

Circuit Court for Dorchester County
Case No.: 9K13015007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 632

September Term, 2016

RODNEY STEPHENSON

v.

STATE OF MARYLAND

Kehoe,
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Shaw Geter, J.

Filed: May 9, 2018

*This is an unreported opinion, and 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.

This case arises from a remand from this Court for resentencing. Appellant Rodney Stephenson was found guilty of wearing, carrying, and transporting a handgun upon his person, in violation of MD. Code, Crim. L. Art. § 4-203, and using a firearm in a felony or a crime of violence, in violation of § 4-204(b), in the Circuit Court for Dorchester County. In an unreported opinion of this court, we reversed in part, finding appellant’s conviction for wearing, carrying, and transporting a handgun upon his person must merge into the conviction for using a firearm in a felony or a crime of violence, and remanded to the circuit court. On May 18, 2016, the circuit court merged the conviction as directed.

We have modified and combined appellant’s question presented as follows¹:

1. Whether the circuit court’s merging of appellant’s convictions as directed on remand was a “resentencing” requiring counsel and the opportunity to speak in allocution?

For the reasons set forth below, we shall remand to the circuit court.

BACKGROUND

On June 13, 2013, appellant Rodney Stephenson was charged with wearing, carrying, and transporting a handgun upon his person, in violation of § 4-203, and using a

¹ Appellant presented the following questions for review:

1. Whether the circuit court erred by resentencing Mr. Stephenson without counsel?
2. Whether the circuit court erred by denying Mr. Stephenson the opportunity to speak in allocution?

firearm in a felony or a crime of violence, in violation of § 4-204(b).² On January 17, 2014, the circuit court sentenced appellant to a ninety-five year term of imprisonment.

Appellant appealed. In an unreported opinion of this court, we found appellant’s conviction for wearing, carrying, or transporting a handgun must merge with his conviction for use of a handgun in the commission of a felony for sentencing purposes, and affirmed his conviction otherwise. *Stephenson v. State*, 2015 WL 5823055 (Aug. 6, 2015) (“Stephenson I”).

Appellant was then, on May 18, 2016, transported to the circuit court for resentencing. The court, per our opinion, merged the convictions. An Assistant Public Defender, who had already appeared in the case, was present with appellant. However, he noted that because “earlier grievances in this matter” had been filed with the Attorney Grievance Commission, he was “unable to take action in this case.” The following exchange then occurred:

The Court: All right. Do you have a motion?

[Assistant Public Defender]: Your honor, it was my intent before the grievances were filed to file a motion to withdraw the appearance. After that my superiors instructed me that I shouldn’t take any action in the case and just to notify the Court about it.

The Court: So you’re just going to look wise and say little; is that it?

[Assistant Public Defender]: Well –

² Appellant was also charged with: attempted first and second degree murder of two individuals, in violation of Md. Code, Crim. L. Art. §§ 2-205 and 2-206; first and second degree assault, in violation of §§ 3-202 and 3-203; reckless endangerment, in violation of § 3-204(a)(1); disorderly conduct, in violation of § 10-201(c)(2); and prohibited possession of a regulated firearm, in violation of § 5-133(c).

...

The Court: ...Now, sentencing in this case was January 17th of 2014. Appeals were filed and the Court of Special Appeals issued its mandate on September 8th, 2015. In that mandate the Court of Special Appeals affirmed the case in part and reversed in part and remanded the case to the Court so that the Court may merge the Appellant's conviction for wearing and carrying or transporting a handgun, that was count eleven, into count twelve.

The Court of Special Appeals said and Judge Kehoe in an unreported opinion, we hold that Stephenson's conviction for wearing, carrying or transporting a handgun must merge with his conviction for use of a handgun in the commission of a felony for sentencing purposes and otherwise affirm the case.

So following that mandate the court will merge count eleven into count twelve which results, Mr. Stephenson, in a reduction of your sentence by ten years.

[Appellant]: Before you start that –

The Court: No.

[Appellant]: No what?

The Court: Not before I start it I've started it. I did it. Now, what do you want to say?

[Appellant]: You did what? What did you do?

The Court: I merged count eleven with count twelve reducing your sentence by ten years. That was the mandate from the Court of Special Appeals.

[Appellant]: All right. But I got other thing I would like to discuss. And before that would like to offer mitigating evidence, I'd like to offer mitigating evidence –

...

The Court: We're only here for one purpose and that's to merge the count.

[Appellant]: Before you impose the sentence I would like to offer mitigating evidence.

The Court: I'm not imposing a sentence. I just revised the sentence.

[Appellant]: You is imposing. You're imposing a new sentence.

The Court: I merged count eleven with count twelve. All other counts remain the same.

[Appellant]: So I can't argue mitigating evidence?

The Court: That's it.

[Appellant]: All right. And another thing he's supposed to be representing me he's not, he's not representing me. He never represented me. And I want to know who –

The Court: Well, as I understand it you filed grievances against the Office of the Public Defender against these lawyers. And apparently they have seen fit not to represent you.

[Appellant]: Yeah, but how can I fire them when they've never been [brought] to your attention or anything like that on the record.

The Court: Well, this is not a matter in which you, sir, you need to be represented.

[Appellant]: It is a matter because I have rights, sir.

This appeal followed.

DISCUSSION

- I. The circuit court's merging of appellant's convictions was a "resentencing" requiring counsel and the opportunity to speak in allocution.

Appellant contends the proceeding on May 18th was a resentencing hearing, in which he was effectively denied his right to counsel and right to allocution. He argues the assistant public defender failed to adequately represent him, this deficient performance prejudiced him, and that the court erroneously denied him his right to present mitigating

evidence. He argues further that the court erred in failing to make an inquiry as to whether the assistant public defender, and the court, had a conflict of interest.

The State, conversely, argues that the May 18th hearing was not a resentencing, and therefore appellant was not required to have counsel or an opportunity to allocute. Further, the state contends that, setting aside that this was a ministerial hearing and not a resentencing, on the merits, appellant's claims are more appropriately addressed in post-conviction relief, as there has been no fact-finding hearing to address whether his attorney's behavior fell below an acceptable standard of competence, and if it did, whether it materially affected the outcome of the proceeding. It argues that, under *Strickland*, prejudice is only material if the error or omission of defense counsel gave rise to a reasonable probability of a different outcome, which appellant has failed to prove.

The mandate in our previous decision stated:

THIS CASE IS REMANDED TO [THE CIRCUIT COURT FOR DORCHESTER COUNTY] SO THAT IT MAY MERGE APPELLANT'S CONVICTION FOR WEARING, CARRYING, OR TRANSPORTING A HANDGUN INTO HIS CONVICTION FOR USE OF A HANDGUN IN THE COMMISSION OF A CRIME OF VIOLENCE FOR SENTENCING PURPOSES.

Maryland Rule 8-604(d)(1), provides that, “[i]f the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment...the Court may remand the case to a lower court.” “In the order remanding the case, the appellate court shall state the purpose for the remand,” “and the opinion upon which the order is based are conclusive as to the points decided.” *Id.* “In a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing

proceeding, the Court shall remand the case for resentencing.” Md. Rule 8-604(d)(2). “Upon receipt of the mandate...the lower court shall proceed in accordance with its terms.” Md. Rule 8-606(e). “Ordinarily, a reversal and remand after trial for error in the trial or decision results in a retrial, *unless the appellate opinion or mandate specifically limits the proceedings on remand.*” *Powell v. Maryland Aviation Admin.*, 336 Md. 210, 222 (1994) (emphasis added).

In *Jones v. State*, the Court of Appeals addressed the exact question before us – whether a circuit court, merging an incorrect sentence on remand, is conducting a “resentencing.” 414 Md. 686, 692-703 (2010). This Court, on Jones’ first appeal, mandated the circuit court to “issue ‘a new sentence in accordance with the views expressed in [it’s] opinion,” in which we called for the merger of two counts. The circuit court, on remand, denied appellant the opportunity to present mitigating evidence, stating that it was sent back only for merger and, therefore, there wasn’t “anything to mitigate on.”

The Court of Appeals stated, “[t]o be sure, the trial court correctly noted that the case was remanded ‘for merger.’” 414 Md. at 694. “This does not mean, however, that the hearing was confined simply and solely to the implementation of that mandate.” *Id.* “To accomplish a merger a new resentencing was required, and because mitigating evidence may be offered at a sentencing, the petitioner was within his right to raise the issue and the trial court should have considered such evidence as may have been offered by him.” *Id.*

Because the mandate called for a “new sentence,” the Court found “the sentencing court must approach [the hearing]...as if no sentence had ever been imposed” and during which the court “must rely on the standard rules of sentencing.” *Id.* at 695 (internal citations omitted). “That the Court of Special Appeals indicated that the new sentence be consistent with the views it expressed required that certain enumerated charges be merged, to be sure, but that directive did not limit the proceedings to that action alone.” *Id.* at 703. “Neither [this Court’s] opinion nor its mandate precluded the trial court from hearing mitigating evidence.” *Id.*

In the instant case, the mandate called for remand “for sentencing purposes.” Under *Jones*, then, we remand for resentencing in which appellant has the right to both counsel and of allocution. We will not address appellant’s other claims.

**JUDGMENT OF THE CIRCUIT
COURT FOR DORCHESTER
COUNTY IS REMANDED. COSTS
TO BE PAID BY APPELLEE.**