Circuit Court for Montgomery County
Case Nos. 123131-C & 122557-C

UNREPORTED

IN THE APPELLATE COURT OF

OF MARYLAND*

No. 202

September Term, 2021

---

DAQUAN TYLER

v.

STATE OF MARYLAND

---

Kehoe,
Zic,
Moylan, Charles E., Jr.,
(Senior Judge, Specially Assigned)
JJ.

---

Per Curiam

---

Filed: March 9, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Daquan Tyler appeals from the denial, by the Circuit Court for Montgomery County, of his motion to correct an illegal sentence. For the reasons to be discussed, we shall remand the case with instructions to amend the commitment record.

## PROCEDURAL HISTORY

On January 25, 2022, this Court filed an opinion addressing the parties' contentions and remanding this case to the Circuit Court for Montgomery County for further proceedings consistent with that opinion. On February 22, 2022, Mr. Tyler filed a motion for reconsideration, asserting, among other grounds, that this Court had failed to consider arguments presented in his reply brief before deciding his appeal. This was because his reply brief had not arrived at this Court when the appeal was decided and the opinion was filed. This Court granted the motion for reconsideration in part and ordered that (1) the reply brief was accepted for filing, (2) the opinion of this Court was withdrawn, and (3) a new opinion would be issued "after consideration of the arguments presented by [Mr. Tyler] in his reply brief." What follows is our revised opinion.

## BACKGROUND

In 2013, a jury found Mr. Tyler guilty of three counts of armed robbery (against separate victims), three counts of first-degree assault (against the same three victims), and three counts of use of a handgun in the commission of a crime of violence, in Case No. 122557-C (the "armed robbery case"), as well as one count of solicitation to intimidate a witness, Case No. 123131-C (the "solicitation case"). The sentencing judge pronounced the sentences as follows:

> [O]n count one, armed robbery, in [the armed robbery case], I sentence you to 16 years in jail. And I'll suspend eight years of that sentence. Count two, first degree assault, with the same victim, generally suspended sentence. I suppose that would merge anyway, for sentencing purposes, into the armed robbery. Count three, use of handgun in a crime of violence, five years mandatory sentence on count three in that case.
>
> On count four, which brings us back to the second victim in [the armed robbery case], armed robbery, 16 years, suspend eight years. *That is consecutive to count one.* Count five [first-degree assault], generally suspended. Count six [use of a handgun in the commission of a crime of violence], five years, concurrent to count three.
>
> Count seven, . . . the third armed robbery victim, 16 years, suspend eight, *consecutive to counts one and four.* Count eight [first-degree assault], generally suspended. Count nine [use of a handgun in the commission of a crime of violence], five years, concurrent with Counts three and six. So I am running the five-year mandatory handgun violations concurrent.
>
> In [the solicitation case], criminal solicitation for witness intimidation, three years, consecutive to the prior sentence in [the armed robbery case]. That's for soliciting somebody to intimidate a witness. That requires extra time on top of the sentence in the other case.
>
> I'm going to place you on five years' probation upon your release. You'll have the suspended time hanging over your head during the five years of probation and the standard conditions of probation.

(Formatting altered, emphasis added).

Prior to the hearing's conclusion, the prosecutor asked the judge for clarification regarding the mandatory five-year sentence on Count 3, asking "would that be concurrent to the other executed time or consecutive?" The judge replied: "Count three is consecutive to the other executed time, but counts six and nine are concurrent to count three." Defense counsel then inquired about the start date of the sentence and, after

confirming that Mr. Tyler had been in custody since February 15, 2013, the court announced that the sentence would run beginning February 15, 2013.

The relevant docket entry reflects that, in the armed robbery case, the sentences for both Count 3 (use of a handgun) and Count 4 (armed robbery of victim two) were to run consecutively to the sentence for Count 1 (armed robbery of victim one), and that Count 7 (armed robbery of victim three) was to run consecutively to Counts 1 and 4. The commitment record that was issued in that case, dated September 6, 2013, reflected the same. Although the commitment record reflected that Mr. Tyler received a split sentence, it did not state the total term imposed. It simply noted that "[a]ll but 29 years is/are suspended" and the "total time to be served is 29 years[.]" The commitment record in the solicitation case, also issued on September 6, 2013, reflects a sentence of three years for solicitation to intimidate and that it runs consecutive "to the sentence imposed in [the armed robbery case]."

Several months later, on January 30, 2014, the court convened a hearing after the Division of Correction apparently notified the court of an error in the commitment record.

The record before us does not include a transcript from that hearing.[1] Mr. Tyler's appellate brief, however, includes a letter from the sentencing judge responding to an

[1] The docket entry from January 30, 2014, reflects that the court directed the State "to file memorandum concerning sentence by February 24, 2014 and defense counsel to respond by March 10, 2014." Assuming that the parties complied with that order, which is not indicated by the docket entries, neither a memo by the State nor a response by defense counsel are in the record before us.

inquiry from a Commitment Records Specialist with the Hagerstown Regional Commitment Office regarding the sentence in the armed robbery case. The letter, dated February 11, 2014, states:

> This letter is in response to the September 19, 2013 and November 4, 2013 letters you sent regarding Daquan Tyler's sentence. At the sentencing on August 29, 2013 my intention was to sentence Mr. Tyler to a total term of 29 years, however, *I misspoke and made two counts consecutive to count one.* After speaking with the attorneys in this case, there is an agreement that the commitment order, as it stands currently giving *Mr. Tyler 24 years, is accurate and cannot be changed.* Therefore, there is no need for an amended commitment order. Please note, however, that in Case No. 123131C, Mr. Tyler received a 3 year sentence consecutive to the sentence in this case.

(Emphasis added.)

This letter comports with our view of the sentences that were pronounced by the sentencing judge with respect to the armed robbery case. It appears that the sentencing judge had intended to run the first handgun sentence (Count 3) consecutive to the armed robbery of victim one (Count 1), and the remaining armed robbery convictions consecutive thereto, that is, 16 + 5 + 16 + 16 (with eight years suspended from each armed robbery sentence). However, the court ran Count 4 (armed robbery of victim two) consecutive to Count 1 (instead of consecutive to Count 3), thereby effectively running the sentence in Count 4 concurrent with the sentence in Count 3.

Given that the commitment record in the armed robbery case, however, indicated the "total time to be served" in that case was 29 years (which did not include the three years in

the solicitation case), we disagree with the judge's statement that the commitment record did not require an amendment.

But in any event, on April 3, 2014, the court entered an order directing that an amended commitment record be issued. The order set forth the sentences imposed in both cases, which generally comport with the sentences announced at the 2013 sentencing hearing.[2] The order also stated that Mr. Tyler's "total sentence be 56 years, 24 years executed time and 32 years suspended time with 5 years['] supervised probation."

This calculation of the total term in both cases and the division of executed and suspended time appears to be an error as in our view it should have been 51 (48 + 3) years total for both cases, with 27 (24 + 3) years to serve, and 24 years suspended. We fail to discern how the court determined that 32 years were suspended from the total sentence when the only suspended time was eight years from each of the three 16-year armed robbery sentences: 8+ 8 + 8 = 24 years of suspended time.

The next day, April 4, 2014, an amended commitment record was issued in the armed robbery case which reflected that, "[a]ll but 29 years is/are suspended" and the "total time to be served is 29 years." Again, this appears to be an error as our calculation of the executed time in that case is 24 years. Moreover, the original commitment record

[2] The order stated that the 5-year sentence for Count 3 (use of a handgun) "be consecutive to the sentence in Count 1 (armed robbery), and concurrent to Counts 4 and 7." That appears to be a misstatement because Count 3 could not be concurrent to both Count 4 and Count 7 because in both the original pronouncement of sentence and in the April 3, 2014 order Count 7 was run consecutive to Counts 1 and 4.

indicated that Mr. Tyler was awarded 195 days credit and that the sentence "commences on 02/15/2013 which includes all of the days credit for time served." In contrast, the amended commitment record indicates that Mr. Tyler has not been awarded any credit for time served pre-trial and that the "sentence commences on 08/29/2013." No one, however, appears to have challenged the April 3rd order or the amended commitment record.

Then in January 2020, Mr. Tyler, representing himself, filed a motion to correct an illegal sentence in both cases. He asserted that the court's pronouncement of sentence at the August 2013 sentencing hearing was ambiguous in regard to how the sentences were to be run in the armed robbery case. He also maintained that the court's running of the three-year sentence for solicitation consecutive to the sentence in the armed robbery case was also ambiguous because the court announced that it would run "consecutive to the prior sentence in [the armed robbery case,]" and the last sentence announced in that case was for Count 9, which runs concurrently with the other handgun sentences. In other words, it appears that Mr. Tyler maintained that the three-year solicitation sentence should not run consecutively to the total sentence imposed in the armed robbery case, but instead should run consecutively to the handgun sentence for Count 9. He also argued that the first-degree assault convictions should have merged with the armed robbery offenses and, therefore, the court erred in "generally suspending" sentences for those convictions, claiming that a "suspended sentence is still a sentence." And he asserted that he was entitled to the 195 days credit for time served pre-trial. Finally, he argued that he

was "resentenced" pursuant to the April 3, 2014 order, but deprived of his right to allocute or present mitigating evidence.

The State filed an opposition, noting that on August 29, 2013, the court sentenced Mr. Tyler "to an aggregate sentence of 29 years' incarceration" in the armed robbery case.[3] The State asserted that "the transcript and docket entries reflect the Court's clear intent as to what sentences run consecutive and concurrent with one another" and the "Court could not have conveyed its intent with any more clarity."

By order dated March 23, 2021 (entered on the docket on April 2, 2021), the court summarily denied Mr. Tyler's motion to correct his sentences. Mr. Tyler appeals that decision.

In his brief, Mr. Tyler presents four contentions:

First, the sentencing court "ambiguously ran [the sentence to] Count 7 consecutive to Count 1 and then Count 4. So when the ambiguity is solved, the total executed sentence is 16 years";

Second, "the oral pronouncement of sentence in [the solicitation case] states the 3 year sentence in [that case] is to run consecutive to Count 9 in #122337-C. Thereby running [the sentence imposed in the solicitation case] concurrent to [the sentences imposed in the armed robbery case]";

[3] We presume the State meant that the court sentenced Mr. Tyler to an aggregate term of 29 years of *executed* incarceration.

Third, the imposition of sentences on Counts 2, 5, and 8 in the armed robbery case violated Double Jeopardy and constituted an illegal sentence; and

Fourth, the circuit court's order of April 1, 2014, requesting an amended commitment record was in fact an unlawful re-sentencing and deprived him of his right to allocution.

Mr. Tyler reiterates all of these contentions in his reply brief.

**DISCUSSION**

"When there is a conflict between the transcript and the commitment record, unless it is shown that the transcript is in error, the transcript prevails." *Lawson v. State*, 187 Md. App. 101, 108 (2009) (quotation marks and citation omitted). Accordingly, we focus on the transcript of the sentencing hearing held on August 29, 2013. Although Mr. Tyler characterizes the April 3, 2014 order as a "resentencing," in our view it was merely an attempt to clarify or correct the commitment record.

We hold that the court's pronouncement of sentence at the August 29, 2013 sentencing hearing was not ambiguous. Mr. Tyler was sentenced to a total term of 48 years in the armed robbery case, namely, 16 years for each of the armed robbery convictions, and a consecutive term of three years in the solicitation case, for a grand total in both cases of 51 years, with all but 27 years suspended. As noted, in the armed robbery case, by announcing that the sentence for Count 4 (armed robbery of victim 2) was to run consecutive to Count 1 (instead of consecutive to Count 3), the court effectively ran Count 4 concurrently with Count 3. The court seemed to acknowledge that fact in its February 2014 letter to the Commitment Records Specialist.

We see no ambiguity with respect to the three-year sentence for the solicitation offense. The court announced that it was to run "consecutive to the prior sentence" in the armed robbery case. When pronouncing that sentence, the court explained that the solicitation offense "requires extra time *on top of the sentence in the other case*." (Emphasis added.) When referring to the "sentence in the other case[,]" the court clearly meant the total term for all the counts imposed in the armed robbery case.

We agree with Mr. Tyler that his first-degree assault convictions may have merged for sentencing purposes with the armed robbery convictions. But the court acknowledged that any sentence imposed for first-degree assault "would merge . . . for sentencing purposes, into the armed robbery" conviction and further announced, for each first-degree assault count, that it was "generally suspended." In other words, no sentences were imposed for the first-degree assault convictions. Although the "generally suspended" language may have been unnecessary verbiage, it did not create any illegality in the sentence.

We do agree with Mr. Tyler, as does the State, that he is entitled to the 195 days of credit for pre-trial detention. There is no explanation in the record before us as to why the credit was removed when the commitment record was amended in April 2014.

Accordingly, we remand the case to the circuit court with instructions to amend the commitment record in the armed robbery case (Case No. 122557-C) to reflect a total sentence in that case of 48 years imprisonment, with all but 24 (not 29) years suspended. The commitment record should also reflect that the "total time to be served" is 24 (not

29) years in that case. Finally, the commitment record should reflect that the sentence began on February 15, 2013, to account for the 195 days of credit for pre-trial detention.

**CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR CORRECTIONS TO THE COMMITMENT RECORD IN CASE NO. 122557-C CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.**