UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2475

September Term, 2014

GREGORY DARNELL TILGHMAN

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: November 13, 2015

Gregory Darnell Tilghman, appellant, appeals the denial, by the Circuit Court for Somerset County, of his motion to correct an illegal sentence. He presents the following question for our review: Did the circuit court err in denying the motion to correct an illegal sentence and in ruling on the motion without first convening a hearing?[1] Finding no error, we affirm.

BACKGROUND

On March 3, 2008, appellant and a companion went to an apartment complex in Princess Anne looking for marijuana. The next day, a resident of the facility was found dead in his apartment. Appellant was subsequently charged with murder and related offenses.

Following a bench trial in the Circuit Court for Somerset County, appellant was convicted of murder in the first degree, armed robbery, use of a handgun in the commission of a felony or crime of violence, theft over $500, and two counts of conspiracy to commit armed robbery. The court sentenced appellant to life imprisonment without the possibility of parole for murder, to a consecutive term of five years imprisonment for the handgun offense, and to concurrent terms of twenty years' imprisonment for armed robbery and conspiracy to commit armed robbery. The remaining convictions merged for sentencing purposes. Appellant appealed and this Court affirmed in an unreported opinion. *Gregory Darnell Tilghman v. State*, No. 2637, September Term, 2008 (filed August 12, 2010). The

[1] Appellant phrased the question as follows: "Did the motion to correct illegal sentence court erred when it failed to recognize the standard of correcting an illegal sentence and refuse to hold a hearing?"

Court of Appeals denied his petition for a writ of certiorari. *Gregory Darnell Tilghman v. State*, 417 Md. 127 (2010).

In 2014, appellant, proceeding *pro se*, filed a motion to correct an illegal sentence. *See* Md. Rule 4-345(a) ("The court may correct an illegal sentence at any time."). In essence, he claimed that, because he was convicted and sentenced for use of a handgun in the commission of a felony or crime of violence, principles of double jeopardy bar his conviction and sentence for the underlying crimes of violence, that is, murder and armed robbery. Specifically, he asserted that, "because the conviction for 'use of a handgun' in a felony or crime of violence would require that the State must first prove the felony or crime of violence, which in this case would be first degree murder and armed robbery, . . . and then prove that it was a handgun which was used to commit these heinous acts," the "crimes are the same for purposes of double jeopardy." Accordingly, he maintained that his "sentences for first-degree murder and armed robbery must be vacated."[2] On September 29, 2014, the circuit court summarily denied the motion.

DISCUSSION

Appellant presents essentially the same argument he did below, that is, that his sentences for first-degree murder and armed robbery must be vacated "because they violate

[2] Appellant, without elaboration, also asserted that his sentence for theft should be vacated. The sentencing court, however, merged the theft offense with the armed robbery offense for sentencing purposes. In other words, appellant did not receive a separate sentence for theft and thus there is no sentence to vacate.

the constitutional prohibition on double jeopardy as use of a handgun in the commission of a crime of violence cannot be proven without first presenting proof of first degree murder (the crime of violence)[.]" In short, he maintains that his convictions for first-degree murder, armed robbery, and use of a handgun in the commission of a crime of violence "are the same [crimes] for purposes of double jeopardy" and, therefore, they should have merged. We disagree.

"The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution prohibits the State from punishing a defendant multiple times for the same offense." *Kyler v. State*, 218 Md. App. 196, 225 (citations omitted), *cert. denied,* 441 Md. 62 (2014). Hence, ordinarily, "[s]eparate sentences are prohibited when 'a defendant is convicted of two offenses based on the same act or acts and one offense is a lesser-included offense of the other.'" *Id.* (quoting *Sifrit v. State*, 383 Md. 116, 137 (2004), *cert. denied,* 543 U.S. 1056 (2005) (further quotation omitted)). But if two crimes arise out of the same act and "the legislature clearly intended" that the crimes be punished separately, "'we [the courts] defer to that legislated choice.'" *Quansah v. State*, 207 Md. App. 636, 645 (2012) (quoting *Walker v. State*, 53 Md. App. 171, 201 (1982)).

To determine whether one offense merges with another, we initially apply the "required evidence test." *Kyler, supra,* 218 Md. App. at 225 (citation omitted). That test "'focuses upon the elements of each offense; if all 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.'" *Id.* at 225-226 (quoting *Kelly v. State*, 195 Md. App. 403, 440 (2010) (further quotation omitted), *cert. denied*, 417 Md. 502 (2011)). "'[I]f 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.'" *Id.* at 226 (quoting *Moore v. State,* 198 Md. App. 655, 684 (2011) (further quotation omitted)).

First-degree murder contains an element -- the unlawful killing of another person -- which is not a required element of the crime of using a handgun in the commission of a felony or crime of violence. Armed robbery contains an element -- a robbery -- which is not a required element of the handgun offense. As such, neither first degree murder nor armed robbery merge with the handgun offense under the required evidence test. Moreover, even if the offenses would merge under the required evidence test, the legislature has made clear that a sentence for the handgun offense must be imposed *in addition to* any sentence for the underlying felony.

The handgun statute at issue provides, in pertinent part:

> (b) *Prohibited.* – A person may not use a firearm in the commission of a crime of violence as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime.
>
> (c) *Penalty*. – (1)(i) 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 to imprisonment for not less than 5 years and not exceeding 20 years.

Section 4-204 of the Criminal Law Article (2012 Repl. Vol.) (Emphasis added.)

In *Whack v. State*, 288 Md. 137, 149 (1980), the Court of Appeals rejected the notion that separate sentences for robbery with a deadly weapon and use of a handgun in the commission of a felony (that is robbery) violated the Double Jeopardy Clause. The Court determined that the legislature, in enacting the handgun statute, clearly intended that separate and distinct sentences be imposed for the use of a handgun in the commission of a felony and the underlying felony, even in cases where the two offenses were based upon the same incident. *Id.* at 149-150. *Whack* is dispositive here. *See also Jones v. State*, 357 Md. 141, 163 (1999) (no violation of the Double Jeopardy Clause where the legislature intended the imposition of separate sentences for offenses arising out of a single act).

Finally, the appellant did not present any argument in his brief in support of his general contention, mentioned only in the question presented, that the circuit court erred in ruling on his motion without first holding a hearing. Accordingly, we need not address it. Maryland Rule 8-504(a)(6) (a brief shall include "[a]rgument in support of the party's position on each issue"); *Klauenberg v. State*, 355 Md. 528, 552 (1999) ("arguments not presented in a brief or not presented with particularity will not be considered on appeal"). Even if addressed, however, we would find no error. Rule 4-345(f) provides that a hearing is required only if the court decides to "modify, reduce, correct, or vacate a sentence."

Because the circuit court denied appellant's motion, the sentence remained the same and thus, the court was not required to conduct a hearing.

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