UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0216

September Term, 2015

JAMES FLOYD

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by, Alpert, J.

Filed: May 20, 2016

*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.

James Floyd, appellant, filed *pro se* a motion to correct an illegal sentence in the Circuit Court for Baltimore City. The circuit court denied the motion, and it is from that denial that Floyd appeals. We shall affirm.

BACKGROUND

In 2011, Floyd pled guilty to attempted first-degree murder and use of a handgun in the commission of a crime of violence. The court sentenced him to 18 years of imprisonment for each conviction, to be served concurrently. Appellant did not file a direct appeal or an application for leave to appeal. In 2013, Floyd filed a motion for post-conviction relief, which after a hearing, the court granted in part and denied in part. Specifically, the court vacated Floyd's attempted murder conviction finding that he had not been advised of the nature and elements of that crime before he pled guilty; the court affirmed the judgments in all other respects. Floyd has appealed that ruling, and it is currently pending before our court. *See Floyd v. State*, No. 1935, Sept.Term, 2014.

In 2014, Floyd filed a motion to correct an illegal sentence alleging two grounds. He argued that his plea agreement was based on fraudulent grounds because he "never agreed to a binding plea," and that his sentence exceeded the terms of the plea agreement because, as he understood it, his plea agreement was for a total incarceration period of 18 years, not concurrent terms of 18 years for each conviction. The court denied the motion without a hearing, prompting this appeal.

DISCUSSION

Citing Md. Rule 8-131(a), the State initially argues that Floyd has not preserved his arguments for our review because he did not raise them below. Regardless of whether this is true, even if preserved, his arguments are without merit.

Floyd argues that he was entitled to a hearing on his motion to correct an illegal sentence. We can quickly dismiss his argument. Md. Rule 4-345(f) mandates a hearing when a court modifies, reduces, corrects, or vacates a sentence, but no such hearing is required when the court denies a motion to correct an illegal sentence. Accordingly, appellant's argument is without merit.

Floyd next argues that his handgun sentence is illegal for two reasons. First, he argues that because his murder conviction was vacated, his conviction for use of a handgun in the commission of a crime of violence, based on the murder conviction, must likewise be vacated. Under the circumstances presented, we disagree.

Maryland appellate courts over the years have vacated a use of a handgun conviction where the predicate crime of violence conviction is vacated. *See Price v. State*, 405 Md. 10, 18-29 (2008)(holding that courts should no longer accept inconsistent jury verdicts so that a jury may not return a guilty charge on use of a handgun in the commission of a crime of violence, if it finds the defendant not guilty of the predicate crime of violence); *Shell v. State*, 307 Md. 46, 52-58 (1986)(holding that in a court trial where the court found the

defendant not guilty of attempted second-degree murder by reason of intoxication, the court erred in finding the defendant guilty of use of a handgun); *Williams v. State*, 117 Md. App. 55, 71 (1997)(where we reversed appellant's felony conviction because of a faulty jury instruction, we also reversed appellant's use of a handgun conviction); *Abernathy v. State*, 109 Md. App. 364, 376 (1996)(where we reversed appellant's attempted murder conviction based on faulty jury instructions, we also reversed appellant's use of a handgun conviction); and *Garland v. State*, 29 Md. App. 27, 32-33 (1975)(where we reversed appellant's second-degree murder conviction because of a faulty jury instruction, we also reversed appellant's conviction for use of a handgun), *rev'd on other grounds*, 278 Md. 212 (1976). And, in seeming contradiction, Maryland appellate courts have refused to vacate a use of a handgun conviction where the predicate crime of violence was vacated. *See Ford v. State*, 274 Md. 546, 550-56 (1975)(upholding inconsistent jury verdict that acquitted the defendant of armed robbery but convicted him of use of a handgun in the commission of a crime of violence); *Wright v. State*, 48 Md. App 185, 192 (upholding inconsistent jury verdict that acquitted the defendant of assault with intent to murder but convicted her of use of a handgun), *cert. denied*, 290 Md. 724 (1981); *Raley v. State*, 32 Md. App. 515, 521-23 (fact that the jury found appellant not guilty of murder, manslaughter, or assault with intent to murder, does not affect the validity of its guilty verdict as to the separate crime of unlawful

use of a handgun in the commission of a felony or crime of violence), *cert. denied*, 278 Md. 731 (1976), *cert. denied*, 431 U.S. 965 (1977).

The above perceived and actual contradictory holdings stem in part because of: the difference between jury trials and bench trials, the difference between an inconsistency created at trial and one created by an appellate reversal of the predicate felony, and shifts in the law. *See McNeal v. State*, 426 Md. 455, 462-73 (2012)(discussing Maryland's and other jurisdictions conflicting law regarding inconsistent verdicts). *See also Williams*, 117 Md. App. at 71 (explaining the shifting law of inconsistent verdicts). Notwithstanding the above, Maryland appellate courts have generally held that inconsistent verdicts that occur in a bench trial cannot stand. *Shell*, 307 Md. at 55-56. Nonetheless, "where a trial judge on the record explains an apparent inconsistency in the verdicts, and where the explanation shows that the trial court's action was 'proper' and that there was no 'unfairness' the verdicts would be sustained." *Id*. at 56 (citation omitted). That is the situation before us.

As stated above, appellant pled guilty to attempted first-degree murder and use of a handgun. Upon filing a post-conviction motion, the circuit court vacated his first-degree murder conviction finding that his guilty plea on that charge was not knowing and voluntary because he was not informed of the premeditation requirement of attempted first-degree murder. The circuit court specifically found, however, that Floyd's guilty plea as to use of a handgun was knowing and voluntary, noting that the detailed recitation of facts at the

guilty plea hearing demonstrated that Floyd had committed a crime of violence. Because the reversal of Floyd's first-degree murder conviction was not based on the sufficiency of the evidence but on a technical, legal proceeding, we shall not vacate his use of a handgun conviction. Here, there is a reasonable explanation for the inconsistency between his conviction for use of a handgun and the vacating of his felony conviction that does not call into question the sufficiency of the evidence.

Second and lastly, Floyd argues that his handgun sentence should have merged into his murder sentence. Floyd cites Maryland's three merger doctrines: the required evidence test, the rule of lenity, and fundamental fairness, but he does not state which one applies. Under any of the above doctrines, however, appellant's argument is meritless. The Court of Appeals has held that "a defendant who uses a handgun in the commission of a felony or crime of violence is guilty of a separate misdemeanor, independent of the underlying felony or crime of violence, and is subject to a separate minimum mandatory sentence." *Parrison v. State*, 335 Md. 554, 559 (1994)(citing *Whack v. State*, 288 Md. 137, 148-49 (1980) and *Dillon v. State*, 277 Md. 571, 584 (1976)). Accordingly, we are persuaded that the circuit court did not err in denying Floyd's motion to correct an illegal sentence.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.