Circuit Court for Baltimore City
Case Nos.: 11335008 - 12

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1138

September Term, 2021

THEODORE RUDOLPH, JR.

v.

STATE OF MARYLAND

Graeff,
Ripken,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: March 1, 2022

In 2011, following trial in the Circuit Court for Baltimore City, a jury found Theodore Rudolph, Jr., appellant, guilty of a number of offenses related to an armed robbery of the victim, Jenell Taylor. This appeal is from the denial, in part, of a motion to correct an illegal sentence filed, *pro se*, pursuant to Maryland Rule 4-345, by appellant in 2020.[1] Of significance to the present appeal are appellant's separate sentences for first-degree assault and robbery with a deadly or dangerous weapon. On appeal, appellant, again proceeding *pro se*, contends that his sentence for first-degree assault should have been merged into his sentence for robbery with a deadly or dangerous weapon under the

[1] After granting in part, and denying in part, his motion to correct an illegal sentence, appellant's sentences are as follows:

Case No.	**Count**	**Offense**	**Sentence**
11335008	Count 3	First-degree assault	18 years
	Count 5	Use of a handgun in the commission of a crime of violence	10 years consecutive to Count 3
	Count 6	Wearing, carrying, and transporting a handgun	3 years concurrent to Count 3 (later merged into Count 5 and vacated)
	Count 7	Reckless endangerment	5 years concurrent to Count 3 (later merged into Count 3 and vacated)
11335009	Count 4	Conspiracy to wear, carry, or transport a handgun	3 years concurrent (later vacated)
11335010	Count 1	Unlawful possession of a regulated firearm	5 years consecutive to Count 5 in the case ending in 08
11335011	Count 1	Armed robbery	18 years all suspended consecutive to Count 5
11335012	Count 1	Conspiracy to commit armed robbery.	18 years all suspended concurrent to Count 1 in 11335011

Blockberger[2] required evidence test.[3] The State agrees. And so do we.[4]

BACKGROUND

Given the nature of appellant's claim, we need not, and do not, explicate the facts of the case in more detail than necessary. Suffice it to say that appellant and his confederate approached the victim by car, exited it, produced a pistol and demanded money. When the victim failed to immediately comply, one of the assailants shot him in the arm. The victim then gave his assailants money. One of the assailants then shot the victim again and told the victim to "kick off" his shoes, which he did. Appellant and his confederate then left.

[2] *Blockburger v. United States*, 284 U.S. 299 (1932).

[3] Due to a procedural morass that took place below, this appeal is actually from an order of the circuit court striking appellant's untimely *pro se* notice of appeal from the denial of his *pro se* motion to correct an illegal sentence.

The circuit court denied appellant's motion to correct an illegal sentence on December 18, 2020, yet it did not receive appellant's notice of appeal until May 11, 2021, well after the 30-day deadline imposed by Maryland Rule 8-202 had expired. On May 18, 2021, the circuit court issued a show cause order directing appellant to explain why his notice of appeal should not be stricken as untimely. Appellant explained that he did not receive a timely copy of the order denying his motion.

On July 15, 2021, the circuit court struck appellant's May 11, 2021 notice of appeal as untimely. Appellant noted a timely appeal from the order striking his prior untimely appeal. Such orders striking appeals are, themselves, appealable final orders. *County Com'rs of Carroll County v. Carroll Craft Retail, Inc.*, 384 Md. 23, 42 (2004); *Sullivan v. Ins. Com'r*, 291 Md. 277, 284 (1981); *Edery v. Edery*, 213 Md. App. 369, 379 n.8 (2013). Because a motion to correct an illegal sentence can be raised "anytime" including for the first time on appeal, (*see Oglesby v. State*, 441 Md. 673, 679 n.4 (2015) ("An illegal sentence may be challenged at any time, including for the first time on appeal.")), and because the present appeal is properly before us, we are inclined to skip past the procedural morass that got us here and simply resolve appellant's illegal sentence claim on its merits.

[4] As will be seen, the State and appellant do not agree to the same remedy for correcting appellant's illegal sentence.

Based on the preceding set of facts, as noted earlier, appellant was convicted of, among other things, first-degree assault, and robbery with a deadly or dangerous weapon,.

DISCUSSION

"When a court fails to merge a sentence when it is required, this constitutes an illegal sentence as a matter of law." *White v. State*, 250 Md. App. 604, 643 (2021) (citing *Britton v. State*, 201 Md. App. 589, 598–99 (2011)). The Court of Appeals has described the required evidence test as follows:

> If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited.

Twigg v. State, 447 Md. 1, 13 (2016) (quoting *Nightingale v. State*, 312 Md. 699, 703 (1988) (abrogated by statute)).

In this case, appellant was convicted of first-degree assault. According to Section 3-202(b) of the Criminal Law Article ("CL"), there are two distinct modalities by which a person can aggravate what would be a second-degree assault up to a first-degree assault. One of those modalities is by causing or attempting to cause "serious physical injury" to another. The other is by committing an assault with a "firearm."

Appellant also was convicted of armed robbery, pursuant to CL 3-403(a), which provides, in pertinent part, that "[a] person may not commit or attempt to commit robbery under § 3-402 of this subtitle . . . with a dangerous weapon[.]"

Our cases make clear that, when based on the same criminal act or acts, first-degree assault (with a firearm as the aggravator), merges, under the required evidence test, into

robbery with a deadly or dangerous weapon because only one offense (robbery with a deadly or dangerous weapon) requires proof of a fact which the other (first-degree assault) does not. *Morris v. State*, 192 Md. App. 1, 39-40 (2010) (quoting *Williams v. State*, 187 Md. App. 470, 476 (2009)).

Moreover, "when the factual basis for a jury's verdict is not readily apparent, the court resolves factual ambiguities in the defendant's favor and merges the convictions if those convictions also satisfy the required evidence test." *Brooks v. State*, 439 Md. 698, 739 (2014).

In appellant's case, although the facts of the case might have supported separate convictions for first-degree assault and robbery with a deadly or dangerous weapon, the jury was not so instructed, the State never argued that they were separate offenses, and the verdict offered no insight into whether the jury found that separate acts supported each conviction. Under these circumstances, the record is ambiguous as to whether the jury applied the same acts as a basis for both convictions, or whether it found that appellant committed two separate and distinct acts that constituted separate offenses. As a result, appellant is entitled to have his sentence for first-degree assault vacated because it merges into his sentence for robbery with a deadly or dangerous weapon under the required evidence test. As noted earlier, the State agrees.

Appellant, citing to *Carroll v. State*, 202 Md. App. 487 (2011), claims that this Court should not order a new sentencing proceeding after vacating his sentence for first-degree assault. In *Carroll*, it was the defendant, rather than the State, who sought a new sentencing so that he might present mitigating evidence and argument at a resentencing after this Court

ordered the merger of various conspiracy convictions. *Id*. at 518. In declining appellant's invitation to order a resentencing, we noted that, "[t]ypically … where merger is deemed to be appropriate, this Court merely vacates the sentence that should be merged without ordering a new sentencing hearing." *Id*.

The State contends that, pursuant to the later 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, pursuant to *Twigg*, the proper remedy in this case is to vacate all of appellant's sentences and remand the case for re-sentencing.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. SENTENCES VACATED. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.