

Circuit Court for Prince George's County
Case No. CT90-1524B

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 568

September Term, 2017

GORDON MAURICE PRAILOW

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: May 8, 2018

*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.

Gordon M. Prailow appeals the denial, by the Circuit Court for Prince George’s County, of his motion to correct an illegal sentence. We affirm.

BACKGROUND

Following a 1991 jury trial, Prailow was convicted of the felony murder of Stuart Smith, the felony murder of Derrick Williams, the second-degree murder of Michael Martin, and other offenses. He was sentenced to twenty years’ imprisonment for second-degree murder, a consecutive term of twenty years’ imprisonment for a handgun offense, to two consecutively run life sentences for felony murder, to run consecutive to the aforementioned term-of-years sentences, and to other concurrently run terms of confinement. This Court affirmed the judgments. *Prailow v. State*, 510, September Term, 1991 (filed January 27, 1992), *cert. denied*, 326 Md. 662 (1992).

In December 2015, Prailow filed a motion to correct an illegal sentence pursuant to Rule 4-345(a), in which, for the most part, he challenged the legality of his sentences by attacking the validity of his underlying convictions. Following a hearing held in February 2017, the circuit court denied relief.

In denying the motion, the circuit court determined that Prailow’s sentences were not “inherently illegal,” and thus his claim was not the proper subject of a motion to correct an illegal sentence. Nonetheless, the court considered and rejected each of Prailow’s contentions, stating as follows:

First, Defendant asserts that the trial court lacked jurisdiction to convict and sentence him due to a defective jury instruction [on reasonable doubt]. This Court finds that such assertion was raised in his Petition for Post Conviction Relief, which a hearing was held, and the petition was denied on November 9, 1998. After the Court of Special Appeals remanded

the case back to the post conviction court for its statement of reason, the post conviction court entered its Statement of Reasons and Order of Court on September 19, 2000. In its Statement of Reasons, the post conviction court found that the jury instruction was not misleading, and that it was proper at the time of trial. Because this issue is finally litigated before the post conviction court, Defendant is barred from raising the same issue in the present proceeding. Even if this Court considers on the merits, this Court finds that the jury instruction was proper as the jury instruction was permissible at the time of trial.

Second, Defendant asserts that he was never indicted on felony murder charges, and thus the felony murder convictions and sentences should be vacated. This Court finds that this assertion has no merit as Defendant was indicted on charges of common law murder, which includes charges of felony murder.

Third, Defendant asserts that he was wrongly convicted of the Felony Murder charge and the Second Degree Murder charge for the same victim, [Derrick] Williams. This Court finds that it was not improper for the jury to find Defendant guilty of both charges of the same victim as the essential elements of the Felony Murder differ from the elements of the Second Degree Murder.

Fourth, Defendant asserts that there was ambiguity of the elements of each offense of common law murder and that such ambiguity confused the jury at trial. This Court finds that there is no evidence of ambiguity that exists on the record concerning the alleged confusion of the jury as to the elements of each offense of murder. Further, Defendant fails to show evidence of the alleged ambiguity present at trial.

Fifth, Defendant asserts that the convictions for Robbery with a Deadly Weapon must merge into the greater offenses. This Court finds that this assertion was raised [in] the Defendant's Motion to Revise Improper Sentence filed April 2, 1991. On April 26, 1991, the court ordered that the Defendant's sentence be revised *nunc pro tunc*, merging the Robbery with a Deadly Weapon counts into the Felony Murder counts. Thus, this issue is moot.

Sixth, Defendant asserts that the convictions of Robbery with a Deadly Weapon should merge into the convictions of Use of Handgun in Commission of a Felony or Crime of Violence. This Court finds that this assertion has no merit as the two offenses cannot merge under Maryland law. *See Md. Code Ann., Crim. Law § 4-204.*

Finally, Defendant asserts that the trial court illegally merged the second degree murder conviction [of Williams] into the felony murder conviction of [Williams] at the sentencing hearing, and that under the rule of lenity, the proper remedy is to vacate the felony murder conviction and sentence him for second degree murder instead. This Court finds that such assertion has no merit as the rule of lenity is inapplicable in this case.

DISCUSSION

On appeal, Prailow asserts that the circuit court erred in denying his motion. Specifically, he continues to maintain that the jury instruction on reasonable doubt was defective, which caused the trial court to lose jurisdiction over his case, thus rendering both his convictions and sentences illegal. He also continues to press his claim that the indictment for murder was insufficient to charge him with felony murder, and that his conviction for the felony murder of Derrick Williams should have merged into his conviction for the second-degree murder of Williams for sentencing purposes, not vice versa. The State responds that the circuit court correctly ruled that Prailow’s “claim does not relate to his sentence” and, therefore, is “not cognizable under Rule 4-345(a).”¹

In pointing out that there is a distinction between “illegal sentences that are cognizable under Rule 4-345(a) and those that are not,” the Court of Appeals has explained that there is no relief, pursuant to Rule 4-345(a), where “the sentences imposed were not

¹ Curiously, the State complains that it cannot “prepare a statement of facts” due to the absence of the trial transcripts and instead includes in its brief a 1990 newspaper article from The Washington Post reporting on the crimes leading to Prailow’s convictions in this case. The trial transcripts, however, are in the record before us. Moreover, our 1992 opinion affirming the judgments includes a summary of the facts, as does the circuit court’s memorandum opinion denying Prailow’s motion to correct an illegal sentence which is the subject of this appeal. Again, due to purported absence of the trial transcripts, the State further maintains that Prailow’s contentions on appeal “cannot be considered, and should be rejected.”

inherently illegal, despite some form of error or alleged injustice.” *Matthews v. State*, 424 Md. 503, 513 (2012). A sentence is “inherently illegal” for purposes of Rule 4-345(a) where there was no conviction warranting any sentence, *Chaney v. State*, 397 Md. 460, 466 (2007); where the sentence imposed was not a permitted one, *id.*; or where the sentence imposed exceeded the sentence agreed upon as part of a binding plea agreement. *Matthews*, 424 Md. at 514. A sentence may also be “inherently illegal” where the underlying conviction should have merged with the conviction for another offense for sentencing purposes, where merger was required. *Pair v. State*, 202 Md. App. 617, 624, *cert. denied*, 425 Md. 397 (2012). In one unusual case, the Court of Appeals found that a sentence was inherently illegal where the defendant was convicted of a crime for which he had never been charged. *Johnson v. State*, 427 Md. 356 (2012). Notably, however, a ““motion to correct an illegal sentence is not an alternative method of obtaining belated appellate review of the proceedings that led to the imposition of judgment and sentence in a criminal case.”” *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Wilkins v. State*, 393 Md. 269, 273 (2006)).

With those principles in mind, we conclude that the only claims Prailow is pursuing on appeal that could perhaps be properly raised in a motion to correct an illegal sentence are his contentions that (1) his sentences for felony murder are illegal because he was not specifically charged with that crime, and (2) his conviction for the felony murder of Williams should have merged into his conviction for second-degree murder of Williams

for sentencing purposes, and not vice versa. We hold, however, that the circuit court correctly found no merit to either contention.²

Pursuant to an indictment filed in August 1990, Prailow was charged with twenty-one offenses, including three counts of murder using the “short form” indictment, a “formula” first established by the legislature in 1906. *See Ross v. State*, 308 Md. 337, 342-343 (1987). Specifically, the charge read as follows:

The Grand Jurors of the State of Maryland, for the body of Prince George’s County, on their oath do present that MARCUS TUNSTALL, GORDON PRAILOW, and GEORGE ANTHONY THORNE late of Prince George’s County, aforesaid, on or about the 20th day of July, nineteen hundred and ninety, at Prince George’s County aforesaid, feloniously, willfully and of their deliberately premediated malice aforethought, did kill and murder Michael LaBrent Martin, in violation of the common law of Maryland, and against the peace, government and dignity of the State. (Murder)

The same language was used, in separate counts, to charge Prailow with the murder of the other victims, Derrick Williams and Stuart Smith.

Several years before Prailow was indicted, the Court of Appeals in *Ross*, *supra*, noted that “a charge of murder,” using the short-form indictment for murder, “may be made

² We disagree with Prailow that the alleged faulty jury instruction on reasonable doubt deprived the trial court of jurisdiction, thus rendering the jury’s verdicts invalid. Any challenge to the jury instruction should have been made by objection at trial and then raised upon direct appeal. Moreover, as the circuit court noted, Prailow raised this contention in a petition for post-conviction relief, and the post-conviction court determined that the reasonable doubt instruction was not improper. Prailow again raised this issue in a motion to re-open a closed post-conviction proceeding and, again, the court denied relief. This Court denied Prailow’s application for leave to appeal that ruling. *Prailow v. State*, No. 2954, September Term, 2011 (filed April 25, 2013). Finally, the circuit court – for the third time – considered Prailow’s claim on the reasonable doubt instruction when it considered the motion to correct an illegal sentence and, again, found that the instruction given was proper.

out by proof of premeditated murder or proof of felony murder[.]” 308 Md. at 347. The Court further stated that, although “murder in the first degree may be proved in more than one way[,] [t]here is no requirement . . . that a charging document must inform the accused of the specific theory on which the State will rely.” *Id.* at 344. Accordingly, the Court rejected Ross’s claim that the State’s use of the short form indictment for murder deprived him of his constitutional right of fair notice and due process when the State successfully tried him for felony murder. *Id.* at 347. As *Ross* makes clear, there is no merit to Prailow’s claim that he was wrongfully convicted of felony murder because he was not explicitly charged with that specific offense.

We also find no merit to Prailow’s claim that the sentencing court erred in merging his conviction for the second-degree murder of Williams into his conviction for the felony of murder of Williams. Prailow insists that, under “the rule of lenity” and “principles of fundamental fairness,” the felony murder conviction (with a maximum penalty of life imprisonment or life without parole) should have merged into the second-degree murder conviction (with a maximum penalty of thirty years’ imprisonment).

We first note that the sentencing court correctly imposed one sentence for Prailow’s murder of Williams. As this Court has explained, “[h]aving killed only one person, [the defendant] committed only one murder. . . . In homicide cases, the units of prosecution are dead bodies, not theories of aggravation.” *Burroughs v. State*, 88 Md. App. 229, 247 (1991), *cert. denied*, 326 Md. 365 (1992).

Even if we assume that the first-degree felony murder and second-degree murder convictions would merge for sentencing purposes under the rule of lenity or principles of

fundamental fairness, merger under either of these theories would require the merger of second-degree murder into first-degree felony murder, which is precisely what the sentencing court here did. *Moore v. State*, 198 Md. App. 655, 693 n. 10 (2011) (“The greater offense for lenity and fundamental fairness is the one carrying the greatest possible penalty.”)(citations omitted); *Abeokuto v. State*, 391 Md. 289, 356 (2006) (“Where ‘there is a merger under the rule of lenity, the offense carrying the lesser maximum penalty ordinarily merges into the offense carrying the greater maximum penalty.’”)(quoting *McGrath v. State*, 356 Md. 20, 25 (1999)(further quotation omitted)); *Miles v. State*, 349 Md. 215, 221 (1998) (“When merger is not based upon the required evidence test, and therefore neither offense is the greater in terms of elements, the offense carrying the highest maximum authorized sentence is ordinarily considered to be the greater offense. Thus, the offense carrying the lesser maximum penalty merges into the offense carrying the greater penalty.”)(quotation omitted)).

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**