT TO PUBLIC SAFETY ARTICLE § 5-133(B)(1). JUDGMENTS AFFIRMED IN ALL OTHER RESPECTS. COSTS ALLOCATED 67% TO APPELLANT AND 33% TO PRINCE GEORGE'S COUNTY.