

Circuit Court for Montgomery County  
Case No. 101365

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 573

September Term, 2017

---

KEVIN RAMON MOSBY

v.

STATE OF MARYLAND

---

Woodward, C.J.,  
Kehoe,  
Moylan, Charles E., Jr.  
(Senior Judge, Specially Assigned),

JJ.

---

PER CURIAM

---

Filed: June 14, 2018

\*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.

Kevin Ramon Mosby, appellant, appeals the denial, by the Circuit Court for Montgomery County, of a motion to correct illegal sentence. For the reasons that follow, we affirm.

On April 7, 2005, Mosby pleaded guilty to first degree burglary, use of a handgun in the commission of a felony or crime of violence, and second degree assault. The prosecutor proffered that Mosby forced his way into the victim’s bedroom, grabbed a handgun off of a nightstand, pointed the handgun at the victim, and demanded cash. After the victim retrieved his wallet, Mosby grabbed the victim by his left arm and threw him down. Mosby then ordered the victim and his wife to refrain from calling the police for fifteen minutes, pulled the bedroom telephone cord out of the wall, and fled through the victim’s front door. When asked for “[a]ny corrections, modifications[,] or revisions,” defense counsel stated only that Mosby’s “intention was never to use the gun,” Mosby “did not actually point it directly” and “did not intend to point it,” and Mosby “pushed [the victim] into a chair as opposed to throwing him down on the ground.”

The court subsequently sentenced Mosby to a term of twenty years’ incarceration, all but fifteen years suspended, for the first degree burglary, a consecutive term of twenty years’ incarceration, all but five years suspended, for the use of a handgun in the commission of a felony or crime of violence, and a consecutive term of ten years’ incarceration, all but two years suspended, for the second degree assault. He did not seek leave to appeal.

In 2017, Mosby filed the motion to correct illegal sentence, in which he contended that the “guilty plea . . . was substantively defective,” the State breached the plea

agreement, the convictions for first degree burglary and second degree assault “should have merged into [the] conviction for use of a handgun in the commission of a felony or crime of violence,” and “[t]he Division of Correction increased [the total] sentence beyond that imposed by the trial [j]udge when it substituted its own judgment for that of the trial [j]udge.” (Quotations omitted.) The court subsequently denied the motion.

Mosby contends that the court erred in denying the motion for three reasons. He first contends that his convictions are “invalid,” because the plea court “fail[ed] to ascertain his requisite understanding of the nature and elements of the charges.” But, “a motion to correct an illegal sentence . . . encompasses only claims of substantively illegal sentences.” *Grandison v. State*, 234 Md. App. 564, 582 (2017) (citation omitted). “An illegal sentence, for purposes of Rule 4-345(a), is one in which the illegality inheres in the sentence itself; *i.e.*, there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful.” *Id.* at 582-83 (internal citations and quotations omitted). Here, Mosby does not dispute that he was convicted of the offenses for which he was sentenced, or that the sentences that he received were permitted for the convictions upon which they were imposed. The contention he is raising should have been raised in a timely filed application for leave to appeal. A “motion to correct an illegal sentence is not an alternative method of obtaining belated appellate review of the proceedings that led to the imposition of judgment and sentence in a criminal case.” *Colvin v. State*, 450 Md. 718, 725 (2016) (internal citation and quotations omitted).

Mosby next contends that “the voluntariness of [his] election to plead was further negated by the State’s subsequent breach of the plea agreement during sentencing.” (Quotations omitted.) But Mosby does not specify how the State allegedly breached the plea agreement. Also, the transcript of the plea hearing reveals that, under the terms of the plea agreement, Mosby agreed to plead guilty to three of the offenses with which he was charged. As for sentencing, there was “no cap, . . . or no limit to the amount of executed incarceration or jail time, that is within what the statutory provisions are.” In exchange, the State agreed to enter a nolle prosequere as to the remaining offenses. At sentencing, the State asked the court “to keep this defendant incarcerated for 30 years.” The court ultimately sentenced Mosby to a total term of executed incarceration of twenty-two years. Accordingly, there was no breach of the sentencing terms of the plea agreement.

Finally, Mosby contends that “his current term of confinement constitutes cumulative punishments under the required evidence test, as well as [a] double jeopardy violation,” because “his convictions for [first] degree burglary and [second] degree assault should have merged into his conviction for use of a handgun in the commission of a felony or crime of violence.” (Capitalization and quotations omitted.) We disagree. With respect to the conviction of first degree burglary, the Court of Appeals has “noted . . . that under certain circumstances, multiple punishment . . . for offenses deemed the same under the required evidence test does not violate the Fifth Amendment prohibition against double jeopardy,” and the “[L]egislature may indicate an express intent to punish certain conduct more severely if particular aggravating circumstances are present by imposing punishment under two separate statutory offenses which otherwise would be deemed the same under

the required evidence test.” *Whack v. State*, 288 Md. 137, 149 (1980) (internal citations, quotations, and brackets omitted), *appeal dismissed and cert. denied*, 450 U.S. 990 (1981).

For example,

[t]he Legislature’s concern about the use of a weapon to intimidate a robbery victim, and its additional concern when that weapon is a handgun, is certainly not unreasonable. When it expressly shows an intent to punish, under two separate statutory provisions, conduct involving those aggravating factors, the Fifth Amendment’s double jeopardy prohibition has not heretofore been regarded as a bar.

*Id.* at 150.

Here, Mosby used a handgun in the commission of first degree burglary. The Legislature’s concern about Mosby’s use of that handgun is not unreasonable, and in ordering courts to impose a sentence for use of a handgun in the commission of a felony or crime of violence in addition to any other penalty imposed for the felony or crime of violence, the Legislature expressly showed an intent to punish that aggravating factor. Hence, the Fifth Amendment’s double jeopardy prohibition is not a bar to the separate sentences for first degree burglary and use of a handgun in the commission of a felony or crime of violence.

With respect to the conviction of second degree assault, Mosby contends that the “force that was applied by the [second] degree assault was force necessary or related to the taking of [the victim’s] handgun.” We disagree. The Court of Appeals has stated that “[m]erger occurs as a matter of course when two offenses are deemed to be the same under the required evidence test *and* when the offenses are based on the same act or acts.” *Nicolas v. State*, 426 Md. 385, 408 (2012) (internal citation, quotations, and brackets omitted)

(emphasis in original). Here, during the plea hearing, the State contended, and Mosby did not dispute, that Mosby grabbed the victim by his left arm and pushed him *after* Mosby had already used the handgun to demand cash. The use of a handgun in the commission of a felony or crime of violence and second degree assault were not based on the same acts, and hence, the offenses do not merge. The court did not err in denying the motion to correct illegal sentence.<sup>1</sup>

**APPELLEE’S MOTION TO DISMISS  
APPEAL DENIED. JUDGMENT OF THE  
CIRCUIT COURT FOR MONTGOMERY  
COUNTY AFFIRMED. COSTS TO BE  
PAID BY APPELLANT.**

---

<sup>1</sup>In its brief, the State moves to dismiss this appeal on the grounds that “Mosby’s arguments [pertaining] to the voluntariness of his guilty plea[] are not properly raised in an appeal from a motion to correct illegal sentence,” and “[p]art of Mosby’s argument appears to be that his sentence should be modified pursuant to Md. Rule 4-345(b),” which gives a court revisory power over a sentence in case of fraud, mistake, or irregularity, rather than Rule 4-345(a). Given our disposition, we deny the motion.