Circuit Court for Anne Arundel County
Case No. 02-K-97-001212

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 200

September Term, 2017

DERRICK L. SELLMAN

v.

STATE OF MARYLAND

Kehoe,
Berger,
Beachley,

JJ.

Opinion by Berger, J.

Filed: March 14, 2018

This case is before us on appeal from an order of the Circuit Court for Anne Arundel County denying a motion to correct an illegal sentence filed by Derrick L. Sellman ("Sellman"), appellant. Sellman presents one question for our review, which we have rephrased as follows:

> Whether the circuit court erred in denying Sellman's motion to correct an illegal sentence.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

Factual Background

We set forth the facts in the light most favorable to the prevailing party below. On the night of July 30, 1990, two women were asleep in separate bedrooms in their home. Sellman, armed with a knife, entered the residence. Sellman came upon his first victim in her bedroom. He grabbed her by the hair, pulled her from the bed, and dragged her to the second bedroom, where he found the other woman. Sellman blindfolded the women, made them undress, and repeatedly raped them. Both women were forced to engage in oral sex, vaginal sex, and anal sex over a course of two hours. Sellman also forced the women to perform sexual acts with each other. During the prolonged attack, Sellman struck the women in the face and head. Sellman squeezed the neck of one of the women, threatened to strangle her, and cut her under the right eye and across the stomach, leaving scars.

Afterward, Sellman rummaged through the wallets of his victims and took the small amount of money they had. Before leaving, Sellman ordered the women to lie down on the living room floor. He told them that he had friends who would kill them if they did

anything. Sellman left, but he soon returned to make sure that the women were still on the floor. Then Sellman left for the second time. Eventually, the women made their way to a neighbor's house, and the police were called.

Forensic analysis revealed that Sellman was the source of the DNA on various items connected with the crime. One of the victims also tentatively identified Sellman from a photo array. Police learned that Sellman lived approximately 1.2 miles from the victims' home. When a detective told Sellman about the DNA evidence, Sellman clutched his face and expressed concern that his children would hear about the crimes through the media. Sellman did not deny committing the crimes.

Procedural Background

On July 14, 1997, Sellman was charged with committing rape in the first degree with each woman, for a total of two counts. Sellman entered a plea of not guilty on an agreed statement of facts. Sellman was convicted on both counts. For each conviction, Sellman was sentenced to life imprisonment with all but twenty years suspended. The two sentences were to run consecutively to each other and to the sentences that Sellman was already serving for other crimes. Sellman was not given credit for time served. Sellman raised a direct appeal challenging the DNA analysis, and his convictions were affirmed.

On December 8, 2016 -- sixteen years later -- Sellman filed a motion to correct an illegal sentence. At the hearing, Sellman argued that his sentences should have been merged under the rule of lenity because the statute in question did not clearly authorize multiple sentences for an offender who rapes multiple women in "a single incident." The

presiding judge was not persuaded. In denying the motion, the circuit court judge announced that

> [t]here were two separate victims who suffered horrendous acts against them. They were not a single act. The rule of lenity cannot, should not, and will not apply according to this member of the bench.

The circuit court denied Sellman's motion, and Sellman noted a timely appeal on April 7, 2017.

DISCUSSION

I. Standard of Review

Maryland Rule 4-345(a) allows a court to "correct an illegal sentence at any time." A sentence is illegal if "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful." *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). "Whether a sentence is an illegal sentence under Maryland Rule 4-345(a) is a question of law that is subject to de novo review." *State v. Crawley*, 455 Md. 52, 66 (2017) (citing *Meyer v. State*, 445 Md. 648, 663 (2015)), *reconsideration denied* (Aug. 23, 2017); *see also Blickenstaff v. State*, 393 Md. 680, 683 (2006) (reviewing the legality of the appellant's sentence *de novo*).

II. The Circuit Court Did Not Err In Denying Sellman's Motion to Correct an Illegal Sentence.

As a preliminary matter, we note that the crux of Sellman's claim -- that the two sentences he received should have been merged under the rule of lenity -- is cognizable via

a motion to correct an illegal sentence.[1] *Pair v. State*, 202 Md. App. 617, 624 (2011); *see also Randall Book Corp. v. State*, 316 Md. 315, 327-28 (1989) (considering the rule of lenity in determining whether appellant's sentence was illegal under Maryland Rule 4-345(a)). We, therefore, deny the State's motion to dismiss Sellman's appeal.

Turning to the merits of the appeal, Sellman argues that the circuit court should have merged his sentences under the rule of lenity because "the act for which [Sellman] was sentenced was one single incident."[2] Sellman claims that the Maryland General Assembly never intended to authorize multiple punishments for the rape of multiple victims during a single "course of conduct." At the very least, Sellman contends that "the statutory construction is unclear pertaining to this type of incident." Upon hearing this argument, the circuit court judge observed that Sellman's reasoning, if adopted, "would throw the entire criminal law on its head." We are in firm agreement with the trial judge.

[1] To be sure, Sellman is curiously fixated on whether the sentences run consecutively or concurrently, which is tangential to the issue of merger. *See Campbell v. State*, 65 Md. App. 498, 510 (1985) (holding that the failure to merge two offenses for sentencing purposes may result in an illegal sentence even if the sentences run concurrently), *cited with approval in Britton v. State*, 201 Md. App. 589, 598 (2011). Sellman's confusion on this issue, however, is not grounds for dismissal.

[2] Insofar as Sellman means to challenge the circuit court's decision to run the sentences consecutively, rather than concurrently, as an abuse of discretion, Sellman has failed to show that such a claim is cognizable on a motion to correct an illegal sentence. The scope of Maryland Rule 4-345(a) is "narrow." *Colvin, supra*, 450 Md. at 721. Furthermore, the decision to run sentences concurrently or consecutively is within the trial court's discretion, which is "virtually boundless" in matters of sentencing. *Bishop v. State*, 218 Md. App. 472, 511 (2014) (internal citations omitted).

The rule of lenity is "a principle of statutory construction" that is "applied to resolve ambiguity as to whether the Legislature intended multiple punishments for the same act or transaction." *Kyler v. State*, 218 Md. App. 196, 228 (2014) (quoting *Marlin v. State*, 192 Md. App. 134, 167 (2010)). The rule of lenity applies when "at least one of the two crimes subject to merger analysis is a statutory offense." *Pair*, *supra*, 202 Md. App. at 638 (citing *Khalifa v. State*, 382 Md. 400, 434 (2004)). "Where there is doubt or ambiguity as to whether the Legislature intended that there be multiple punishments for the same act or transaction, multiple punishments will not be permitted and for sentencing purposes, the statutory offenses will merge." [3] *Jones v. State*, 357 Md. 141, 167 (1999); *see also Quansah v. State*, 207 Md. App. 636, 645 (2012) ("If we are uncertain as to what the Legislature intended, we turn to the so-called 'Rule of Lenity,' by which we give the defendant the benefit of the doubt." (quoting *Walker v. State*, 53 Md. App. 171, 201 (1982))).

The rule of lenity does not apply in the instant case because the plain language of the statute manifests a clear intent on the part of the General Assembly to impose multiple sentences for acts of first-degree rape committed against multiple persons, regardless of whether such acts occurred during one "course of conduct." To determine the intent of the

[3] As a basis for merger, the rule of lenity is distinct from the required evidence test. *See Jones*, *supra*, 357 Md. at 164 ("Even where two offenses are separate under the required evidence test, there may still be merger for sentencing purposes based on . . . the rule of lenity."); *accord Kyler*, *supra*, 218 Md. App. at 228. Here, Sellman argues for merger solely on the basis of the rule of lenity. Indeed, Sellman's counsel made this quite clear at the hearing before the circuit court: "We're not talking about the Blockburger test or the -- the required elements test, that's something different."

legislature, "we look first to the language of the statute, giving it its natural and ordinary meaning." *Wagner v. State*, 445 Md. 404, 417 (2015) (quoting *Stoddard v. State*, 395 Md. 653, 661 (2006)). If the statutory language is clear and unambiguous, our inquiry is at an end, and "we will give effect to the statute as it is written." *Id.* at 418 (quoting *Stoddard v. State*, 395 Md. 653, 661 (2006)).

Sellman was convicted under Md. Code (1957, 1996 Repl. Vol.), § 462 of Article 27 (Black Volume) ("Art. 27"),[4] which defined the crime of rape in the first degree as follows:

> (a) *Elements of offense.* -- A person is guilty of rape in the first degree if the person engages in vaginal intercourse **with another person** by force or threat of force against the will and without the consent of **the other person** and:
>
> (1) Employs or displays a dangerous or deadly weapon or an article which **the other person** reasonably concludes is a dangerous or deadly weapon; or
>
> (2) Inflicts suffocation, strangulation, disfigurement, or serious physical injury upon **the other person** or upon anyone else in the course of committing the offense; or
>
> (3) Threatens or places **the victim** in fear that **the victim** or any person known to **the victim** will be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
>
> (4) The person commits the offense aided and abetted by one or more other persons; or

[4] Art. 27 § 462 has since been repealed and replaced with Md. Code (2002, 2012 Repl. Vol., Suppl. 2016), § 3-303 of the Criminal Law Article. The current version of the statute expands the scope of first-degree rape to include sexual acts other than vaginal intercourse, but the other elements are, for the most part, unchanged.

> (5) The person commits the offense in connection with burglary in the first, second, or third degree.
>
> (b) *Penalty*. -- Any person violating the provisions of this section is guilty of a felony and upon conviction is subject to imprisonment for no more than the period of his natural life.

(Emphasis added). The language of the statue is clear. The intended unit of prosecution is "the other person" or "the victim" with whom the offender has engaged in non-consensual vaginal intercourse, by force or threat of force, with one of the listed aggravating circumstances. Where an offender has subjected multiple victims to such treatment, the offender has committed multiple crimes. Each violation of the statute constitutes a felony warranting the penalty of imprisonment, with a life sentence being the maximum punishment allowed.[5] There is no ambiguity here.

Indeed, departing from the natural and ordinary meaning of the statutory language would produce absurd results. At the hearing below, the judge posed a number of hypothetical scenarios to Sellman's counsel:

> THE COURT: So, under your theory if he killed 33 people in a house after he broke in, he could only get one sentence for first degree murder?
>
> [SELLMAN'S COUNSEL]: Well --
>
> THE COURT: If he raped 30 people, he could only get one sentence for first degree rape. If he went into a fast food restaurant and robbed 50 customers, he could only get one sentence for armed robbery if he used a weapon? Is that -- I just want to make sure that's your theory.

[5] Notably, Sellman received less than the maximum penalty under the statute. Even if the circuit court had merged his two convictions, the court would have been authorized to sentence Sellman to a life sentence for just a single conviction of first-degree rape.

> [SELLMAN'S COUNSEL]: It --
>
> THE COURT: So I understand it.
>
> [SELLMAN'S COUNSEL]: It -- it sounds strange, but yes, Your Honor.

This colloquy underscores an important point: The unit of prosecution for crimes against persons is typically the victim. *See Borchardt v. State*, 367 Md. 91, 148 (2001) (robbery); *see also Hall v. State*, 69 Md. App. 37, 50 (1986) (aggravated assault), *cert. denied*, 308 Md. 382 (1987); *see also Burroughs v. State*, 88 Md. App. 229, 247 (1991) (homicide), *cert. denied*, 326 Md. 365 (1992); *see also Albrecht v. State*, 105 Md. App. 45, 58 (1995) (reckless endangerment); *see also Savoy v. State*, 67 Md. App. 590, 594-95 (1986) (vehicular manslaughter). There is something deeply counter-intuitive, if not morally repugnant, in the notion that the suffering of multiple victims might be cancelled out in the equation of justice simply because they were victimized *together*, in one brutally efficient course of conduct.

The cases cited by Sellman only strengthen our conclusion. In *Purnell v. State*, the Court of Appeals held that the appropriate unit of prosecution for the common law offense of resisting arrest is the incident, rather than the number of officers attempting to make the arrest. 375 Md. 678, 704 (2000). In that case, the Court had no statute to guide its analysis. *Id.* at 699. In the case *sub judice*, Sellman was convicted pursuant to a criminal statute that clearly makes the unit of prosecution the victim, rather than the incident. Moreover, the crime of first-degree rape is fundamentally different from the crime of resisting arrest. As the Court of Appeals observed in *Purnell*, "resisting arrest is, in short, an offense against

the State and not personally against the officers." *Supra*, 375 Md. at 698; *see also id.* at 698-99 (opining that, although two officers were injured in the incident, "the proper response to that consequence lies with the prosecution of the resister for assault against each officer"). First-degree rape, on the other hand, is a crime against a person; it is the victim of the rape, and not the State, who suffers most directly and grievously at the hands of the offender.

Sellman likewise falters in his interpretation of *Bey v. State*, a case involving a defendant who was convicted under Md. Code (2002, 2012 Repl. Vol., Suppl. 2016), § 3-315 of the Criminal Law Article ("Crim. Law"), for sexually abusing a single victim over a four-year span. 228 Md. App. 521 (2016), *cert. granted*, 450 Md. 105 (2016), *and cert. denied*, 450 Md. 108 (2016), *aff'd*, 452 Md. 255 (2017). Although we held in *Bey* that the trial court should have merged the defendant's sentences, we made it clear that the unit of prosecution under Crim. Law § 3-315 is "a continuing course of conduct *per victim*." *Id.* at 541 (emphasis added). Far from supporting Sellman's argument, *Bey* is yet another example of a criminal statute that authorizes multiple convictions where multiple persons have been victimized. Furthermore, the statutory ambiguity in *Bey* arose from the phrase "continuing course of conduct," which, we held, is susceptible to more than one valid interpretation. *Supra*, 228 Md. App. at 544-545. No such language is present in Art. 27 § 462, which simply authorizes punishment whenever a "person" or "victim" is subjected to the defined conduct.

Finally, in *Walker v. State* we considered the case of a defendant who was convicted of common law assault and attempted rape for a single attack on a single victim. 53 Md.

App. 171 (1982). In the absence of any indication that the General Assembly "intended an assault which is also the overt act of an attempt to be punished separately from that attempt," we held that the sentences should have been merged. *Id*. at 201. Incredibly, Sellman claims that "[t]he fact pattern in *Walker* is similar to the fact pattern in the instant case." We disagree. The defendant in *Walker* was convicted of two separate -- but conceptually overlapping -- offenses for attacking a single victim. *Supra*, 53 Md. App. at 205. Sellman, by contrast, was convicted of one count of first-degree rape for each victim, for a total of two counts. A second victim is not a mere technicality. As the judge below noted, "[d]ouble jeopardy does not apply when we have two separate individuals, two separate people, two separate human beings who are raped."

In short, none of the cases cited by Sellman support merger under the circumstances of the present appeal, and two of them -- *Purnell* and *Bey* -- actually undermine Sellman's argument. At the hearing below, the circuit court judge reached the same conclusion:

> The fact pattern in this case is not even close to what the cases counsel cited in her motion relate to. Each sexual act shall be, can be, and should be punished separately. The legislature has made it very clear that there is zero ambiguity in this sentence.

We whole-heartedly agree. Art. 27 § 462 plainly authorizes multiple punishments for an offender who rapes multiple victims, regardless of whether he did so during "a single incident" or "a single course of conduct."[6] The statute simply does not -- and cannot --

[6] Because the legislature clearly intended to impose multiple punishments in these circumstances, we would reach the same result under a double jeopardy analysis. "Under the Double Jeopardy Clause, a defendant is protected against multiple punishment for the same conduct, *unless the legislature clearly intended to impose multiple punishments*."

sustain the interpretation that Sellman has attempted to wring from it. Indeed, to conclude otherwise would leave the words of the legislature warped beyond recognition. Because the language of the statute is clear, there is no need for recourse to the rule of lenity. We hold, therefore, that the circuit court correctly denied Sellman's motion to correct an illegal sentence.

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

Quansah, *supra*, 207 Md. App. at 645 (emphasis added) (quoting *Jones*, *supra*, 357 Md. at 156).