UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0663

September Term, 2013

WADE CLARK, JR.

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Graeff, J.

Filed: August 19, 2015

In 1994, a jury sitting in the Circuit Court for Prince George's County found Wade Clark, Jr., appellant, guilty of felony murder, use of a handgun in the commission of a felony or crime of violence, and other offenses.[1] The circuit court sentenced appellant to life imprisonment, with all but thirty years suspended, for felony murder, a consecutive term of twenty years for the handgun offense, and to various other terms for the remaining offenses, to run concurrently with the sentence for felony murder.[2]

Appellant filed a direct appeal. This Court held that the sentencing court erred in not merging appellant's conviction for robbery with a dangerous weapon into the conviction for felony murder, but otherwise affirmed the judgment of the circuit court. *Clark v. State*, No. 1182, Sept. Term, 1994 (filed May 2, 1995). The Court of Appeals denied his petition for writ of certiorari, *Clark v. State*, 340 Md. 301 (1995), and his subsequent requests for post-conviction relief were unsuccessful.

[1] The jury also found appellant guilty of conspiracy to rob with a deadly or dangerous weapon, robbery, robbery with a deadly or dangerous weapon, assault with intent to maim, possession of cocaine, possession of cocaine with intent to distribute, attempted first-degree murder, and attempted second-degree murder. The jury found appellant guilty of three counts of use of a handgun in the commission of a felony or crime of violence: (1) the use of a handgun in the commission of a felony murder; (2) the use of a handgun in the commission of robbery, robbery with a deadly or dangerous weapon, and/or assault with intent to maim; and (3) the use of a handgun in the commission of attempted first-degree murder or attempted second-degree murder (or both).

[2] Appellant received sentences, to run concurrently with the sentence imposed for felony murder, of thirty years imprisonment for attempted first-degree murder, fifteen years for attempted second-degree murder, fifteen years for assault with intent to maim, twenty years for robbery with a dangerous weapon, twenty years for conspiracy to rob with a deadly weapon, and twenty years for possession with intent to distribute. The remaining offenses merged for sentencing purposes. The total aggregate sentence to serve was fifty years.

In 2013, appellant, proceeding *pro se*, filed a motion to correct an illegal sentence pursuant to Maryland Rule 4-345(a),[3] asserting that his sentence for the use of a handgun in the commission of a felony or crime of violence was illegal because it should have merged, under "the required evidence test," with his sentence for felony murder. He also argued that all the sentences imposed were illegal because the indictment stated that he committed the charged offenses on October 25, 1992, but "[w]ithout moving to amend the indictment," the State's theory at trial was that the crimes were committed on October 24, 1992. The circuit court denied the motion. This appeal followed.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 4:00 p.m. on October 24, 1992, appellant and two companions entered a home in a Prince George's County neighborhood and robbed, at gunpoint, several occupants who were in the midst of packaging crack cocaine. During the robbery, one occupant of the home was shot and killed. A neighbor, an off-duty police officer who attempted to investigate immediately after shots inside the house were fired, was shot (but survived) as the assailants fled the home. Appellant was not the shooter, but he was tried and convicted as an accomplice to the crimes.

[3] Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time."

DISCUSSION

I.

Merger of Felony Murder & Use of a Handgun in the Commission of a Felony or Crime of Violence

"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, *cert. denied*, 441 Md. 62 (2014). Thus, generally, "[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). If, however, two "statutory 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)), *cert. denied*, 430 Md. 13 (2013).

To determine whether one offense merges with another, we initially apply the "required evidence test." *Kyler*, 218 Md. App. at 225 (citation and quotations omitted). "The required evidence 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 225-26 (quoting *Kelly v. State*, 195 Md. App. 403, 440 (2010)). "'[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)).

As noted, in his motion below appellant argued that the conviction for use of a handgun in the commission of a felony or crime of violence should have merged into the conviction for felony murder. On appeal, he contends that the felony murder conviction, which he now claims was the "lesser offense," should have merged into the handgun offense. In appellant's view, "the offense of use of a handgun in the commission of a felony or crime of violence requires proof of all of the elements of the offense first degree felony murder along with proof of one additional element," that is, "that the defendant used a handgun." He therefore maintains that the handgun offense "is the greater offense," and under both the "required evidence test" and "double jeopardy" principles, the sentence imposed for felony murder must be vacated.

The State initially responds that appellant's sentences are not "inherently illegal" and hence are not subject to correction by motion filed under Rule 4-345(a). We disagree. If appellant were right that his sentences should have merged as a matter of law, the sentence imposed would be "illegal" for Rule 4-345(a) purposes. *Pair v. State*, 202 Md. App. 617, 625 (2011), *cert. denied*, 425 Md. 397 (2012). Accordingly, we shall address his contention.

The State next asserts that felony murder and the use of a handgun in the commission of a crime of violence or felony do not merge and thus the separate sentences imposed for these offenses are legal. We agree.

First-degree felony murder is a crime prohibited by Md. Code (2012 Repl. Vol.) § 2-201(a) of the Criminal Law Article ("CL") (formerly Md. Code (1992 Repl. Vol.) Art. 27 § 410). The statute provides that a murder "committed in the perpetration of or an attempt to perpetrate" certain enumerated felonies, including robbery, is murder in the first degree. The jury in this case found appellant guilty of first-degree felony murder based on its findings that appellant participated in a robbery and during that incident a person was shot and killed.

The handgun offense at issue here also is a statutory offense. When appellant was convicted, the statute, in relevant part, read:

> Any person who shall use a handgun . . . in the commission of any felony or any crime of violence as defined in § 441 of this article shall be guilty of a separate misdemeanor and on conviction thereof shall, **in addition to any other sentence** imposed by virtue of commission of said felony or misdemeanor: (1) For a first offense, be sentenced . . . for a term of not less than 5 nor more than 20 years, and: (i) It is mandatory upon the court to impose no less than the minimum sentence of 5 years."

Art. 27 § 36B(d) (emphasis added).[4]

[4] The statute presently is codified at Md. Code (2012 Repl. Vol.) § 4-204 of the Criminal Law Article and provides, in relevant part, as follows:

(continued...)

The jury found that appellant was guilty of using a handgun in the commission of a felony, and that the underlying felony was first-degree felony murder. Merger of the two convictions for sentencing purposes was not permitted, however, because the court was mandated by statute to impose a sentence for the handgun offense "in addition to" any sentence imposed for the felony murder. Art. 27 § 36B(d); *Whack v. State*, 288 Md. 137, 149 (1980) (clear legislative intent that separate sentences be imposed for the use of a handgun in the commission of a felony and the underlying felony), *cert. denied*, 450 U.S. 990 (1981). Consequently, even if we were to assume that the offenses at issue here would merge under the required evidence test, the Maryland legislature has determined that separate sentences must be imposed. As such, there was no double jeopardy violation. *Jones v. State*, 357 Md. 141, 156 (1999) (no violation of the Double Jeopardy Clause where the legislature "clearly intended to impose multiple punishments"). The circuit court properly rejected the motion to correct an illegal sentence on this ground.

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[4](...continued)

(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.

(Emphasis added).

II.

The Indictment

Appellant next contends that the circuit court erred in denying his claim that the sentences were illegal because the indictment charged that the offenses were committed on October 25, 1992, but the State's evidence at trial was that he committed the crimes on October 24, 1992. He claims, in essence, that because the State did not move to amend the indictment to reflect the October 24th date, the convictions were defective, and therefore, the sentences were illegal.

The State contends that this issue is not properly before this Court because it is a substantive challenge to the judgment of conviction, not an illegal sentence claim. Moreover, it asserts that the claim is "meritless."

We agree that appellant's complaint regarding the sufficiency of the indictment should have been raised on direct appeal. *State v. Wilkins*, 393 Md. 269, 273 (2006) ("a motion to correct an illegal sentence is not an alternative method of obtaining belated appellate review of the proceedings that led to the imposition of judgment and sentence in a criminal case"). In any event, appellant would not prevail on this claim.

Maryland Rule 4-202(a) provides that a charging document, such as an indictment, "shall contain a concise and definite statement of the essential facts of the offense with which the defendant is charged and, **with reasonable particularity, the time and place the offense occurred**." (Emphasis added). "[T]he purpose of an indictment is 'to inform the

defendant of the charge against him in order that he may prepare his defense and may also protect himself against a subsequent prosecution for the same offense.'" *Dzikowski v. State*, 436 Md. 430, 444 (2013) (quoting *Seidman v. State*, 230 Md. 305, 312 (1962)).

Here, the indictment read, for each count, that "on or about the 25th day of October, nineteen hundred and ninety-two, in Prince George's County" appellant committed an enumerated offense. The time provided in the indictment put appellant on sufficient notice that the State intended to prosecute him for crimes that occurred "on or about October 25, 1992," a time period that certainly encompassed October 24, 1992.

The Court of Appeals has recognized that "the time of an offense stated in an indictment need not be precise." *Mulkey v. State*, 316 Md. 475, 482 (1989). Depending "upon the facts and circumstances of each case," *id.* at 488, "general allegations as to time" may be "sufficient." *Id.* at 484. Moreover, the Court of Appeals has noted that the State is "not confined in its proof to the date alleged in the indictment." *Chisley v. State*, 236 Md. 607, 608 (1964). Thus, the fact that the State's evidence at trial was that appellant committed the offenses on October 24, 1992, not the next day as alleged in the indictment, did not render his convictions invalid or his sentences illegal.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.