UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0473

September Term, 2011

WILLARD C. TURNER

v.

STATE OF MARYLAND

Krauser, C.J.,
Meredith,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: July 7, 2016

Willard C. Turner appeals from the denial, by the Circuit Court for Baltimore County, of a motion to correct an illegal sentence. Finding no error, we affirm the court's judgment.

In 2005, after pleading guilty to first degree assault and use of a handgun in the commission of a felony or crime of violence, Turner was sentenced to a term of 10 years' imprisonment for the first degree assault and a term of 5 years' imprisonment for the handgun offense, to run consecutive to the first degree assault sentence pursuant to Md. Code (2002, 2005 Supp.), § 4-204(b)(1)(i) of the Criminal Law Article ("CL") (a sentence for use of a handgun in the commission of a crime of violence or felony shall be imposed "in addition to any other sentence imposed for the crime of violence or felony"), *recodified as* Md. Code (2002, 2011 Supp.), CL § 4-204(c)(1)(i).

Turner then filed a motion to correct an illegal sentence, contending that the conviction for first degree assault "must merge" with the conviction for use of a handgun in the commission of a felony or crime of violence, because first degree assault "is the lesser included offense of" use of a handgun in the commission of a felony or crime of violence. The court denied the motion.

Discussion

On appeal, Turner renews his contention that the court erred in denying his motion to correct an illegal sentence, because the conviction for first degree assault "must merge under the [r]equired [e]vidence [t]est." (Underlining omitted.) We disagree. The Court of Appeals has stated that the required evidence test is

> the general rule for determining whether two criminal violations, treated separately under the statutory provisions, should be deemed the same when both violations are based on the same transaction[.] Under this test, the violations are separate if each requires proof of an additional fact which the other does not, or, stated another way, if each of the offenses created requires proof of a different element. However, if only one has a distinctive element, they are deemed to be the same offense under the required evidence test. [The Court has] generally applied this standard to decide the permissibility of successive trials, as well as multiple punishment, under the double jeopardy clause of the Fifth Amendment, under Maryland common law double jeopardy principles, and as a matter of Maryland merger law.

Whack v. State, 288 Md. 137, 141-42 (1980) (internal citations, quotations, brackets, and footnote omitted), *appeal dismissed and cert. denied*, 450 U.S. 990 (1981). The Court has "noted, however, 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." *Id.* at 149 (internal citation, quotations, and brackets omitted). One of those circumstances is when "[t]he [L]egislature . . . indicate[s] 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.* (internal citation, quotations, and brackets omitted). And that principle applies here. As the Court of Appeals observed in *Whack*:

> The 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.

Hence, the separate sentences Turner received for first degree assault and the use of a handgun in the commission of a felony or violent offense were not barred by the Fifth Amendment.

Turner next contends that this Court's opinion in *Harris v. State*, No. 758, September Term, 2005 (February 6, 2007), required the sentencing court to grant the motion. But, Rule 1-104(a) states that "[a]n unreported opinion of the . . . Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority." Hence, the court did not err in denying the motion in question.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.