UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0969

September Term, 2014

TREVIN DREW COLEMAN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Meredith,
Leahy,

JJ.

Opinion by Meredith, J.

Filed: May 12, 2015

On October 1, 2013, a grand jury in Prince George's County issued an 11-count indictment, charging Trevin Coleman, appellant, with a variety of theft-related crimes that allegedly occurred on April 26, 2013. Following a jury trial, appellant was convicted on three counts: theft $10,000 to under $100,000 (Count 4); theft $1,000 to under $10,000 (Count 5); and unauthorized removal of property (Count 7).

Appellant's appeal does not attack the sufficiency of evidence underlying his convictions, but rather, appellant contends that the sentencing court erred when it failed to merge his conviction on Count 7 with his conviction on Count 4 for sentencing purposes. He also argues that the court erred when it sentenced him on two convictions on two theft charges (Counts 4 and 5) arising out of a single theft scheme.

The State agrees that appellant's sentences on Counts 5 and 7 should be vacated. Our review of the record and relevant case law compels us to agree that appellant's sentences on Count 5 and Count 7 must be vacated.

QUESTIONS PRESENTED

Appellant presents four questions for our review:

1. Did the trial court err when it imposed on Mr. Coleman an illegal sentence for unauthorized removal of a motor vehicle?

2. Did the trial court err when it allowed Mr. Coleman's multiple convictions for the same theft to stand in violation of the single larceny doctrine?

3. Did the trial counsel render ineffective assistance of counsel by failing to object to Mr. Coleman's multiple convictions?

4. Did the trial counsel render ineffective assistance of counsel by failing to request merger of Mr. Coleman's sentence for unauthorized removal of a motor vehicle?

We shall vacate the sentence on Count 5, and the sentence on Count 7. We need not reach questions 3 and 4.

DISCUSSION

I. The illegal sentence on Count 7

As noted above, appellant was convicted of theft of property having a value of at least $10,000 and less than $100,000 (Count 4); theft of property having a value of at least $1,000 and less than $10,000 (Count 5); and unauthorized removal of property, namely, an automobile (Count 7). The court sentenced appellant to 15 years, suspending all but 12, on Count 4; ten years concurrent on Count 5; and ten years concurrent on Count 7.[1]

In his brief, appellant contends that his sentence on Count 7 is "illegal for two reasons." First, appellant points to the required evidence test, and argues that the trial court erred in failing to merge his conviction for unauthorized removal — which he characterizes as a lesser-included theft offense — with his conviction on Count 4 (theft, $10,000 - $100,000). Second, appellant points out that, in any event, his sentence for unauthorized removal is in excess of the statutorily-permitted maximum for that offense.[2]

[1] The sentence on Count 4 was to run consecutive to any sentence appellant was serving. From the record, it appears that, at the time of sentencing in this case, appellant was serving an 8-year sentence for another burglary.

[2] The crime of unauthorized removal of property is a misdemeanor, as provided in Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 7-203(a), and it carries a maximum penalty of four years' incarceration. CL § 7-203(b). "Property" within the statute expressly may include "a motor vehicle." CL § 7-203(a)(2). Although the State alerted the court to the fact that the statutory maximum for unauthorized removal of property was four years, and the transcript reflects that the court attempted to fix its mistake on the record at the hearing, the commitment record actually filed in this case reflects what is stated

(continued...)

The State agrees that the sentence for unauthorized removal should be vacated, but it contends that the rule of lenity, and not the required evidence test, is the applicable reason. We agree with the State. Because the crimes of theft and unauthorized removal each include a distinct element, the convictions do not merge under the required evidence test. *See McGrath v. State*, 356 Md. 20, 27-28 (1999). CL § 7-104 requires proof of intent or use that "deprives the owner of the property"; and CL § 7-203(a) requires the taking away of one of four specified classes of chattels.

Nevertheless, as the State concedes, the offenses merge under the rule of lenity "because there is nothing in either statute that indicates the legislature intended separate punishments based on the same conduct." *Cf.* CL § 7-105(d)(2), which expressly provides for merger of the related offense of motor vehicle theft.

We agree with the State that, "[u]nder the rule of lenity, the offense carrying the smaller maximum penalty (here, unauthorized use) merges into the offense carrying the greater maximum penalty." *See Miles v. State*, 349 Md. 215, 221, 229 (1998).

Accordingly, we will vacate the sentence imposed on Count 7.

II. The single larceny doctrine

Appellant's grand jury indictment reflects that, in both Counts 4 and 5, he was charged with theft of property in violation of CL § 7-104, the general theft statute. CL § 7-104(g) establishes the penalties for violating the general theft statute. Pursuant to CL

[2](...continued)
above: a sentence of twelve years' executed time, with two ten-year sentences running concurrent.

§ 7-104(g)(1)(i), a person convicted of theft of property or services having a value between $1,000 and $10,000 is guilty of a felony, and subject to imprisonment "not exceeding 10 years or a fine not exceeding $10,000 or both," and "shall restore the property to its owner or pay the owner the value of the property or services." Pursuant to CL § 7-104(g)(1)(ii), a person convicted of theft between $10,000 and $100,000 is likewise guilty of a felony, but is subject to up to 15 years' incarceration, or a $15,000 fine, or both, and also must "restore" the property to its owner or pay the owner its value. Under CL § 7-103(f), a continuing theft scheme is one crime, but the State is permitted to aggregate the value of the property stolen in determining whether the theft was a felony or a misdemeanor. The statute provides:

> (f) When theft is committed in violation of this part under one scheme or continuing course of conduct, whether from the same or several sources:
>
> (1) the conduct may be considered as one crime; and
>
> (2) the value of the property or services may be aggregated in determining whether the theft is a felony or misdemeanor.

In this case, the State prosecuted the theft at issue as one crime committed on or about April 26, 2013, at which time property owned by a married couple was taken from their home and later pawned or concealed. The State did not assert that appellant stole property from the victims on any other occasion, or that there were other victims of a different theft perpetrated by appellant, nor did it try to make the case that there were multiple distinct thefts involved here. However, appellant was convicted of two theft offenses under CL § 7-104 (Count 4 and Count 5), and sentenced as if the thefts were distinct crimes. At sentencing,

the court sentenced appellant to 15 years, suspend all but 12, on Count 4, and ten years, concurrent, on Count 5.

Appellant argues on appeal that his "dual convictions for theft violated the single larceny doctrine" because the State failed to produce any evidence at trial that even arguably could have pointed to a finding that appellant engaged in multiple thefts, and therefore, his conviction and sentence on Count 5 was "inherently illegal" and reviewable even in the face of his trial counsel's failure to object at trial. Appellant asks that this Court "vacate the multiplicitous conviction for Count 5."

The State concurs that appellant's claim of an illegal sentence is reviewable without regard to the lack of an objection, and the State "agrees that [appellant's] conviction and sentence for theft in count five should be vacated, but for different reasons than suggested by [appellant]." The State asserts that double jeopardy concerns, not the single-larceny doctrine, dictate this result. The State contends that "the issue is one of multiple punishments for the same offense," and, since, in this case "the offenses charged in count four and count five are identical," both appellant's conviction and sentence on Count 5 should be vacated. We agree with the State's assertion that appellant was prosecuted for only a single larceny, but we come to a different conclusion with respect to the merger of the lesser included offense charged in Count 5.

The State acknowledges that, at trial, it "proceeded on the theory that there was a single breaking and entering and that [appellant] came into possession of all of the stolen property at the same time," but it contends that the single larceny doctrine "was not violated

by submitting to the jury the 'lesser included offense' of theft of property with a value of at least $1,000 but less than $10,000." Indeed, the only difference between what was alleged in Count 4 and what was alleged in Count 5 related to the value of the property stolen. The jury was instructed:

> [BY THE COURT]: The defendant is charged with the crime of theft. In order to convict the defendant of theft, the State must prove that defendant willfully or knowingly obtained or exerted unauthorized control over the property of an owner and that the defendant had the purpose of depriving the owner of the property.
>
> Or that defendant willfully or knowingly abandoned, used, or concealed the property in such a manner as to deprive the owner of the property or knew that the abandonment, use, or concealment probably would deprive the owner of the property.
>
> And that the value of the property was — and there are different charges in this case. Either theft between a thousand [sic] to one hundred thousand or theft between one thousand and ten thousand.

Pursuant to CL § 7-104(g), conviction on either Count 4 or Count 5 would be a felony (because the minimum threshold for felony theft is $1,000).

The State's position in this case is that, "because the value of stolen property is not an element of theft in Maryland, the offense alleged in count five is not a distinct offense of that charged in count four; it is the 'same offense.'" In support of its assertion that value of the stolen property is not an "element" of the offense of theft, the State cites: *Moore v. State*, 163 Md. App. 305, 319 (2005); *Stackowitz v. State*, 68 Md. App. 368, 373-74 (1986); and *Proctor v. State*, 49 Md. App. 696, 704 (1981).

But the State also acknowledges that there is language to the contrary in some cases in which the Court of Appeals had said that value *is* an element that must be charged and

proved. *See, e.g., Spitzinger v. State*, 340 Md. 114, 121 (1995); *Hagans v. State*, 316 Md. 429, 441-42 (1989).[3] If we apply the latter caselaw and view value as an element that must be proved, then we must conclude that, under the required evidence test, Count 5 was clearly a lesser included offense relative to the offense alleged in Count 4. In the absence of an indication from the Court of Appeals that the statements in *Spitzinger* and *Hagans* regarding proof of value are no longer good law, we will adopt that analysis, and conclude that Count 5 was a lesser included offense relative to the offense charged in Count 4. Accordingly, there should have been no separate sentence imposed for the conviction on Count 5, and we will vacate that sentence.

SENTENCES ON COUNTS 5 AND 7 VACATED; OTHERWISE, JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

[3] The State also points out that a case is currently pending in the Court of Appeals in which this issue was raised in a different context — namely whether an amendment at the beginning of trial should have been permitted where the increased value would elevate the maximum penalty. *Counts v. State*, *cert. granted*, 440 Md. 114 (2014).