Circuit Court for Washington County
Case No.: C-21-CR-21-392

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 805

September Term, 2022

Craig Deshawn Wright

v.

State of Maryland

Graeff,
Reed,
Wilner, Alan M. (Senior Judge),
Specially Assigned,

JJ.

Opinion by Wilner, J.

Filed: March 15, 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.

*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.

Appellant was convicted by the Circuit Court for Washington County of a multitude of offenses. In this appeal, he makes two complaints – that the presiding judge was obliged to recuse himself and that two of the offenses of which appellant was convicted should have been merged. We shall reject his first complaint but find merit in his second.

FACTUAL BACKGROUND

At about 3:00 a.m. on January 22, 2021, Officer Jonathan Zupan, of the Hagerstown Police Department, while driving on West Antietam Street, noticed a car in the left turn lane that had stopped for a red light. When the light turned green, the car did not move for the entire light cycle.

Concerned that the driver may be intoxicated or suffering from a medical emergency, Officer Zupan positioned his car to the rear of the stopped vehicle, activated his emergency lights, and approached the vehicle. He saw appellant slumped forward in the driver's seat and noticed that he was drooling. He shined his flashlight into the vehicle, got no response, and, concerned as to whether there was a medical emergency, he called for backup assistance and continued knocking on the window of the car. He noticed an open half-full alcoholic beverage in the center cupholder.

After a few minutes, appellant woke up and looked around. The car, at the time, was in the reverse gear. Officer Zupan told appellant to turn the car off, put it in park, and exit the vehicle. When the door opened, Officer Zupan smelled the odor of alcohol. Appellant struggled with exiting and leaned against the door for balance. Because of that, Officer Zupan believed it was safer to effect an immediate arrest rather than perform a sobriety test. He instructed appellant to face away and put his hands behind his back.

Appellant initially complied, but, as Officer Zupan attempted to handcuff him, he jumped back into the car. The handcuff was caught on the officer's sleeve, and his right arm went into the car with appellant and was pinned behind his back. Although Officer Zupan told him to stop, appellant immediately started driving away and did not try to close the door. Officer Zupan's body was outside of the car, and he was dragged about 100 yards over the curb and into a wooded embankment. The car stopped when appellant crashed into a fallen tree.

Officer Zupan's head hit the car, and he fell backward. He testified that appellant then stood up and began choking him to the point that he was unable to breathe. Officer Zupan was able to escape by knocking appellant off of him. At that point, Officer Anderson arrived, and appellant was handcuffed. Officer Zupan was transported to the hospital with abrasions on his legs and a swollen and

bleeding forehead. Appellant's blood tested positive for benzoylecgonine – a cocaine metabolite – and fentanyl.

At trial, appellant was convicted of 12 charges – first and second degree assault, assault against a law enforcement officer, resisting arrest, possession of CDS and CDS paraphernalia, driving while impaired by CDS, driving without a license, attempt to elude a uniformed officer, reckless driving, negligent driving, and failure to obey a designated lane direction. The court sentenced appellant to 10 years imprisonment for the second degree assault, five years for first degree assault consecutive to the 10 years, five years for assault against a law enforcement officer concurrent to the five years for first degree assault, and concurrent or suspended sentences for the other convictions.

Appellant's merger complaint involves the conviction and 10-year sentence he received for second degree assault and the conviction and three-year sentence he received for resisting arrest. He urges that the former merges into the latter.

DISCUSSION

Merger

The merger issue is governed by *Nicolas v. State*, 426 Md. 385 (2012). The Court there held, explicitly, that "the offense of second degree assault merges into the offense of resisting arrest." *Id.* at 407. The Court explained:

> "All of the elements of second degree assault are included within the offense of resisting arrest. The "force" that is required to find a defendant guilty of resisting arrest is the same as the "offensive physical contact" that is required to find a defendant guilty of the battery variety of second degree assault. Furthermore, there is no element required to satisfy the offense of second degree assault that is different from or additional to the elements required to satisfy the offense of resisting arrest."

Id. at 407. *See* also *Clark v. State*, 473 Md. 607, 616 (2021). In its brief, the State agrees that the record does not unambiguously show that the convictions were based on distinct acts and agrees that the Court should vacate **all** of appellant's sentences and remand for resentencing.

In seeking a total remand as to sentencing, the State relies on the discussion in *Twigg v. State*, 447 Md. 1, 19 *et seq.* (2016). The Court there accepted the proposition that the sentencing court may have imposed individual sentences as component parts of a larger punishment for aggregate convictions and that "to invalidate any part of that package without allowing the court thereafter to review and revise the remaining valid convictions would frustrate the court's sentencing intent." *Id.* at 28. Thus, the Court held that, when an appellate court "unwraps the

package" and removes one or more charges from its confines, the sentencing judge is in the best position to assess the effect of that withdrawal. *Id*.

Given the multiple sentences imposed in this case, some consecutive, most concurrent, the State's request appears reasonable, especially as appellant has not objected to it.

Recusal

The judge in this case had been the Deputy State's Attorney in the county prior to his appointment to the court. In that capacity, he supervised the assistant who ended up prosecuting this case, he attended an awards ceremony for Officer Zupan, he received donations to his election campaign from the current State's Attorney and a candidate for local sheriff, and he made an inflammatory statement regarding another defendant who had been incarcerated for killing a police officer. The judge himself conducted a hearing on the motion in this case and, as part of it, introduced several exhibits and accepted testimony from a political figure of some prominence.

There was no evidence that the judge had any personal involvement in this case as a prosecutor. Although admitting that he attended a benefit for a police officer, he said that he left early and was unaware that the officer being honored

was Officer Zupan. There was evidence that he supported the candidacy of defense counsel in this case to be appointed a magistrate. Evidence was presented that, although in his campaign for election he accepted a $500 donation from the State's Attorney, he also accepted a contribution from an Assistant Public Defender and other defense attorneys.

Two issues are presented here: (1) whether the recusal motion should have been heard by another judge; and (2) whether the allegations and evidence required recusal in this case.

The answer to the first issue was given in *Surratt v. Prince George's County*, 320 Md. 439, 466 (1990):

> "We hold that when the asserted basis for recusal is personal conduct of the trial judge that generates serious issues about his or her personal misconduct, then the trial judge must permit another judge to decide the motion for recusal."

The Court made clear that that procedure has its drawbacks; it can delay a trial and put a strain on judicial staffing requirements. The kind of "personal misconduct" that requires it has a narrow meaning. It is not everything a judge is accused of doing wrong.

The Court followed that statement with the belief that the kind of personal misconduct that warrants the motion being handled by another judge "is not likely

to be frequently invoked" and "its use should be rare." *Id.* at 466. It would not be invoked merely because the judge is accused of having a financial interest in the matter, or is related to a party, or his/her impartiality is questioned. *Id.* at 467. Those kinds of allegations, the *Suratt* Court held, "would not trigger [that] procedure" because "allegations seeking recusal on those bases generally do not involve personal misconduct of the judge." *Id.* "Personal conduct" the Court held, has a more limited meaning. In *Suratt*, the charges, and proof, involved sexual harassment by the judge, which the Court concluded **did** constitute personal misconduct. We do not believe that the complaints against the trial judge here fell within that narrow range and required submission of the motion to another judge. It may have been prudent to do that, but it was not required.

As to whether the allegations alleged in this case required recusal, most of them involved conduct – accepting campaign contributions, attending events – that, regrettably, are a common, accepted, and almost necessary component of a political campaign to win or retain the position of Circuit Court Judge.

Efforts have been made over the decades to get rid of that practice, so far without success. *See*, for example, Recommendation 11 of the legislatively created

Commission on the Future of Maryland Courts (December 15, 1996).[1] *See* also Dana M. Levitz and Ephriam R. Siff, *The Selection and Election of Circuit Court Judges in Maryland: A Time for Change*, University of Baltimore Law Forum, Vol. 40, No. 1 (2009). It is the system we, however, have locked in the State Constitution, and, as a practical matter, it requires judicial candidates to do some of the things the judge in this case is accused of doing.

We shall remand the case to the Circuit Court for reconsideration of the sentences it imposed in light of the required merger of the convictions for second degree assault and resisting arrest.

JUDGMENT VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR WASHINGTON COUNTY FOR FURTHER PROCEEDINGS IN CONFORMANCE WITH THIS OPINION; COSTS TO BE PAID BY WASHINGTON COUNTY.

[1] The Recommendation reads: "The current method of selecting and retaining Circuit Court judges should be changed. With the exception of the length of the term, the system for selecting and retaining Circuit Court judges should be the same as that used for appellate judges. A Circuit Court judge should be appointed by the Governor from a list submitted by the appropriate trial court Judicial Nominating Commission, subject to confirmation by the State Senate. At the next general election following one year from the vacancy filled by the appointment, the judge should stand on his or her record for a 14-year term in a retention election, the voters voting for or against retention. At the next general election following the expiration of that term, the judge should again stand on his or her record for an additional 14-year term in a similar retention election. This would replace the current system that subjects Circuit Court judges to contested primary and general elections."