UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0784

September Term, 2015

DURON STUKES

v.

STATE OF MARYLAND

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: February 26, 2016

In this appeal, Duron Stukes, appellant, claims that the Circuit Court for Baltimore City erred in denying his motion to correct an illegal sentence. We affirm the judgment of the circuit court.

BACKGROUND

In April of 2003, following a jury trial, Stukes was convicted of, among other related crimes, two counts of first-degree assault and two counts of the use of a handgun in the commission of a felony or crime of violence. The circuit court sentenced Stukes to two concurrent terms of 25 years in prison for first-degree assault and to two concurrent terms of five years' imprisonment for the handgun offense, running consecutive to the sentence for first-degree assault.

Stukes appealed and raised two issues for this Court's consideration: one issue concerned an alleged *Hicks* violation, *see State v. Hicks*, 285 Md. 310 (1979), and the other concerned the denial of a motion for a new trial. In an unreported opinion, we resolved those issues in favor of the State and affirmed the judgments below. *Stukes v. State*, No. 346, Sept. Term 2003, 160 Md. App. 718 (filed Dec. 10, 2004), *cert. denied* 386 Md. 182 (2005). In 2013, Stukes was denied post-conviction relief by the circuit court, and this Court denied his application for leave to appeal the denial of post-conviction relief.

Turning to the proceedings at hand, on March 4, 2015, Stukes, proceeding *pro se*, filed a motion to correct an illegal sentence. Stukes asserted in his motion that his sentence for the handgun offense was illegal because it should have merged with first-

degree assault. The circuit court disagreed and left the sentence intact in an order dated April 1, 2015.

Stukes filed an appeal to this Court on May 1, 2015, and presents one question for our review:

> Was appellant subjected to double jeopardy by the court below failing to merge the use of a handgun offense into his first-degree assault when the use of a handgun is an essential element to the assault offense?

DISCUSSION

Stukes's only complaint is that his sentence for the handgun offense should have merged into first-degree assault for sentencing purposes under, alternatively, the required evidence test, the rule of lenity, or fundamental fairness.[1] His complaint has no merit.

As the Court of Appeals has explained:

> The doctrine of merging of offenses . . . stems in part from the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution, applicable to state court proceedings via the Fourteenth Amendment. The Double Jeopardy Clause states that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." The Fifth Amendment guarantee against double jeopardy prohibits both successive prosecutions for the same offense as well as multiple punishment for the offense.

Dixon v. State, 364 Md. 209, 236 (2001) (Citations omitted). As we observed in *Britton v. State*:

[1] Contrasting the use of "shall" in subsection (b)(2) with its absence in subsection (b)(1), Stukes also argues that (b)(1) does not mandate consecutive sentences for conviction for a crime of violence and the use of a handgun. We note that nothing requires the separate sentences to be served concurrently.

> [W]hen the trial court is required to merge convictions for sentencing purposes but, instead, imposes a separate sentence for each unmerged conviction, it commits reversible error. . . . [S]uch an error implicates the illegality of imposing multiple sentences ... for the same offense. . . . [T]he result is the imposition of a sentence not permitted by law.

201 Md. App. 589, 598-99 (2011) (Citations and internal quotation marks omitted). Our review of a court's failure to merge offenses for sentencing purposes is *de novo. Pair v. State*, 202 Md. App. 617, 625 (2011) (Review of court's decision regarding merger pursuant to the "required evidence" test or "the rule of lenity" is decided "as a matter of law"), *cert. denied*, 425 Md. 397 (2012).

"The applicable standard for determining whether one offense merges into another is what is often called the required evidence test." *Abeokuto v. State*, 391 Md. 289, 353 (2006) (quoting *McGrath v. State*, 356 Md. 20, 23 (1999)) (Internal quotation marks omitted).

> 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. Stated another way, the required evidence is that which is minimally necessary to secure a conviction for each [] offense. If each offense requires proof of a fact which the other does not, or in other words, if 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. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, and where both offenses are based on the same act or acts, [] merger follows[].

Id. at 353 (Citations and quotation marks omitted). "When a merger is required, separate sentences are normally precluded; instead, a sentence may be imposed only for the offense having the additional element or elements." *Id.*

When Stukes was convicted, the use of a handgun in the commission of a felony or crime of violence was a criminal offense set forth in § 4-204 of the Criminal Law Article of the Maryland Code (2002). That section provided:

> (a) Prohibited.
> A person may not use an antique firearm capable of being concealed on the person or any handgun in the commission of a crime of violence, as defined in Article 27, § 441 of the Code, or any felony, whether the antique firearm or handgun is operable or inoperable at the time of the crime.
> (b) 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.**
> (ii) The court may not impose less than the minimum sentence of 5 years and, except as otherwise provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole in less than 5 years.
> (2) For each subsequent violation, the sentence shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony.

(Emphasis added).

Stukes argues that the legislature did not intend to "creat[e] a new substantive offense" in enacting a penalty for the use of a handgun in the commission of a crime of violence. The Court of Appeals has resoundingly rejected the merger argument that Stukes makes in this appeal. In interpreting the precursor to this statute, Article 27, § 36B(d) of the Maryland Code (1957, 1971 Repl. Vol., (1975 Supp.))[2], the Court stated, "Subsection (d) makes it clear that the use of a handgun in the commission of any felony

[2] Article 27, § 36B(d) was recodified to C.L. § 4-204 in 2002. Laws of 2002, ch. 26. The Revisor's Note states: "This section is new language derived without substantive change from former Art. 27, § 36B(d)."

or any 'crime of violence,' constitutes a separate misdemeanor, independent of the felony or 'crime of violence,' in connection with which a handgun may have been used, and mandates a separate minimum sentence." *Dillon v. State*, 277 Md. 571, 584 (1976) (footnote omitted), *abrogated in part on other grounds by Stevenson v. State*, 289 Md. 167 (1980), *as stated in Unger v. State*, 427 Md. 383, 413 (2012). What is now termed first-degree assault was included in the definition of a "crime of violence" at the time of the Court's decision. *See* Art. 27, § 441. Thus, contrary to appellant's contention, the General Assembly created a new, substantive offense for which merger is not required.

The Court of Appeals has similarly considered the issue of separate sentences for the use of a handgun and for robbery under the Double Jeopardy Clause:

> What has been said also requires the rejection of petitioner's suggestion of double jeopardy. Assuming that the two offenses should be deemed the same under the required evidence test of *Blockburger*[*v. United States*, 284 U.S. 299, 304 (1932)], what we said in *Newton v. State, supra*, 280 Md. [260,] 274 n. 4, is dispositive:
>
> > "It should be noted, however, that under certain circumstances, multiple punishment . . . for offenses deemed the same under the required evidence test do(es) not violate the Fifth Amendment prohibition against double jeopardy. . . . (T)he legislature may indicate an express intent to punish certain conduct more severely if particular aggravating circumstances are present by imposing punishment under two separate statutory offenses which otherwise would be deemed the same under the required evidence test. . . ."
>
> The Legislature's concern about the use of a weapon to intimidate a robbery victim, and its additional concern when that weapon is a handgun, is certainly not unreasonable. When it expressly shows an intent to punish, under two separate statutory provisions, conduct involving those aggravating factors, the Fifth Amendment's double jeopardy prohibition has not heretofore been regarded as a bar.

Whack v. State, 288 Md. 137, 149-50 (1980) (Footnote omitted). This same analysis applies to Stukes's sentences for first-degree assault and the use of a handgun.

Merger is also not required under the rule of lenity. The rule of lenity, "applicable to statutory offenses only, provides that where there is no indication that the [General Assembly] intended multiple punishments for the same act, a court will not impose multiple punishments but will, for sentencing purposes, merge one offense into the other." *Garner v. State*, 442 Md. 226, 248 (2015) (quoting *McGrath*, 356 Md. at 25). It matters not whether the convictions arise out of the same transaction or occurrence—the rule of lenity does not apply here, because the General Assembly, through unambiguous language in § 4-204, demonstrated an intent to permit separate sentences for convictions for first-degree assault and the use of a handgun in the commission of a crime of violence. *See* § 4-204(b).

Finally, we note that failure to merge sentences under principles of fundamental fairness does not result in an inherently illegal sentence that is subject to correction pursuant to Maryland Rule 4-345(a). *Pair*, 202 Md. App. at 649. In sum, the circuit court did not err in denying Stukes's motion to correct an illegal sentence.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.