UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1109

September Term, 2011

JAMES DAVIS

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: April 6, 2016

Following a jury trial in the Circuit Court for Baltimore County, appellant, James Davis ("Davis"), was convicted of one count of robbery with a dangerous weapon, three counts of use of a handgun in a felony or crime of violence, three counts of first-degree assault, and one count of first-degree burglary. For his offenses, Davis was sentenced to a total of thirty years' incarceration. Davis appealed his convictions and the computation of his sentences. We affirmed the judgments in an unreported opinion. *Davis v. State*, No. 2509, Sep. Term 2003 (Md. Ct. Spec. App. Mar. 4, 2005). Thereafter, Davis filed a motion to correct an illegal sentence. The circuit court denied Davis's motion. This timely appeal followed.

On appeal, Davis presents three issues for our review,[1] which we rephrase as follows:

> Whether the circuit court erred in denying Davis's motion to correct an illegal sentence.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Baltimore County.

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[1] The issues, as presented by Davis, are:

> 1) Did the lower court error [*sic*] in not finding that appellant's sentences ere illegal and not properly merged as required by the laws of this State amounting to double jeopardy?
>
> 2) Did the lower court error [*sic*] by holding that merger did not apply for sentencing purpose [*sic*] to this instance case?
>
> 3) Did the lower court's lack of reasoning supporting the denial of the motion result in the decision being arbitrary and capricious violating his due process?

FACTUAL AND PROCEDURAL BACKGROUND

On February 19, 2003, Adolf Cloud ("Cloud"), Katharine Simms ("Simms"), and Keisha Smoot ("Smoot") were in an apartment in Essex, Maryland. That evening Cloud heard a knock on the apartment door. Cloud answered the door believing that the visitor was a guest of Simms. When Cloud opened the door three men armed with guns ran inside the apartment yelling, "where's the money at?" Two of the men were wearing masks.

Davis was identified as one of the three armed men who participated in the home invasion. Witnesses testified that during the robbery, Davis was wearing a gray sweatshirt. A gray sweatshirt was subsequently recovered from Davis's home with Cloud's blood on it. The evidence adduced at trial further revealed that Davis threatened Cloud, Simms, and Smoot with a handgun. Additionally, Davis possessed a long knife. Upon entering the home, Davis directed Cloud to turn around and he then pushed Cloud to the ground. Davis proceeded to spray mace in Cloud's eye while demanding that Cloud surrender his money. Cloud advised Davis that he had more than $100 in his pocket.

Upon learning that Cloud possessed money in his pocket, Davis stripped Cloud of his trousers. Davis then proceeded to stab Cloud numerous times in the back, neck, hand, groin, and both legs. As he was being stabbed, Cloud tried to close his legs and cover his groin with his hands. Pointing the gun at Cloud's neck, Davis demanded that he "open [his] legs." Cloud did so, and Davis continued stabbing him. During this ordeal, the two other assailants escorted Simms and Smoot into a closet. The two assailants then left.

While the two other assailants left, Davis held a gun over Cloud's head. Then, one of the other two men came back into the apartment and said to the appellant, "no, don't do that, let's just go, let's just go." Davis then left, but not before taking Cloud's money, his wallet, and his cell phone. At trial, Davis testified on his own behalf. Davis presented an alibi defense, claiming that he was involved in a car accident at the time of the robbery.

Davis was convicted of one count of robbery with a dangerous weapon, three counts of use of a handgun in a felony or crime of violence, three counts of first-degree assault, and first-degree burglary. Specifically, Davis was convicted of robbing Cloud with a dangerous weapon; one count of use of a handgun in a felony or crime of violence for each of the three victims; one count of first-degree assault against each of the three victims; and first degree burglary. Thereafter, Davis appealed his conviction and questioned, among other things, whether "the sentencing court err[ed] by not merging his conviction or sentence for first-degree assault of Cloud into his conviction or sentence for robbery with a dangerous weapon of cloud?" We answered in the negative and affirmed Davis's conviction and sentences.

Thereafter, on June 2, 2011, Davis filed a motion to correct an illegal sentence. The circuit court denied Davis's motion on June 22, 2011. This timely appeal followed. Additional facts will be discussed as necessitated by the issues presented.

STANDARD OF REVIEW

Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." "A sentence is illegal when the illegality inheres in the sentence itself." *Taylor v.*

State, 224 Md. App. 476, 500 (2015) (internal quotations omitted). The "'failure to merge a sentence is considered to be an "illegal sentence" within the contemplation of the rule.'" *McClurkin v. State*, 222 Md. App. 461, 489 n.8 (2015) (quoting *Pair v. State*, 202 Md. App. 617, 624 (2011)). Moreover, "a defendant may attack the sentence by way of direct appeal, or collaterally and belatedly through the trial court, and then on appeal from that denial." *Bishop v. State*, 218 Md. App. 472, 504 (2014) (internal quotations omitted). Whether a sentence is illegal under Rule 4-345(a) is a legal question that we review *de novo*. *Carlini v. State*, 215 Md. App. 415, 425-26 (2013).

DISCUSSION

Although Davis argues generally that the circuit court erroneously denied his motion to correct an illegal sentence, we discern from his brief two specific arguments as to why the circuit court should have granted his motion to correct an illegal sentence. First, Davis asserts that "Count 1-Robbery with a Dangerous and Deadly weapon, Count two First Degree Assault, [and] Count 8 Use of a Handgun in the Commission of violence" should merge. Secondly, Davis contends that he was deprived of procedural due process when his motion to correct an illegal sentence was denied without a hearing, without having given Davis the opportunity to respond to the States opposition to Davis's motion, and without the trial judge having sufficiently articulated his reasons for denying the motion. We shall address these issues in turn.

I. The Circuit Court Did Not Err in Refusing to Merge Davis's Sentences.

In his argument, Davis alleges that "Count 1-Robbery with a Dangerous and Deadly weapon, Count two First Degree Assault, [and] Count 8 Use of a Handgun in the Commission of violence" should merge. For the reasons stated herein, Davis is precluded from asserting that first degree assault and robbery with a dangerous weapon should merge. We further hold that the offenses of use of a handgun and robbery with a dangerous weapon should not merge. We, therefore, hold that Davis's rights under the Fifth Amendment's double jeopardy clause of the U.S. Constitution were not violated.

A. The Circuit Court Did Not Err in Refusing to Merge Davis's Sentence for First Degree Assault Into Robbery With a Dangerous Weapon.

Davis first argues that his sentence is illegal because the circuit court was required to merge his sentences for first-degree assault and robbery with a dangerous weapon. The State, in response, contends that the law of the case doctrine precludes the circuit court, and this Court from reconsidering this question because we have already opined on this question in Davis's direct appeal. We agree with the State. Accordingly, we decline to reconsider whether Davis's sentences for first-degree assault and robbery with a dangerous weapon should have merged.

> "The law of the case doctrine is one of appellate procedure. . . . Under the doctrine, once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case . . . . Not only are lower courts bound by the law of the case, but decisions rendered by a prior appellate panel will generally govern the second appeal at the same appellate level as well, unless the previous decision is incorrect because it is out

> of keeping with controlling principles announced by a higher court and following the decision would result in manifest injustice."

Haskins v. State, 171 Md. App. 182, 189-90 (2006) (quotations and alterations omitted) (ellipses in original) (quoting *Scott v. State*, 379 Md. 170, 183-84 (2004)).

In the instant action, Davis has already presented us with the question of whether his sentences for first-degree assault and robbery with a dangerous weapon should merge. In an unreported opinion filed March 4, 2005, we affirmed his cumulative sentences because separate instances of conduct gave rise to each of his sentences. Indeed, we held that:

> Under the circumstances, it must have been clear to the jurors that the charges of robbery with a dangerous weapon and first-degree assault against Cloud were based on separate acts by [Davis] -- holding at gunpoint (robbery) and stabbing (first-degree assault) -- that caused separate insults. Accordingly, it is likewise clear to us that the convictions were based on separate insults, and therefore the sentences were not required to merge.

We refuse to reconsider our express holding in our March 4, 2005 opinion. Indeed, our prior opinion constitutes the law of the case.

B. The Circuit Court Did Not Err by Refusing to Merge Davis's Sentence for Use of A Handgun Into Robbery With a Dangerous Weapon.

Additionally, Davis avers that under the required evidence test the circuit court should have merged Davis's sentence for use of a handgun into his sentence for robbery with a dangerous weapon. The State, for its part, asserts that the circuit court properly declined to merge these sentences because the legislature has expressly authorised separate cumulative sentences for this conduct. We agree with the State.

Although we agree with the State, as an initial matter--for the reasons stated in Part I(A), *supra*--appellate review of this question might very well also be precluded by the law of the case doctrine. Indeed:

> In Maryland, the law of the case doctrine prevents the revisiting of not only an issue that has been properly raised on appeal but also "a question that could have been raised and argued in that appeal on the then state of the record . . . ." *Martello v. Blue Cross & Blue Shield of Maryland, Inc.*, 143 Md. App. 462, 474, 795 A.2d 185 (2002) (emphasis added). Under the law of the case doctrine, "[n]either the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal." *Id*. (emphasis omitted).

Haskins, *supra*, 171 Md. App. at 190. Our opinion in *Haskins*, *supra*, indicates that not only is Davis precluded from relitigating arguments that we have already decided in a prior appeal, but he is also precluded from making arguments that he could have made in his direct appeal. In his direct appeal, Davis could have raised the question of merger regarding all of his sentences, but he did not. The parties, however, have not asserted that the law of the case doctrine precludes this argument. Accordingly, for the purpose of this appeal, we shall assume without deciding that the law of the case doctrine does not apply to preclude this question.

Turning to the parties' argument, the doctrine of merger exists to determine "whether the legislature may have intended to preclude cumulative punishment" for two particular offenses. *Spitzinger v. State*, 340 Md. 114, 121 (1995); *see also Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (holding that the intent of "[l]egislatures, not courts, prescribe the scope of punishments"); Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment:*

Cutting the Gordian Knot, 77 U. Colo. L.Rev. 595, 596-97 (2006) (arguing that issues of multiple punishment involve questions of legislative intent rather than double jeopardy). "Under Maryland law, the doctrine of merger is examined under three distinct tests: (1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness." *Alexis v. State*, 437 Md. 457, 484 (2014). Davis asserts that his cumulative sentences for use of a handgun and robbery with a dangerous weapon are improper under the required evidence test. We disagree.

The Fifth Amendment to the U.S. Constitution provides "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. "The Fifth Amendment guarantee against double jeopardy prohibits both successive prosecutions for the same offense as well as multiple punishment for the same offense." *Newton*, *supra*, 280 Md. at 263. Generally, the Supreme Court of the United States and the Court of Appeals have indicated that the double jeopardy clause protects defendants from multiple punishments for the same offense, just as it prevents multiple prosecutions arising from the same offense. *Newton*, *supra*, 280 Md. at 265 (quoting *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874) ("[W]e do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.")).

"Under federal double jeopardy principles and Maryland merger law, 'the principal test for determining the identity of offenses is the required evidence test.'" *Christian v. State*, 405 Md. 306, 321 (2008) (quoting *Dixon v. State*, 364 Md. 209, 236-37 (2001)). The

standard for determining whether two offenses are the same under the required evidence test is the same standard employed by the Supreme Court of the United States to determine whether two offenses are the same under *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Newton v. State*, 280 Md. 260, 266 (1977). Accordingly, "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, *supra*, 284 U.S. at 304. In essence, under the required evidence test we ask whether it is possible in the abstract to commit each offense without also committing the other.

Under some circumstances, however, the imposition of multiple punishments for the same conduct may not run afoul of the Fifth Amendment if the legislature has specifically authorized cumulative punishments.

> Under the Double Jeopardy Clause, a defendant is protected against multiple punishment for the same conduct, unless the legislature clearly intended to impose multiple punishments. *See Missouri v. Hunter*, 459 U.S. 359, 365-69, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); *Whalen v. United States*, 445 U.S. 684, 688-89, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Where the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct, cumulative punishment may be imposed under the statutes in a single trial. *See Missouri v. Hunter*, 459 U.S. at 368, 103 S.Ct. 673. The Supreme Court has said that with respect to cumulative punishments imposed in a single trial, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id*. at 366, 103 S.Ct. 673. The bottom line in resolving "the question of what punishments are constitutionally permissible is not different from the question of

> what punishments the Legislative Branch intended to impose." *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

Jones v. State, 357 Md. 141, 156 (1999). Accordingly, "even if offenses are deemed the same under the required evidence test, the Legislature may punish certain conduct more severely if particular aggravating circumstances are present, by imposing punishment under two separate statutory offenses." *Frazier v. State*, 318 Md. 597, 614-15 (1990).

In the instant action, Davis argues that the lesser offense of use of a handgun in commission of a crime should merge into the greater offense of robbery with a dangerous weapon. Critically, the elements of robbery with a dangerous weapon are: an actual or attempted robbery;[2] with a dangerous weapon or by displaying a written instrument claiming that the person has possession of a dangerous weapon. Md. Code (2002, 2012 Repl. Vol., 2015 Suppl.), § 3-403 of the Criminal Law Article ("CL"). Moreover, one commits use of a handgun in commission of crime when they: use a firearm, in the commission of a crime of violence or any felony.[3] As an initial matter, we observe that the offenses here are not the same under the required evidence test.

[2] The crime of Robbery is set forth in CL § 3-402. Under that section, robbery is "'the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence, or by putting him in fear.'" *Peters v. State*, 334 Md. App. 306, 355 (2015) (quoting *Coles v. State*, 374 Md. 114, 123 (2003)).

[3] In this case, robbery with a dangerous weapon is both a felony and a crime of violence. *See* CL § 5-101(c)(14).

Notably, one may commit robbery with a dangerous weapon without also using a handgun. Likewise, one may commit use of a handgun in commission of crime without also robbing someone with a dangerous weapon. Indeed, when we undertake a *Blockburger* analysis we aim to determine whether one must, necessarily, always, commit the lesser included offense in order to accomplish the greater offense. The fact that the two offenses occurred in a "single transaction" of criminal conduct is immaterial to this analysis. *See Grady v. Corbin*, 495 U.S. 508, 521 (1990) (undermining *Blockburger*, and holding that double jeopardy analysis "is not an 'actual evidence' or 'same evidence' test. The critical inquiry is what conduct the State will prove." (footnote omitted)), *overruled by United States v. Dixon*, 509 U.S. 688, (1993) (reaffirming *Blockburger*, and condemning *Grady* as "unworkable" and "badly reasoned."). Accordingly, we hold that the crimes of use of a handgun and robbery with a dangerous weapon are not the same offense under the required evidence test.

Assuming *arguendo*, that the offenses at issue here are the same under the required evidence test, merger is nonetheless not appropriate here. This is so because the legislature has expressly articulated that the lesser offense of use of a handgun is to be applied as an enhancement to the greater offense of robbery with a dangerous weapon. *Frazier*, *supra*, 318 Md. at 614-15. Indeed, with regard to the handgun offense, the General Assembly has specifically provided that "[a] person who violates this section is guilty of a misdemeanor and, **in addition to any other penalty imposed for the crime of violence or felony,** shall be sentenced . . . ." CL § 4-204(c)(1)(i) (emphasis added). This language unambiguously

indicates that the General Assembly intended that the aggravating circumstances articulated in CL § 4-204 are to serve as an enhancement to and punished separately from the underlying crime that served as the basis for that offense.

In a merger analysis, the required evidence test is merely a tool that ordinarily "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri, supra*, 459 U.S. at 366. Although the required evidence test is generally an appropriate tool to discern the intent of the legislature, when the text of a statutory code clearly expresses that a defendant may be subject to cumulative punishments for two offenses that are the same under the required evidence test, we allow the statute to control. *Jones, supra*, 357 Md. at 156. Here, the imposition of cumulative sentences for Davis's convictions are in accordance with the General Assembly's clearly articulated policy determination to "punish certain conduct more severely if particular aggravating circumstances are present." *Frazier*, *supra*, 318 Md. at 614-15. We, therefore, hold that the required evidence test does not require merger here.

II. The Circuit Court Did Not Deprive Davis of Procedural Due Process in Denying His Motion to Correct an Illegal Sentence.

Davis further argues that the circuit court violated his procedural due process rights when it denied his motion to correct an illegal sentence without a hearing, without giving him adequate time to respond to the State's opposition to his motion, and without providing him a statement of reasons for denying his motion. The State asserts that the court was not

required to give Davis a hearing on his motion, and that Davis was otherwise provided all of the process that he was due. We agree with the State.

"The due process clauses in the Fourteenth Amendment and in Article 24 of the Maryland Declaration of Rights protect an individual's interests in substantive and procedural due process." *Knapp v. Smethurst*, 139 Md. App. 676, 703 (2001). "A fundamental component 'of the procedural due process right is the guarantee of an opportunity to be heard and its instrumental corollary, a promise of prior notice.'" *Id.* (quoting Lawrence Tribe, *American Constitutional Law* § 10-15, at 732 (2nd ed.1988)). Procedural due process is "a flexible concept that calls for such procedural protections as a particular situation may demand." *Wagner v. Wagner*, 109 Md. App. 1, 24 (1996). "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprize interested parties and the pendency of the action and afford them an opportunity to present their objections.'" *Griffin v. Bierman*, 403 Md. 186, 197 (2008) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The process that is due, however, is "'created and [its] dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Elliott v. Kupferman*, 58 Md. App. 510, 520-21 (1984) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Notably, "[d]ue process of law does not mean that the litigant need be satisfied with the result." *Bugg v. Md. Transp. Auth.*, 31 Md. App. 622, 630 (1976).

With regard to a motion to correct an illegal sentence, Md. Rule 4-345(f) provides:

> The court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard. The defendant may waive the right to be present at the hearing. No hearing shall be held on a motion to modify or reduce the sentence until the court determines that the notice requirements in subsection (e)(2) of this Rule have been satisfied. If the court grants the motion, the court ordinarily shall prepare and file or dictate into the record a statement setting forth the reasons on which the ruling is based.

Md. Rule 4-345(f).

Plainly, then, the text of Md. Rule 4-345(f) requires a hearing to be held before a court *grants* a motion to correct an illegal sentence, but the rule does not require a hearing before the court *denies* such a motion. The plain and unambiguous text of the rule as it exists, however, does not grant a defendant a right to a hearing when a court denies a motion to correct an illegal sentence. Accordingly, the circuit court did not err in denying Davis's motion to correct an illegal sentence without a hearing.

Davis further contends that he was not permitted an opportunity to respond to the State's opposition to his motion to correct an illegal sentence, and that the court erred by denying Davis's motion without adequately articulating its reasons for doing so. Under Md. Rule 8-504, Davis has an obligation to cite us to the authority supporting the relief he seeks. Davis, however, fails to cite us to authority which mandates that he be afforded an opportunity to respond to the State's opposition, or that the circuit court must provide a statement of reasons or otherwise articulate its reasons for denying Davis's motion.

Moreover, our review of Md. Rule 4-345, as well as of the Maryland Rules relating to criminal cases -- thorough, we trust -- unearths no support for Davis's proposition that he was entitled to an opportunity to respond to the State's opposition, or a statement of reasons upon the denial of his motion to correct an illegal sentence. We, therefore, hold that the circuit court did not deprive Davis of Procedural due process by denying Davis's motion to correct an illegal sentence in its order dated June 23, 2011.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. APPELLANT TO PAY COSTS.