UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2389

September Term, 2014

WILLIAM CHARLES GAY

v.

STATE OF MARYLAND

Wright,
Graeff,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: November 2, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The appellant, William Charles Gay, was charged with (1) creating a counterfeit check, (2) possessing a counterfeit check, (3) issuing a counterfeit check, and (4) the attempted theft of property of a value less than $1,000. On November 24, 2014, a jury in the Circuit Court for Frederick County convicted the appellant on all counts. At the sentencing hearing on December 12, 2014, the lower court merged the appellant's conviction for attempted theft with his conviction for issuing a counterfeit check. The court imposed separate sentences for each of the remaining three counts. The appellant received a sentence of ten years, with all but five suspended, for creating a counterfeit check. He received a consecutive suspended sentence of three years for possessing a counterfeit check and an additional consecutive suspended sentence of ten years for issuing the same. The appellant presents a single issue for our review.

> "Must [appellant]'s conviction for possession of a counterfeit check be merged into his conviction for the issuance of the same counterfeit check?"

The State agrees that the appellant's convictions for possessing and issuing the counterfeit check, stemming from a single transaction, should have merged for purposes of sentencing under the required evidence test. We too agree with the appellant, and vacate the sentence imposed for possession of the counterfeit check.

Background

On August 23, 2013, the appellant entered the Middletown Valley Bank in Jefferson, Maryland. He approached the counter and presented the teller, Lisa Michael, with a typewritten check made out in his name for the amount of $802.16. The check, which was

numbered 21695, appeared to have been issued by Stroup Flooring America (Stroup Flooring), a company located in Frederick, Maryland, which sells and installs various types of flooring. The appellant informed Ms. Michael that he desired to cash the check.

Ms. Michael made a copy of the check and the appellant's state-issued identification card. She then ran the check through the bank's scanner. She testified that the bank's system generated an error message directing her not to cash the check for a non-customer because "there had been fraud on the account previously." She further testified that the appellant "seemed very nervous," and asked "a good many times" what she was doing and how long it would take. When she told the appellant that she could not cash the check, the appellant replied that he "told his boss this was going to happen." He then retrieved the check and exited the bank. Ms. Michael contacted the bank's security office.

Paul Fink, employed by the bank as a "compliance and security officer," testified that he was at the main office in Middletown when he received a call regarding the incident. He subsequently reviewed the surveillance footage of the exchange, interviewed Ms. Michael, and contacted the Frederick County Sheriff's Department to "report the potential fraud." He also reached out to Gilbert Stroup, the president of Stroup Flooring, to determine whether his company had actually written the check.

Mr. Stroup testified that he did not know the appellant and that, to the best of his knowledge, the appellant had never worked for Stroup Flooring. He explained that the company only has eight employees and that those individuals are engaged in sales,

warehouse, and administrative duties. He testified that the actual installation of the flooring is performed by one of four subcontracting companies, which are paid for their work in the form of a weekly check. Mr. Stroup emphasized that the weekly checks are issued in the name of the particular subcontracting company itself and never in the name of a subcontractor's individual employee. He confirmed that a search of his company's electronic accounting software which catalogs, *inter alia*, employee and company check data, produced no results for either the appellant's name or for a check numbered 21695.

The State presented Mr. Stroup with a copy of the appellant's check which Mr. Stroup then compared to an example of the checks issued by Stroup Flooring. He noted several discrepancies with respect to the appellant's check including the font which was used, the appearance of the bank's seal, and the absence of a memo line. Additionally, the appellant's check bore the purported signature of Nancy A. Stroup, who is Mr. Stroup's wife and was, as of the date of the signature, the vice president of Stroup Flooring.[1] Mrs. Stroup testified that her responsibilities as vice-president included signing payroll checks but that she had never signed a check made out to the appellant and that the signature on the appellant's check was not, in fact, hers.

The appellant testified in his own defense. The defense theory was a lack of knowledge regarding the check's counterfeit nature.

[1]Mrs. Stroup had retired from that position at the time of trial.

The jury convicted the appellant on all counts. At the sentencing hearing on December 12, 2014, the State recited the list of charges and merger was discussed. The trial court articulated its understanding that the conviction for attempted theft should merge with the conviction for issuing the counterfeit check, but that the remaining counts did not merge. Appellant's trial counsel agreed.

> "[THE STATE]: Well, Count 1, Your Honor, is ten years, $1,000; Count 2, possession of a, ah, counterfeit document is three years, $1,000; issuing a false document, Count 3, is ten years, $1,000; and Count 4, Court's indulgence.
>
> "THE COURT: Is theft. Theft less than a thousand –
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> ....
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> "THE COURT: Do any of these counts merge? That's a question that I, I'm, I need to –
>
> "[THE STATE]: No –
>
> "THE COURT: – if, if we need to, ah, go back into the facts we'll have to do that.
>
> "[THE STATE]: Well, Count 1 is the counterfeiting count. I, I would argue that that doesn't merge with the others.
>
> "THE COURT: Right.
>
> "[THE STATE]: Um, and for issuing a false –
>
> "THE COURT: If –
>
> "[THE STATE]: – document and possessing a counterfeit document, um ....

"THE COURT: Well, if your, forgery is different from issuing.

"[THE STATE]: Right.

"THE COURT: The attempted theft seems to me though that that, wasn't it the issuing of the false document that was also the attempted theft?

"[THE STATE]: That's correct, Your Honor.

"THE COURT: All right –

"[THE STATE]: So those two would merge –

"THE COURT: So it seems to me the attempted theft merges.

"[THE STATE]: With Count 3.

"THE COURT: All right.

"[THE STATE]: I would agree with that, Your Honor –

"THE COURT: But the other three do not merge. Do you agree with that, [Defense Counsel]?

"[DEFENSE COUNSEL]: I, I do, Your Honor."

As stated above, the trial court sentenced the appellant on each of the remaining counts, including separate sentences for possessing a counterfeit check (Count 2) and for issuing the same counterfeit check (Count 3).

Discussion

This appeal involves an application of the merger doctrine, which is founded upon principles of double jeopardy and "provides the criminally accused with protection from, *inter alia*, multiple punishment stemming from the *same offense*." *Purnell v. State*, 375 Md.

678, 691, 827 A.2d 68, 75 (2003) (emphasis added). The primary test for determining whether two (or more) criminal offenses are to be deemed the "same offense" for double jeopardy purposes is the required evidence test, *Dixon v. State*, 364 Md. 209, 236, 772 A.2d 283, 299 (2001), described by the Court of Appeals 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.
>
> ....
>
> "When there is a merger under the required evidence test, separate sentences are normally precluded. Instead, a sentence may be imposed only for the offense having the additional element or elements."

State v. Lancaster, 332 Md. 385, 391-92, 631 A.2d 453, 456-57 (1993) (quotations and citations omitted).

The appellant contends that his conviction for possession of a counterfeit check should have been merged for sentencing purposes with his conviction for issuing the same counterfeit check.[2] The State agrees. Accordingly, and for the reasons explained below, we

[2]As the appellant notes, although trial counsel did not object at the time of the sentencing hearing, the issue of merger is properly before this Court as a challenge to an illegal sentence. *Kyler v. State*, 218 Md. App. 196, 222, 96 A.3d 881, 896 ("[W]here merger is required under the required evidence test ... the issue of merger is properly before us even in the absence of an objection below."), *cert. denied*, 441 Md. 62, 105 A.3d 490 (2014). Moreover, "[a] court ... is not bound by an erroneous concession of law." *Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 380 n.3, 744 A.2d 549, 551 n.3 (2000).

will merge the convictions for sentencing purposes and vacate the sentence imposed for the possession conviction.

In support of their shared position, both parties rely on this Court's decision in *Moore v. State*, 198 Md. App. 655, 18 A.3d 981 (2011), where it was held that a conviction for the possession of counterfeit currency merges for sentencing purposes into a conviction for the issuance of the counterfeit currency under the required evidence test. The comparison is persuasive.

Moore was convicted of possessing and issuing counterfeit United States currency on six separate occasions. With respect to two of those occasions, the trial court imposed separate sentences for the possession conviction and the issuance conviction. On appeal, Moore argued that the possession and the issuance of counterfeit currency in a single transaction constitute the same offense under the required evidence test. Moore compared her situation to that at issue in *Anderson v. State*, 385 Md. 123, 133, 867 A.2d 1040, 1045 (2005), where the Court of Appeals concluded that possession of a controlled dangerous substance and the distribution of that dangerous substance in a single transaction were the "same offense" for double jeopardy purposes. The Court reasoned that it was "not possible" to distribute a controlled dangerous substance without also possessing the substance. *Id*. "Thus," the Court declared,

> "possession of the substance distributed is necessarily an element of the distribution. The crime of distribution obviously contains an element not contained in the crime of possession – the distribution – but there is no

> element in the crime of possession not contained in the crime of distribution. ... [T]herefore, possession and distribution are the 'same' offenses for double jeopardy purposes."

Id. at 133, 867 A.2d at 1045.

The rationale in *Moore* is similar:

> "Following the Court's reasoning in *Anderson*, it is clear that possession of counterfeit currency and the issuance of the same counterfeit currency in a single transaction constitute the same offense under the required evidence test. *Just as it is impossible for an individual to distribute a controlled dangerous substance without exercising dominion and control over it, one cannot issue counterfeit currency without possessing it.* To avoid offending double jeopardy principles, we are compelled to merge [Moore]'s convictions for possessing counterfeit currency ... into her convictions for issuing the same currency ... and vacate each merged sentence."

Moore, 198 Md. App. at 697, 18 A.3d at 1005 (emphasis added).

Turning to the present case, there is no material distinction, for purposes of the required evidence test, between possessing and issuing counterfeit currency and possessing and issuing a counterfeit check. The appellant was convicted of possessing a counterfeit check pursuant to Maryland Code (2002, 2012 Repl. Vol), § 8-601(b) of the Criminal Law Article (CL), which contains the following prohibition:

> "A person may not knowingly, willfully, and with fraudulent intent possess a counterfeit of any of the items listed in subsection (a) of this section."[3]

The appellant was convicted of issuing the same counterfeit check in violation of CL § 8-602. That section reads:

[3]Checks are among the listed items. CL § 6-101(a)(2).

> "A person, with the intent to defraud another, may not issue or publish as true a counterfeit instrument or document listed in §8-601 of this subtitle."

Applying the reasoning of the Court of Appeals as articulated in *Anderson,* and adopted by this Court in *Moore*, it is evident that one cannot be guilty of issuing a counterfeit check with the intent to defraud unless one is also guilty of possessing the counterfeit check with fraudulent intent. Where convictions for both offenses arise from a single transaction, as in the present case, possessing a counterfeit check and issuing the same counterfeit check are the "same offense" under the required evidence test.[4]

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY MODIFIED BY VACATING THE SENTENCE ON COUNT 2 AND, AS MODIFIED, AFFIRMED.

COSTS TO BE PAID BY FREDERICK COUNTY.

[4]As was emphasized in *Moore*, merger on the basis of the required evidence test does not operate to vacate the substantive conviction for the merged offense, but only the sentence imposed for the merged offense. 198 Md. App. at 692, 18 A.3d at 1001-02 ("The conviction for the lesser included offense survives the merger.").