UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1265

September Term, 2014

OLIVER ROWAN TUNSTALL

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: October 21, 2015

Oliver Rowan Tunstall, appellant, appeals from a judgment of the Circuit Court for Prince George's County denying his motion to correct an illegal sentence. He presents one question for our review: "Did the trial court err by failing to correct the current illegal sentence?"

For the reasons that follow, we answer that question in the negative, and we shall affirm the judgment of the circuit court.[1]

FACTUAL AND PROCEDURAL BACKGROUND

In November 2006, appellant was charged in a 58-count indictment. According to the Application for Statement of Charges, on October 18, 2006, appellant and an accomplice robbed a restaurant at gunpoint, beating the owner of the restaurant with handguns and a fire extinguisher, and taking two hostages in the process. Appellant pleaded guilty to four of the charges: robbery with a deadly weapon (Count 1), use of a handgun in the commission of a crime of violence (Count 8), and two counts of false imprisonment (Counts 43 and 48). In June 2007, the court sentenced appellant to ten years for each offense, for a total of forty years. The remaining counts were nol prossed.

[1] The full transcript of the court proceedings below, including the sentencing hearing, was not forwarded for our review. The record, however, contains the information necessary to resolve the question on appeal. Accordingly, the State's motion to dismiss the instant appeal due to the lack of the transcript is denied.

Six years later, in October 2013, appellant, *pro se*, filed a motion to correct illegal sentence pursuant to Maryland Rule 4-345(a). On January 24, 2014, the circuit court denied the motion.

DISCUSSION

Appellant's first argument is that, under the required evidence test, the rule of lenity and/or principles of fundamental fairness, the sentence for robbery with a deadly weapon should have merged with the sentence for the use of a handgun in the commission of a crime of violence. Alternatively, he argues that the pronouncement of the sentence was ambiguous, and therefore illegal, because it was not clear whether the sentences for the handgun and false imprisonment offenses were to run consecutive to the sentence for armed robbery or consecutive to each other.

The State contends, initially, that several issues raised are not properly before this Court. In particular, it asserts that appellant's claims that: (1) the sentences should have merged under the rule of fundamental fairness; and (2) the sentence was ambiguous, are not arguments that the sentence was "illegal" for Rule 4-345(a) purposes and, therefore, that these issues do not qualify as "illegal sentence" claims that can be raised despite the failure to raise them below. In any event, the State argues that, even if appellant's arguments are properly before this Court, the rule of fundamental fairness does not apply in this case and the sentence as announced by the sentencing court was not ambiguous. The State further

responds that the sentences for armed robbery and use of a handgun in a felony do not merge under either the required evidence test or the rule of lenity.

Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." To be subject to correction by motion filed under Rule 4-345(a), however, the "illegality must inhere in the sentence, not in the judge's actions." *State v. Wilkins*, 393 Md. 269, 284 (2006). "[T]he focus is not on whether the judge's 'actions' are *per se* illegal but whether the sentence itself is illegal." *Id.* The concept of an "'illegal sentence' under Rule 4-345(a) is a very narrow one—it is limited 'to those situations 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.'" *Bryant v. State*, 436 Md. 653, 662-63 (2014) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)).

A circuit court's ruling on a motion to correct an illegal sentence filed pursuant to Maryland Rule 4-345(a) is subject to appellate review upon the timely filing of a notice of appeal. *State v. Kanaras*, 357 Md. 170, 183-84 (1999). In determining whether a sentence is illegal, we exercise *de novo* review. *Carlini v. State*, 215 Md. App. 415, 443 (2013).

I.

Merger of Sentences

Appellant's first argument is that the sentence is inherently illegal because the sentencing court was required to merge the sentence for armed robbery with the sentence for

using a handgun in the commission of a crime of violence. Appellant asserts that this sentence subjects him to multiple punishments for the same offense.

As the Court of Appeals has explained:

> The doctrine of merging of offenses . . . stems in part from the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution, applicable to state court proceedings via the Fourteenth Amendment. . . . The Double Jeopardy Clause states that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." The Fifth Amendment guarantee against double jeopardy prohibits both successive prosecutions for the same offense as well as multiple punishment for the offense.

Dixon v. State, 364 Md. 209, 236 (2001). "A failure to merge a sentence is considered to be an 'illegal sentence' within the contemplation of [Rule 4-345(a)]." *Pair v. State* 202 Md. App. 617, 624 (2011), *cert. denied*, 425 Md. 397 (2012). As we observed in *Britton v. State*, 201 Md. App. 589 (2011):

> [W]hen the trial court is required to merge convictions for sentencing purposes but, instead, imposes a separate sentence for each unmerged conviction, it commits reversible error. . . . [S]uch an error implicates the illegality of imposing "multiple sentences" . . . for the same offense. . . . [T]he result is the imposition of a sentence "not permitted by law."

Id. at 598-99.

"The applicable standard for determining whether one offense merges into another is what is often called the required evidence test." *Abeokuto v. State*, 391 Md. 289, 353 (2006) (quoting *McGrath v. State*, 356 Md. 20, 23 (1999)) (quotations omitted). This test has been summarized as follows:

> "The required evidence test focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter. Stated another way, the required evidence is that which is minimally necessary to secure a conviction for each [] offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, there is no merger under the required evidence test even though both offenses are based upon the same act or acts. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, and where both offenses are based on the same act or acts, [] merger follows []."

Id. at 353 (quoting *McGrath*, 356 Md. at 23-24). "When a merger is required, separate sentences are normally precluded; instead, a sentence may be imposed only for the offense having the additional element or elements." *Id.*

As the Court of Appeals observed in *Whack v. State*, 288 Md. 137 (1980), however, "the required evidence test is not the only standard for determining when two statutory violations, based on the same transaction, will be treated as one." *Id.* at 142. The issue of whether separate sentences constitutes multiple punishment for the same offense "is often particularly dependent on the intent of the Legislature." *Id.* at 143.

> "[U]nder certain circumstances, multiple punishment . . . for offenses deemed the same under the required evidence test do[es] not violate the Fifth Amendment prohibition against double jeopardy. . . . [T]he legislature 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."

Id. at 149 (quoting *Newton v. State*, 280 Md. 260, 274 n.4 (1977)).

In *Whack*, the defendant challenged separate sentences for robbery with a deadly weapon and use of a handgun in the commission of a felony (i.e., robbery). The Court of Appeals examined the legislative history of the 1972 handgun control statute (currently codified as Md. Code (2015 Supp.) § 4-101 *et seq.* of the Criminal Law Article), and determined that "[t]he language of the 1972 handgun statute confirms that there was no intent to delete by implication penalties provided by other statutes, and confirms that the penalties set forth in the handgun act were intended to be imposed, *in addition* to the penalties under other applicable statutes." *Id*. at 147. The Court therefore concluded that:

> [I]t is clear to us that the General Assembly intended to authorize the imposition of punishment under both § 36B(d)[2] and § 488 of Art. 27[3], when one commits a robbery with a handgun. It has viewed the use of a weapon to intimidate the victim of a robbery as an aggravating factor, warranting the enhanced penalty of § 488. And when that weapon is a handgun, it has viewed it as a further aggravating factor, requiring the *additional* penalty under 36B(d).

Id.

Under *Whack*, therefore, the sentencing court was not required to merge appellant's conviction for robbery with a dangerous weapon with the conviction for use of a handgun

[2] Currently Md. Code (2015 Supp.) § 4-204 of the Criminal Law Article ("CR") (Use of a handgun in commission of a crime.).

[3] Currently CR § 3-403 (Robbery with a dangerous weapon.).

in commission of a felony for sentencing purposes, under the required evidence test, the rule of lenity, or fundamental fairness.[4]

Appellant's separate sentences for armed robbery and use of a handgun in the commission of a felony were not illegal. The circuit court properly denied appellant's motion to correct an illegal sentence.

II.

Ambiguous Sentence

"The trial judge's obligation is to articulate the period of confinement with clarity so as to facilitate the prison authority's task." *Robinson v. Lee*, 317 Md. 371, 379 (1989). Any ambiguity in sentencing should be resolved in favor of lenity. *Id.* at 380.

Appellant argues that the sentence was illegal because the pronouncement by the sentencing court was ambiguous. Appellant has provided the excerpt of the sentencing hearing where the sentence was announced:

> THE COURT: . . . I will sentence you as follows[:] For Count 1, robbery with a deadly weapon, for a period of ten years. For Count 8, use of a handgun in a crime of violence, for a period of ten years. For Count 43, false imprisonment of Phabiene Simeon, for a period of ten years. And for Count 48, false imprisonment of Yephnick Adelphi, for a period of ten years, all to run consecutive.

[4] We do note, as the State correctly points out, that failure to merge sentences under principles of fundamental fairness does not result in an inherently illegal sentence that is subject to correction pursuant to Md. Rule 4-345(a). *Pair v. State* 202 Md. App. 617, 649 (2011) *cert. denied*, 425 Md. 397 (2012).

Appellant asserts that the phrase "all to run consecutive" is ambiguous because there is more than one way to interpret the pronounced sentence. He suggests the following potential interpretations: (1) each sentence is consecutive to each other; (2) Counts 8, 43 and 48 are consecutive only to Count 1 - and thereby concurrent to each other; or (3) Count 48 is the only sentence to run consecutive. Appellant further suggests that the perceived ambiguity must be resolved in his favor, so that all four sentences shall be deemed to run concurrently.

The State contends that appellant's argument that the sentence was ambiguous is not a claim that the sentence was illegal, and therefore, the issue was not properly preserved. In any event, the State asserts that the pronouncement of the sentence was clear. We conclude that the issue is not properly before this Court.

As indicated, *supra*, an illegal sentence is one where there has either been no conviction warranting a sentence for a particular offense, or the sentence is not a permitted one for the particular conviction. Neither situation is present here. Appellant was sentenced only to the four offenses to which he pled guilty. Furthermore, the consecutive ten-year sentences for each offense were permitted by law.[5] Appellant does not argue otherwise.

[5] The statutory penalty for armed robbery is a sentence of up to 20 years. CR § 3-403(b). The statutory penalty for use of a handgun in the commission of a crime of violence is 5 to 20 years. CR § 4-204(c). The only restriction on a sentence for false imprisonment, a common law crime, is that it be within the reasonable discretion of the trial judge and not cruel and unusual punishment. *See Kirkorian v. State*, 233 Md. 324, 326, *cert.* (continued...)

Therefore, appellant's argument that the sentence was ambiguous is not properly before this Court on appeal from the denial of a motion to correct an illegal sentence.

Even if the issue were properly before us, we would conclude that it is without merit. We perceive no ambiguity. The sentencing court announced the ten-year sentences for each of the four offenses to which appellant had pled guilty, then announced "all to run consecutive." This sentence clearly indicted that the sentences were to run consecutively to each other.

Moreover, the commitment record indicated that the sentence for each of the four offenses was ten years, and "[t]he total time to be served is 40 years." *See Dutton v. State*, 160 Md. App. 180, 193 (2004) (unambiguous commitment order satisfies the concern that a defendant be clearly apprised of the time he must serve), *cert. denied*, 385 Md. 512 (2005). And the docket entry states as follows:

> Count 1 for a period of 10 years;
> Count 8 for a period of 10 years; consecutive to Count 1;
> Count 43 for a period of 10 years; consecutive to Count 8;
> Count 48 for a period of 10 years; consecutive to Count 43.

See Collins v. State, 69 Md. App. 173, 197 (1986), *cert. denied*, 308 Md. 572 (1987) (even when a sentencing judge does not clearly articulate the period of confinement, "where the

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[5](...continued)
denied, 377 U.S. 945 (1964). Finally, "[a] court has a power to impose whatever sentence it deems fit as long as it does not offend the maximum and minimum penalties. This judicial power includes the determination of whether a sentence will be consecutive or concurrent, with the same limitations." *State v. Parker*, 334 Md. 576, 592-93 (1994).

duration of a sentence is otherwise discernable from the record, it will be upheld without resort to the presumption of leniency").

Even if the issue were properly before us, there was no ambiguity in the sentence here. It is clear from the record that appellant's sentences were to run consecutive to each other.

APPELLEE'S MOTION TO DISMISS DENIED. JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.