UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0620

September Term, 2014

JERRY LEE HURT, JR.

v.

STATE OF MARYLAND

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: September 4, 2015

At the conclusion of a jury trial in the Circuit Court for Worcester County, Jerry Hurt, Jr., appellant, was convicted of several offenses arising from his possession of a quantity of oxycodone and cocaine, as well as two firearms in relation to drug trafficking. The trial judge imposed separate sentences for the possession of each drug, and separate sentences for each firearm. In this appeal, Hurt argues that the sentences were illegally duplicative because, he contends, he should have been convicted of only one drug possession offense and one firearm offense. In the alternative, he argues that, even if the multiple convictions are allowed to stand, the second conviction for drug possession and the second conviction for firearm possession should have been merged for sentencing purposes. He presents the following two questions:

> I. Must the Court vacate one of Mr. Hurt's convictions and sentences for possession of a controlled dangerous substance with intent to distribute, when the State presented evidence of only one drug-trafficking enterprise?
>
> II. Must the Court vacate one of Mr. Hurt's convictions and sentences for possession of a firearm during and in relation to a drug-trafficking crime, when the State presented evidence of only one drug-trafficking enterprise?

We shall vacate Hurt's conviction and sentence for one of the counts of possession of a firearm during and in relation to a drug trafficking crime, and we will affirm the remaining convictions and sentences.

BACKGROUND

The charges in this case stem from a search warrant executed by police on April 2, 2013, at 10118 Orchard Road in Berlin, Maryland. Inside the bedroom that was rented to Hurt, police found a safe that contained the following contents: one loaded black Beretta

model 85F semiautomatic nine millimeter handgun; one loaded Hi-Point model C-9 semiautomatic nine millimeter short handgun; 41 oxycodone pills; and 0.1 gram of crack cocaine. The safe also contained several documents with Hurt's name, including Hurt's birth certificate, a social security statement, a certificate of title to a 1999 Ford vehicle, and several receipts. At an Ocean City condominium unit rented by Hurt, the police found an empty safe and three digital scales. Hurt was arrested based on his connection to the items that were recovered from the safe at the Berlin house. When he was arrested, Hurt had in his possession two cell phones and $2,272 in cash. He was charged with illegal possession of the oxycodone, the crack cocaine, and the two firearms.

The jury found Hurt guilty of simple possession of oxycodone as well as possession of oxycodone with intent to distribute; simple possession of cocaine as well as possession of cocaine with intent to distribute; possession of the Beretta in relation to a drug trafficking enterprise; and possession of the Hi-Point firearm in relation to a drug trafficking enterprise. The sentencing court merged the simple possession conviction counts into the possession with intent to distribute counts, and then imposed sentences as to the following four convictions. The court sentenced Hurt to twenty years' imprisonment, with all but ten years suspended, for possession of cocaine with the intent to distribute. The court imposed a concurrent sentence of twenty years, with all but ten years suspended, for possession of oxycodone with the intent to distribute. With respect to the two firearms found in the safe, the court sentenced Hurt to a consecutive term of five years' imprisonment for possession of a firearm (*i.e.,* the Beretta model 85F semiautomatic) during and in relation to drug

trafficking; and, concurrent with that sentence, the court imposed a sentence of five years for possession of a firearm (*i.e.*, the Hi-Point model C-9 semiautomatic) during and in relation to drug trafficking. This appeal followed.

DISCUSSION

On appeal, Hurt argues that this Court "must vacate one of the convictions and sentences for possession of a controlled dangerous substance with intent to distribute, and one of the convictions and sentences for possession of a firearm during and in relation to a drug trafficking crime." The State responds that this Court should address only the legality of the sentences (and not the legality of the convictions) because Hurt did not preserve his challenge to these convictions. We agree with Hurt that both the legality of the convictions and the legality of the sentences may properly be raised pursuant to Maryland Rule 4-345(a).

Rule 4-345(a) provides: "The court may correct an illegal sentence at any time." *See generally Carlini v. State*, 215 Md. App. 415, 422-43 (2013). The Court of Appeals has explained that, "[w]hen the illegality of a sentence stems from the illegality of the conviction itself, Rule 4-345(a) dictates that both the conviction and the sentence be vacated." *Johnson v. State*, 427 Md. 356, 378 (2012). Accordingly, we may review the legality of Hurt's convictions as well as the legality of the sentences on appeal. *See also Kyler v. State*, 218 Md. App. 196, 222 (2014) ("in a situation where merger is required under the required evidence test or the rule of lenity, the issue of merger is properly before us even in the absence of an objection below"); *Wimbish v. State*, 201 Md. App. 239, 270 (2011) ("Although appellant did not object to his convictions or sentence at trial, we may review,

on direct appeal, a sentence that is beyond the statutory power of the court to impose even if no objection was made at the trial level.") (internal quotation marks omitted).

"The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides the criminally accused with protection from, *inter alia*, multiple punishment stemming from the same offense." *Purnell v. State*, 375 Md. 678, 691 (2003). "We analyze the unit of prosecution when we are faced with multiple punishments deriving from a single statutory provision." *Triggs v. State*, 382 Md. 27, 43 (2004) "'[T]he unit of prosecution reflected in the statute controls whether multiple sentences ultimately may be imposed.'" *Handy v. State*, 175 Md. App. 538, 576 (2007) (quoting *Moore v. State*, 163 Md. App. 305, 320 (2005)). Accordingly, "[t]o ascertain the unit of prosecution, we must construe the statute." *Handy,* 175 Md. App. at 576.

As Judge Sally Adkins observed for the Court of Appeals in *Johnson, supra*, 427 Md. at 368, "one type of illegal sentence which this Court has consistently held should be corrected under Rule 4-345(a) . . . [is a sentence which was imposed] where **no sentence or sanction should have been imposed**." (Emphasis added in *Johnson*) (internal quotation marks and citations omitted). Such a claim "may be raised 'at any time' under Rule 4-345(a)." *Id*. at 371. Moreover, because such claims are cognizable under Rule 4-345(a), they "are not subject to waiver." *Id*. Indeed, "a motion to correct an illegal sentence under Rule 4-345(a) is not waived even if 'no objection was made when the sentence was

interposed' or 'the defendant purported to consent to it[.]'" *Id*. (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). Accordingly, we will address each of Hurt's arguments below.

I.

Hurt was convicted of possession of cocaine with intent to distribute and also convicted of possession of oxycodone with intent to distribute under the same statute — Maryland Code (1957, 2012 Repl. Vol.), Criminal Law Article ("C.L."), § 5-602(2) — which provides: "Except as otherwise provided in this title, a person may not: . . . (2) possess a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a controlled dangerous substance." As discussed above, the court sentenced Hurt on both counts charging violations of C.L. § 5-602(2), but ordered that the sentences be concurrent to each other.

Hurt argues that "Section 5-602 of the Criminal Law Article, the statute governing possession of a controlled dangerous substance with intent to distribute, permits only one conviction and sentence when the State proves just one drug dealing operation, regardless of the number of drugs involved in that operation." Hurt concedes that the Court of Appeals held otherwise in *Cunningham v. State*, 318 Md. 182 (1989), but argues that, "notwithstanding the *Cunningham* decision, this Court should vacate one of the convictions and sentences for possession of a controlled dangerous substance with intent to distribute." In response, the State disagrees, and contends that "controlling Court of Appeals case law permits separate sentences, and convictions, for the simultaneous possession of two different controlled substances[.]"

Although Hurt has cited authority from other jurisdictions that appear to support his argument that the unit of prosecution should be the number of drug-trafficking operations rather than the number of different drugs possessed by the trafficker, we agree with the State's argument that *Cunningham* remains controlling authority in Maryland. Consequently, the trial court correctly ruled that Hurt could be convicted of two separate counts of possession of a controlled dangerous substance with intent to distribute.

In *Cunningham,* the defendant "simultaneously possessed, in a single bag, separate quantities of heroin and cocaine." 318 Md. at 184. The Court of Appeals evaluated whether two separate sentences — one for possessing heroin with intent to distribute and one for possessing cocaine with intent to distribute — could be imposed for violations of Maryland Code (1957, 1987 Repl. Vol.) Art. 27, § 286(a)(1), the predecessor to C.L. § 5-602(2).[1] 318 Md. at 188. The Court stated that "the resolution of this question depends upon the unit of prosecution intended by the General Assembly." *Id.* at 184. After reviewing the statutes in the context of the statutory scheme, the *Cunningham* Court concluded that the language of the statutes appears "to demonstrate the intention of the legislature to regulate each controlled dangerous substance, and *to authorize a separate conviction for the possession of each substance*." *Id.* at 188 (emphasis added). Writing for the Court, Judge John McAuliffe stated: "We read §§ 286 and 287 of [Article 27] to authorize a separate conviction and

[1] Maryland Code (1957, 1987 Repl. Vol.) Art. 27, § 286(a)(1), was repealed by 2002 Md. Laws, Chapter 26, § 1, effective October 1, 2002. Maryland Code (1957, 2012 Repl. Vol.), Criminal Law Article, § 5-602(2), was added by 2002 Md. Laws, Chapter 26, § 2, effective October 1, 2002. The revisor's note provides: "This section is new language derived without substantive change from former Art. 27, § 286(a)(1)."

punishment for the possession with intent to distribute, or possession, as the case may be, of each controlled dangerous substance covered by the Act, even when there is a simultaneous possession of more than one such substance." Consequently, the Court held that "Cunningham was properly given separate sentences for the simultaneous possession of two controlled dangerous substances." *Id.* at 194.

We perceive no material change in the applicable statutes under which Hurt was convicted of possession of oxycodone and cocaine. C.L. § 5-101(f)(i) defines "Controlled dangerous substance" to mean "a drug or substance listed in Schedule I through Schedule V; . . . ." Both oxycodone and cocaine are listed in Schedule II, set forth in C.L. §§ 5-403(b)(1)(xiv) and 5-403(b)(3)(iv). The current language of the statute prohibiting possession — C.L. § 5-602(2) — is virtually unchanged from the wording of the predecessor statute that was quoted by the Court of Appeals in *Cunningham* as: "it is unlawful for any person . . . to possess a controlled dangerous substance in sufficient quantity to reasonably indicate under all circumstances an intent to . . . distribute . . . a controlled dangerous substance . . . ." 318 Md. at 187. Finally, the current penalty provision applicable to a Schedule II substance, set forth in C.L. § 5-608(a), includes language virtually identical to the phrase the *Cunningham* Court quoted as providing a penalty for "[a]ny person who violates any provisions of [Art. 27, § 286(a)] with respect to: (1) A substance classified in Schedules I or II . . . ." 318 Md. at 187.

In the 25 years since *Cunningham* was decided, the General Assembly has not enacted any statute to alter the Court of Appeals's conclusion that the legislature intended for C.L.

§ 5-602(2) to "regulate each controlled dangerous substance, and to authorize a separate conviction for the possession of each substance." *Cunningham*, 318 Md. at 188. Accordingly, because the unit of prosecution is the substance and not the drug dealing operation, and there were two distinct Schedule II substances possessed by Hurt, he was legally convicted of two separate counts of possession with intent to distribute, and a separate sentence was legally imposed with respect to each of those two convictions.

II.

Hurt was also convicted of two counts of possession of a firearm during and in relation to drug trafficking, under C.L. § 5-621(b)(1), which provides: "During and in relation to a drug trafficking crime, a person may not: (1) possess a firearm under sufficient circumstances to constitute a nexus to the drug trafficking crime[.]" The statute defines a drug trafficking crime as "a felony or a conspiracy to commit a felony involving the possession, distribution, manufacture, or importation of a controlled dangerous substance under §§ 5-602 through 5-609 and 5-614 of this article." C.L. § 5-621(a)(2).

Hurt argues that "the unit of prosecution of the firearms offense is the drug dealing operation, not the number of guns or drugs involved in that operation." Citing *Nicolas v. State*, 426 Md. 385 (2012), and *Snowden v. State*, 321 Md. 612 (1997), Hurt argues, in the alternative, that there is illegal ambiguity in the jury's verdict; he asserts: "Because the jury could have predicated both firearms convictions on the same underlying conduct, only one firearm sentence is appropriate." The State responds that the two sentences were proper because Hurt was convicted of two counts of possession with intent to distribute. The State

contends that there was no ambiguity in the jury's verdict because, "if [Hurt] was in possession of a firearm with nexus to possessing while intending to distribute one substance, the jury would have logically had to find that [Hurt] was in possession of a firearm with nexus to possessing while intending to distribute the other substance." We agree with Hurt that only one conviction can survive for the offense of possessing a firearm in relation to drug trafficking.

In *Handy, supra*, 175 Md. App. at 543, we were asked to "determine whether the [sentencing] court was entitled to impose separate sentences for each gun 'possessed' by the defendant in regard to a single drug trafficking conviction." We reviewed the statute defining the offense, and we concluded "that [C.L. § 5-621] is ambiguous with respect to the unit of prosecution" because neither the legislative history nor the statute's text "clearly indicate that the Legislature intended to subject a defendant to multiple sentences for multiple weapons in connection with a single offense of a drug trafficking crime." *Id.* at 587. We pointed out that, "if the Legislature had intended multiple sentences for each weapon involved in a single drug trafficking offense, it could have explicitly so stated." *Id.* at 588. Ultimately, we applied the rule of lenity, and held "that the unit of prosecution under C.L. § 5-621 is the drug offense, rather than the gun," and we reversed three of Handy's four "convictions and sentences under C.L. § 5-621." *Id.*

Hurt's case is distinguishable from Handy's because the defendant in *Handy* was convicted of only one drug trafficking crime, as defined by C.L. § 5-621(a)(2), whereas, in this case, Hurt was convicted of two drug trafficking crimes. Nevertheless, we agree with

Hurt's argument that merger of his two firearm convictions is required by *Nicolas* and *Snowden*. In his brief, Hurt argues:

> [T]he State did not argue that Mr. Hurt used one firearm in furtherance of his possession of cocaine with intent to distribute and the other firearm in furtherance of his possession of oxycodone with intent to distribute. Nor did the circuit court instruct the jury to determine which of the predicate [drug trafficking] counts . . . was the basis for each of the firearms convictions. Accordingly, it is impossible to tell whether the jury convicted Mr. Hurt upon finding that he used both firearms in furtherance of his possession with intent to distribute the same drug, or whether the jury found that he used one firearm in each of the underlying drug trafficking offenses. . . . Because the jury could have predicated both firearms convictions on the same underlying conduct, only one firearm sentence is appropriate.

"The burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State." *Alexis v. State*, 437 Md. 457, 486 (2014) (quoting *Morris v. State*, 192 Md. App. 1, 39 (2010)). "Accordingly, when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant." *Id.*

Here, the court's instructions to the jury advised that each firearm count pertained to a different weapon, but the instructions did not require the jury to make a specific finding with respect to whether either or both of the firearms were used in connection with any specific drug trafficking incident. The court instructed:

> Now, the defendant is charged with two counts of the crime of possessing a firearm during and in relation to a drug trafficking crime. One count involves a firearm described as a Beretta model 85F semiautomatic handgun, and the other count involves a firearm described as a Hi-Point model C-9 semiautomatic handgun.

> In this case, the alleged drug trafficking crimes are possession of cocaine with intent to distribute **and/or** possession of Oxycodone with intent to distribute.
>
> * * *
>
> In order to convict the defendant, the State must prove, in addition to the drug trafficking crime: First, that the defendant possessed a firearm during the crime; and secondly that there was a connection between the defendant's possession of cocaine with intent to distribute **and/or** possession of Oxycodone with intent to distribute.
>
> In determining whether the defendant committed the crime of possession of a firearm during and in relation to a drug trafficking crime, you may consider such factors as the location and proximity of the firearm to the drugs or the defendant, whether the firearm increased the likelihood of success of the crime, and whether the firearm was within easy reach and available to the defendant during the commission of the crime of possession of cocaine with intent to distribute **and/or** possession of Oxycodone with intent to distribute.

(Emphasis added.)

By instructing the jury that they could find Hurt guilty of both firearm charges if there was a connection between the firearm and the possession of cocaine with intent to distribute "and/or" the possession of Oxycodone with intent to distribute, the court made the unit of prosecution the number of guns rather then the drug trafficking offense. As a result, it was unclear whether the jury found Hurt guilty on the two firearm counts based on the number of guns or the number of drug trafficking offenses. Because we resolve any ambiguity in favor of the defendant, we must assume that Hurt's convictions were based on the two firearms being used in one drug trafficking crime and not based on a finding that a different firearm was used in each of two different drug trafficking crimes. *See Nicolas v. State*, 426 Md. 385, 400 (2012) ("[W]here there is a factual ambiguity in the record, in the context of

merger, that ambiguity is resolved in favor of the defendant."). The *Nicolas* Court stated, *id*. at 408 n.6:

> As Maryland case law indicates, the appropriate standard to apply when addressing a question of factual ambiguity in the context of merging convictions is to resolve the ambiguity in the defendant's favor in a situation where it is impossible to know for certain the rationale of the trier of fact for finding the convictions entered against the defendant. *See Snowden*, 321 Md. at 619, 583 A.2d at 1059–60; *Nightingale*, 312 Md. at 708, 542 A.2d at 377; *State v. Frye*, 283 Md. 709, 723–25, 393 A.2d 1372, 1379–80 (1978); *Cortez v. State*, 104 Md. App. 358, 361, 656 A.2d 360, 361 (1995).

Just as the *Nicolas* Court concluded that the "factual ambiguity" compelled merger of two convictions in that case, *id*. at 412, we conclude that only one conviction for possession of a firearm in relation to a drug trafficking crime can stand in the present case. Consequently, we will vacate the conviction and sentence which was the second to be announced for the firearms offenses.

CONVICTION AND SENTENCE FOR POSSESSION OF A FIREARM (HI-POINT MODEL C-9 SEMIAUTOMATIC) DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME VACATED. REMAINING CONVICTIONS AND SENTENCES AFFIRMED. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY WORCESTER COUNTY.