UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1403

September Term, 2015

JAMES ALPHONSO LAURY, JR.

v.

STATE OF MARYLAND

Woodward,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: February 10, 2017

On October 5, 2006, after a jury trial in the Circuit Court for Baltimore County, James Alphonso Laury, Jr., appellant, was convicted of second-degree murder, second-degree assault, and use of a handgun in the commission of a crime of violence. A sentencing hearing was held on December 21, 2006. The precise terms of the sentence are the subject of this appeal. No notice of appeal was filed. In a post-conviction proceeding, appellant was granted the right to file a belated appeal, and this timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following three questions for our consideration:

I. Should this Court order a correction of the commitment record relating to the sentence for murder in the second degree?

II. Must this Court vacate the sentence announced in court for use of a handgun because it exceeds the statutory maximum?

III. Did the suppression hearing court err by upholding the search of appellant's cell phone?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

This appeal arises out of the 2005 shooting death of Earl Washington Barnes, Jr., also known as Josh Barnes, in the Randallstown area of Baltimore County. Barnes died of a "[g]unshot wound to the head with complications" and the manner of death was homicide. During an autopsy, a "[c]aliber .25 auto-fired bullet" was recovered from Barnes's head.

Police recovered six 9 mm spent shell casings and two .25 caliber spent cartridge cases from the scene of the shooting. Ronnie Robinson admitted that he was present at the scene of the shooting and fired a 9 mm gun in the air to scare away two men who were

assaulting Josh Barnes. Later testing determined that the six 9 mm spent shell casings collected at the scene of the shooting had been fired from Robinson's gun.

Gregory Banks pleaded guilty to second-degree assault and agreed to testify as a witness for the State. On the night of the shooting, he arrived at the home of Mia Wilson with Laury and LaDavia Dempsey. According to Banks, he and Laury went there to confront and beat up Barnes, who had been "disrespecting" and "cussing … out" Wilson, who was Dempsey's friend. Laury had a gun, which he asked Banks to hold once they arrived at Wilson's house. Banks gave the gun to Dempsey before he and Laury started beating up Barnes. When someone started shooting, Banks, Dempsey, and Laury ran back towards their car. As he was running, Banks told Dempsey to give him the gun, but she refused. Laury then took the gun from Dempsey and started shooting. Thus, it was the State's theory that Laury fired the bullet that killed Barnes.

I. & II.

Laury contends that his commitment record should be corrected to reflect a sentence of only three years, instead of thirty years, for second-degree murder. He also argues that the sentence for use of a handgun in the commission of a crime of violence must be vacated because it exceeds the statutory maximum sentence of twenty years. *See* Md. Code (2002, 2012 Repl. Vol.), § 4-204(c)(1). Our resolution of these issues requires an examination of the record with respect to Laury's sentences.

On October 5, 2006, the jury returned its verdict, as follows:

THE COURT:	All right, Mr. Clerk, would you take the verdict, please?

THE CLERK:	Yes, Your Honor. Ladies and gentlemen of the jury, are you agreed upon a verdict?
THE JURY:	Yes.
THE CLERK:	Who shall say for you?
THE JUROR:	Madam Foreman.
THE CLERK:	Please stand. What say you in case K-05-2857, State of Maryland versus James Laury, 1, Murder in the First Degree; not guilty, guilty?
THE FOREPERSON:	Not guilty.
THE CLERK:	2, Murder in the Second Degree; guilty, not guilty?
THE FOREPERSON:	Guilty.
THE CLERK:	3, Use of a Handgun in the Commission of a Crime of Violence; not guilty, guilty?
THE FOREPERSON:	Guilty.
THE CLERK:	4, Assault in the Second Degree; not guilty, guilty?
THE FOREPERSON:	Guilty.
THE CLERK:	Thank you. You may be seated.

At the sentencing hearing, defense counsel asked the court to consider sentencing Laury to incarceration for a term of twenty years for the second-degree murder conviction and a concurrent term of five years, without the possibility of parole, for the use of a handgun in the commission of a crime of violence conviction. The State, on the other hand,

asked the court to impose a sentence of thirty years for second-degree murder and a consecutive term of twenty years for the handgun conviction.

The court sentenced Laury, stating, in part, as follows:

THE COURT:	All right. Well, first a little housekeeping. The assault charge, which count is that, so I don't have to go through this thick file? He was found guilty of assault.
THE CLERK:	Count 4.
THE COURT:	Is that Count 4? Thank you very much. Count 4 will merge into – I assume Count 1 is the murder charge, right?
[PROSECUTOR]:	That's correct.
THE COURT:	Okay. That will merge in because it – those elements comprise part of the elements of the murder in this case.
[PROSECUTOR]:	Yes, Your Honor.
THE COURT:	All right? All right. As to Count 1 – what's the handgun count? Count 8? 9? I forget.
THE CLERK:	2 and 3.
THE COURT:	Okay. Which one is a crime of violence?
THE CLERK:	They're both – two and three both show crime of violence.
THE COURT:	State, one's not a felony?
[PROSECUTOR]:	Your Honor, --

THE COURT:	Make sure I just get the right sentence on things. Count 3's the felony. So I'll sentence on Count 2. I'll merge Count 3.
[DEFENSE COUNSEL]:	Count 2.
[PROSECUTOR]:	Okay. Thank you, Your Honor.
THE COURT:	Okay? All right. Count 1, three years Department of Correction. Count 2, 30 years Department of Correction, five years without parole, and I will run it consecutive. I am going to refer him to the Patuxant [sic] Youth Offender Program. All right? You have to – because of the nature of, at least, Count 1, you must serve 50 percent of that sentence before you're eligible for parole because it's under the Violent Crime statute. I don't believe that's correct with Count 2, but DOC will know that. But, of course, Count 2, you have to serve five years of that.

The case history portion of the docket entries indicates that Laury was convicted of count one, second-degree murder and sentenced to incarceration for a term of thirty years. It also indicates that the conviction for count four, second-degree assault, was merged with the conviction for second-degree murder for sentencing purposes. In addition, the case history shows that Laury was found guilty of counts 2 and 3, both of which charged him with use of a handgun in the commission of a felony or crime of violence. For count two, Laury was sentenced to a term of twenty years, the first five years to be served without the possibility of parole, to run consecutive to the sentence imposed for second-degree murder. Count three, which appears to have charged a second handgun violation, was merged into

count two for sentencing. The "Sentencing Net Totals" section of the docket entries provides that Laury received a sentence totaling fifty years and that he was entitled to credit for 541 days.

Laury's commitment record similarly provides that, for count one, he was sentenced to thirty years for second-degree murder and, for count three, he was sentenced to a consecutive term of twenty years for use of a handgun in the commission of a felony or crime of violence, the first five years to be served without the possibility of parole. Like the case history in the docket entries, the commitment record indicates that Laury's conviction under "Count No: 3," which charged use of a handgun in the commission of a felony or crime of violence, was merged, for sentencing purposes, with "Count No: 2," which charged the same crime, and that count four, which charged second-degree assault, was merged with second-degree murder for sentencing purposes.[1]

[1] It is unclear whether Laury was charged with one or two counts asserting a handgun violation and whether one or two counts were sent to the jury for consideration. Prior to trial, defense counsel stated on the record, "Mr. Laury, given the nature of the charges against you which in this case are first degree murder, use of a handgun in the commission of a felony, as well as use of a handgun in the commission of a crime of violence, you're entitled to a jury trial." After the State rested, and just after the court's denial of Laury's motion for judgment of acquittal with respect to the charge of "use of a handgun," the judge asked the prosecutor, "[o]ne is a crime of violence, one is felony [sic]. You're only submitting one to the jury?" The prosecutor responded, "[e]xactly."

In describing the verdict sheet to the jurors, the court mentioned only four crimes, specifically first and second-degree murder, use of a handgun in the commission of a crime of violence, and second-degree assault.

The transcript of the jury's announcement of the verdict suggests that Laury was found guilty of only one count of use of a handgun in the commission of a crime of violence. The transcript of the sentencing hearing, however, suggests that Laury was

On November 18, 2016, the court reporter who transcribed the sentencing hearing issued a corrected transcript in which the court's sentence for "Count 2" was changed from thirty years to twenty years, so that the transcription of the court's imposition of sentence now provides, in relevant part:

THE COURT:	Make sure I just get the right sentence on things. Count 3's the felony. So I'll sentence on Count 2. I'll merge Count 3.
[DEFENSE COUNSEL]:	Count 2.
[PROSECUTOR]:	Okay. Thank you, Your Honor.
THE COURT:	Okay? All right. Count 1, three years Department of Correction. Count 2, 20 years Department of Correction, five years without parole, and I will run it consecutive.

The parties do not dispute that when there is a conflict between the transcript and the docket entries, unless it is shown to be in error, the transcript prevails. *See Lawson v. State*, 187 Md. App. 101, 108 (2009) (quoting *Douglas v. State*, 130 Md. App. 666, 673

convicted of two counts involving the use of a handgun and reveals that, for sentencing purposes, "Count 3" was merged into the sentence imposed for "Count 2."

In its "Statement of Reasons and Order" granting Laury's petition for post-conviction relief, the circuit court stated that Laury "was also convicted of Use of a Handgun in the Commission of a Crime of Violence (Count Two). Count Three (Use of a Handgun in the Commission of a Felony) was not submitted to the jury."

We do not have before us the charging document or the verdict sheet to aid in clarifying this issue. We need not resolve it, however, because no party raised it on appeal. Md. Rule 8-131 ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.").

(2000)). In the case before us, the transcript was clearly incorrect and, therefore, the transcript does not prevail. As the State points out, the three year sentence for second-degree murder that is reflected in the transcript cannot be reconciled with the discussion that occurred at the sentencing hearing. Defense counsel asked the court to consider a sentence of twenty years for the second-degree murder charge, which was at the "bottom of the guidelines," while the prosecutor sought the maximum sentence of thirty years. Before announcing the sentence, the judge expressed how "unfathomable" it was that "these things can happen," and stated that he did not "understand the senseless violence." If we were to find that the three year sentenced reflected in the transcript was accurate, we would have to ignore the judge's comments, the fact that the sentence was seventeen years less than what the defense argued for and twenty-seven years less than what the State requested, and the fact that the prosecutor did not raise any objection to a sentence that deviated so wildly from the State's recommendation and even from the defense's request.

Moreover, the three-year sentence for second-degree murder that is reflected in the transcript is illogical. There is nothing else in the record to justify the court's show of such incredible leniency with respect to the sentence for second-degree murder while imposing the maximum sentence for the handgun conviction.

For these reasons, we conclude that the three-year sentence for second-degree murder that is reflected in the transcript is erroneous and that the thirty-year sentence for that crime, reflected in the docket entries and commitment record, was the sentence actually imposed. Because the court reporter issued a corrected transcript showing the correct sentence of twenty years for use of a handgun, which is both consistent with the docket

entries and the commitment record, and within the statutory maximum, Laury's contention with regard to that sentence is moot.

III.

Laury contends that the circuit court erred in denying his motion to suppress the warrantless search of his cell phone following his arrest. We disagree and explain.

In reviewing a circuit court's denial of a motion to suppress, we are limited to the record of the suppression hearing and do not consider the trial record. *Lee v. State*, 418 Md. 136, 148 (2011) (citing *Longshore v. State*, 399 Md. 486, 498 (2007)). We extend great deference to the fact finding of the suppression judge and accept the facts as found, unless clearly erroneous. *Myers v. State*, 395 Md. 261, 274 (2006); *State v. Green*, 375 Md. 595, 607 (2003) (citing *Dashiell v. State*, 374 Md. 85, 93 (2003)). In addition, we review the evidence in the light most favorable to the prevailing party, in this case, the State. *Lee*, 418 Md. at 148-49; *Myers*, 395 Md. at 274; *Green*, 375 Md. at 607. We make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case. *State v. Luckett*, 413 Md. 360, 375 n.3 (2010).

At the hearing on Laury's motion to suppress, Baltimore County Police Detective Gary Childs, who was the principal investigating officer in the shooting death of Barnes, testified that he conducted a recorded interview of Laury after his arrest. A portion of that recorded interview was played for the court. The parties do not dispute that Detective Childs told Laury, "I'm going to look through the phone," and that Laury responded, "okay." At the suppression hearing, Laury argued, as he does on appeal, that in saying "okay," he was not giving permission for the search of his phone, but merely

acknowledging what the detective intended to do. According to Laury, Detective Childs subsequently asked him to sign a consent to search form, but he refused because the detective had already looked through the cell phone.

The suppression court denied Laury's motion, stating:

> As to the consent issue, there's no dispute that detective says, I'm going to look through the phone. He says, okay. He doesn't ask, can I look through the phone? He says, I'm going to look through the phone. He says, okay, then he says he wouldn't sign a consent because he already looked through the phone. I view that a little different than [defense counsel]. I think that, of course, the Defendant says now that okay didn't mean he was giving consent. It's hard to decipher that on the video that it didn't mean consent, so I'm going to rule that consent was given. There was no – it was voluntarily given, no coercion or threats.
>
> Also, I believe that the State has given the case law that says in a search incident to arrest if you seize a cell phone, you can [gleen] through the numbers. So motion to suppress is denied.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. Amend. IV. This constitutional mandate is made applicable to the states through the Fourteenth Amendment and is embodied in Article 26 of the Maryland Declaration of Rights.[2] *Corbin v. State*, 428 Md. 488, 499 (2012); *see*

[2] Article 26 of the Maryland Declaration of Rights provides:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

generally Fitzgerald v. State, 384 Md. 484, 506 (2004) (Article 26 of the Maryland Declaration of Rights is, generally, considered to be co-extensive with the Fourth Amendment of the United States Constitution). While warrantless searches and seizures are presumptively unreasonable, voluntary consent is one of the well-established exceptions to the warrant requirement. *Jones v. State*, 407 Md. 33, 51 (2008). "'The burden of proving that consent was freely and voluntarily given is upon the State.'" *Gamble v. State*, 318 Md. 120, 123 (1989) (quoting *Doering v. State*, 313 Md. 384, 401-02 (1988)). The question of whether the consent was voluntary is ordinarily a factual question to be determined "in light of the totality of all the circumstances." *Id.* at 125. As a result, we shall not set aside the suppression court's finding of voluntariness unless clearly erroneous. *McMillan v. State*, 325 Md. 272, 285 (1992).

In the case at hand, the suppression judge's determination that Laury's consent was voluntary was based on his review of the video recording wherein Detective Childs stated his intent to search the cell phone and Laury responded, "okay." That finding was not clearly erroneous.

Even if Laury's consent was not voluntary, however, the search would be permitted under the good faith exception to the warrant requirement. In 2014, the United States Supreme Court held that police "must generally secure a warrant before" searching data stored on a cell phone. *Riley v. California*, ___ U.S. ___, 134 S.Ct. 2473, 2485 (2014). With regard to the search of a cell phone that occurred prior to the Supreme Court's decision in *Riley*, Maryland's Court of Appeals has held that such a search would be permitted if it was conducted in good faith reliance on then controlling law, specifically

United States v. Robinson, 414 U.S. 218 (1973), which permitted such searches incident to a lawful arrest. *See Demby v. State*, 444 Md. 45, 51 (2015) (in search of cell phone prior to *Riley* decision, police reasonably relied on *Robinson* in conducting search incident to arrest).

That is the case here. The search of Laury's cell phone occurred on June 28, 2005, after the decision in *Robinson*, but prior to the decision in *Riley*. Even if Laury's consent had not been voluntary, Detective Childs acted in good faith reliance on the controlling authority at the time of the search. Accordingly, the suppression court did not err in denying Laury's motion to suppress evidence acquired during the search of his cell phone.

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