Circuit Court for Worcester County
Case No.: 23-K-15-000030

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 443

September Term, 2020

RICHARD WAYNE KIDWELL

v.

STATE OF MARYLAND

Graeff,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: May 5, 2021

In 2015, following a bench trial in the Circuit Court for Worcester County, the court found Richard Wayne Kidwell, appellant, guilty of five counts of sexual abuse of a minor, three counts of second-degree rape, five counts of third-degree sexual offense, and one count of attempted third-degree sexual offense. On the five counts of sexual abuse of a minor, the court sentenced appellant to four concurrent twenty-five year terms of imprisonment, plus a consecutive fully suspended twenty-five year term. The court merged the remaining counts for sentencing.

On appeal, appellant contends that, because each count charging sexual abuse of a minor covered the same date range, his separate sentences for all five counts are illegal. The State agrees, and so do we. Appellant also contends that his sentences violate his right to be free from cruel and unusual punishment. In light of our holding on appellant's first contention, we need not reach his second. We explain.

BACKGROUND

Because appellant's contentions on appeal relate to the legality of his sentence, we need not, and do not, explicate the facts of the offense in significant detail. It is sufficient to say that the court convicted appellant of various sexual and abusive offenses against a minor child. The indictment, as amended before trial, charged him for offenses that, despite being grouped into five groups, were all alleged to have occurred between the same date range, *i.e.*, between December 1, 2011, and December 1, 2014. The following table reflects the charges and dispositions in appellant's case:

Count#	Offense	Verdict	Sentence
1	Continuing course of conduct against a child	Nolle prosequi	
2	**Sexual Abuse of a Minor**	**Guilty**	**25 years**
3	Second-Degree Rape	Not Guilty	
4	Third-Degree Sexual Offense	Guilty	Merged with 2[1]
5	**Sexual Abuse of a Minor**	**Guilty**	**25 years concurrent**
6	Second-Degree Rape	Guilty	Merged with 5
7	Third-Degree Sexual Offense	Guilty	Merged with 5
8	**Sexual Abuse of a Minor**	**Guilty**	**25 years concurrent**
9	Second-Degree Rape	Guilty	Merged with 8
10	Third-Degree Sexual Offense	Guilty	Merged with 8
11	**Sexual Abuse of a Minor**	**Guilty**	**25 years concurrent**
12	Second-Degree Rape	Guilty	Merged with 11
13	Third-Degree Sexual Offense	Guilty	Merged with 11
14	**Sexual Abuse of a Minor**	**Guilty**	**25 years all suspended consecutive**
15	Third-Degree Sexual Offense	Guilty	Merged with 14
16	Attempted Third-Degree Sexual Offense	Guilty	Merged with 14

[1] It appears that the court gave appellant more merger than required, as Section 3-602 of the Criminal Law article permits, as relevant here, a sentence for sexual abuse of a minor to be imposed "consecutive to or concurrent with a sentence for [] any crime based on the act establishing the violation of this section." Thus, the court was not required to merge counts 4, 6, 7, 9, 10, 12, 13, 15, & 16 into their respective umbrella offenses of sexual abuse of a minor.

DISCUSSION

I.

As noted earlier, appellant contends that his five separate sentences for sexual abuse of a minor are illegal because they all were alleged to have occurred during the same date range. When his *pro se* Brief of Appellant is liberally construed, appellant's real complaint appears to be that he was punished more than once for the same offense.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Maryland's common law protect against multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Randall Book Corp. v. State*, 316 Md. 315, 323 (1989); *Brown v. State*, 311 Md. 426, 431 (1988).

Whether a particular course of conduct constitutes one violation, or more than one violation, of a single statutory offense depends on the appropriate "unit of prosecution" of that offense. *Brown v. State*, 311 Md. 426, 431-32 (1988). As the Supreme Court stated in *Brown v. Ohio*, 432 U.S. 161, 169 (1977), "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

Appellant was charged with five counts of violating section 3-602(b) of the Criminal Law Article, titled "Sexual Abuse of a Minor," which, as relevant here, prohibits "a household member or a family member" from causing sexual abuse to a minor. As Judge Moylan observed in *Warren v. State*, 226 Md. App. 596 (2016):

> In analyzing double jeopardy scenarios, an umbrella crime such as Sexual Child Abuse, pursuant to § 3-602, poses especially perplexing problems, because an umbrella crime may appear in ever changing shapes and sizes. It is an accordion. It may be pressed together so tightly that at times it embraces a single constituent crime. It may actually be compressed even more tightly, embracing only instances of sexually abusive behavior that are not actually criminal. The accordion of Sexual Child Abuse, on the other hand, may at times be opened up so expansively as to embrace dozens, nay hundreds, of constituent criminal acts, charged or uncharged. Even if embracing a hundred constituent criminal acts, however, the umbrella crime of Sexual Child Abuse itself remains a single and indivisible crime. It does not fragment with the multiplication of its supporting evidence.

Id. at 615-16.

The charging document in *Warren*, charged Warren with child sexual abuse in four separate counts of the charging document covering the same date range. This Court explained that:

> The Sexual Abuse of a Minor charge … could not be multiplied by four. It would have been an improper multiplication of guilt for Sexual Child Abuse that would presume to increase the maximum penalty of 25 years for such an offense into an illegal sentence of 100 years. In taking the single indivisible crime of Sexual Child Abuse and fragmenting it into four distinct offenses, the State was attempting to divide the indivisible.

Id. at 610.

Thus, in the present case, the five counts purporting to charge five separate counts of sexual abuse of a minor actually charged appellant with the same offense in more than one count. Such a charging document is multiplicative and not permitted. *Brown v. State*, 311 Md. 426, 432 (1988). However, appellant waived any challenge to the multiplicative charging document when he failed to file a pre-trial motion or otherwise object to it. Md. Rule 4-252(a). Nevertheless, he still is being punished more than once for a single crime because the court imposed separate sentences for all five sexual abuse of a minor

convictions. He is entitled, therefore, under the required evidence test, to have his sentences merged. *Rudder v. State*, 181 Md. App. 426, 451 (2008), *Ezenwa v. State*, 82 Md. App. 489 (1990).

With respect to the remedy for appellant's illegal sentence, appellant suggests that we merge the sentences for sexual abuse of a minor found in count numbers 5, 8, 11, & 14 into the sentence on count number 2, "or at least run count #14 concurrent [with the] other counts."

The State contends that, pursuant to the Court of Appeals' holding in *Twigg v. State*, 447 Md. 1 (2016), we should vacate all of appellant's sentences and remand this matter to the circuit court for resentencing. In *Johnson v. State*, 248 Md. App. 348 (2020), we explained that "*Twigg* stands for the proposition that appellate courts have the discretionary authority to remand cases for resentencing in response to their decision that the trial court's sentencing package has been disrupted by mergers the trial court didn't anticipate or consider." *Id*. at 357.

We agree with the State that the proper remedy in this case is to vacate all of appellant's sentences and remand the case for re-sentencing.

II.

Appellant also contends that his fifty-year sentence, with twenty-five years suspended, violates his right to be free from cruel and unusual punishment. In support of that contention, he points out that the Maryland sentencing guideline range was calculated to be between ten and fifteen years, that these are his first convictions of this nature, and

that, according to fellow inmates who have been convicted of similar charges, a first time offense should only merit a sentence between five and ten years.

In light of our earlier holding, we need not address this contention.

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY REVERSED. SENTENCES VACATED. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WORCESTER COUNTY.