Circuit Court for Baltimore City
Case No. 115337009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1219

September Term, 2016

RICHARD CURTIS

v.

STATE OF MARYLAND

Meredith,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Raker, J.

Filed: July 5, 2018

Richard Curtis, appellant, was convicted in the Circuit Court for Baltimore City of failure to remain at the scene of a fatal accident, failure to stop at the scene of a fatal accident, failure to render aid at the scene of a fatal accident, failure to report a fatal accident to police, and driving on a suspended license. He presents three questions for our review, which we have re-ordered:

> 1. Must the sentence for Count 3 merge into the sentence for Count 2 under a *Blockburger* [*v. United States*, 284 U.S. 299 (1932)], or other, merger analysis?
>
> 2. Must the one-year sentences imposed on Counts 5 and 6 be vacated because each count carries a maximum two-month sentence?
>
> 3. Did the circuit court abuse its discretion in propounding the flight instruction to the jury?

The State agrees with appellant that the trial court erred in imposing the sentences on Counts 2, 3, 5, and 6. Accordingly, we shall remand to the trial court for resentencing. We shall hold as to the flight instruction that the trial court did not abuse its discretion or err in instructing the jury as to flight.

I.

The Grand Jury for Baltimore City indicted appellant in a six-count indictment: Count 1, driving on a suspended license in violation of Md. Code, Transportation Article, § 16-303(c);[1] Count 2, failure to remain at the scene of a fatal accident in violation of § 20-102(b)(2); Count 3, failure to stop at the scene of a fatal accident in violation of § 20-

[1] All subsequent statutory references herein shall refer to Md. Code, Transportation Article.

102(b)(1); Count 4, failure to render aid at the scene of a fatal accident in violation of § 20-104(a); Count 5, failure to report a fatal accident to police in violation of § 20-104(d); and Count 6, driving on a suspended license which was suspended for failure to attend a driver improvement program in violation of § 16-303(h). He proceeded to trial before a jury and was convicted on all counts.[2] The trial court imposed the following sentences:

> "The sentence of the Court is, on [Count 2], ten years to the Division of Corrections, suspend all but seven, to be followed by three years of supervised probation.
>
> On [Count 3], I believe, but I'm not sure—I think that merges. But, in any event, I'll impose the same sentence and run it concurrent. That is ten years, suspend all but seven, followed by three years' probation.
>
> On [Count 4], I believe that that merges; and I'm merging it with [Count 2]. On [Count 5], reporting the accident, that's separate. One year concurrent. On [Count 6], driving on a suspended license; your driving record leaves a lot to be desired. One year concurrent."

At trial, the State presented evidence that appellant, while driving on a suspended license, struck pedestrian Charlotte Hutcherson in a through traffic lane of North Avenue. He then left the scene of that fatal accident and failed to report it.

On April 1, 2015, around 10:30 p.m., Randy Lee was outside on the 1300 block of West North Avenue in Baltimore when he "heard a loud crash." He testified that he saw a dark-colored pickup truck heading away from the scene "shoot southbound on Etting Street; which is a northbound, one-way" street intersecting North Avenue. Mr. Lee saw an injured woman; he called 911 and prevented other cars from hitting her.

[2] The docket lists Count 1 as NSTJ, indicating it was not sent to jury. The jury found appellant guilty on all five counts that it considered.

Baltimore City Police Department investigators collected evidence that led them to a dark Toyota Tacoma with front-end damage. The vehicle was parked outside the Baltimore County residence of its registered owner, Dr. Vincent Wroblewski. The police matched crash site debris forensically to that vehicle.

Dr. Wroblewski testified that he loaned his truck to appellant on March 29, 2015. Before returning the vehicle on the night of April 2, appellant called him to advise that he had just hit a deer. A home-video recording showed Dr. Wroblewski waiting outside his residence as appellant drove up to return the truck at 8:48 p.m. on April 2.

In July, the police served a "DNA warrant" on appellant, and they arrested appellant on November 11, 2015. He made a statement to the police, which they recorded and played for the jury. In that statement, appellant did not claim that he was elsewhere when the accident occurred nor did he deny being at the wheel of Dr. Wroblewski's truck or indicate that anyone else was driving the truck on the evening in question.

While incarcerated, appellant made several phone calls, which were recorded by jail personnel. In one call, he stated that he loaned the truck to someone else who was driving it at the time of the fatal accident. In another call, he stated that he needed someone to say where he was at the time of the accident. In another call, he claimed that a friend who was later killed had been driving at the time of the accident. The State played a recording of these calls before the jury.

At trial, appellant presented an alibi defense. His friend, Paul Moore, III, testified that at the time of the accident, appellant was at his home in Curtis Bay. According to Mr. Moore, appellant arrived at his house on April 1, 2015, while it was still light out, driving

a Honda Accord. Sometime after 10:00 p.m., which was when the convenience store within walking distance closed, Mr. Moore asked appellant to drive to a store to buy cigarettes. The two men drove to a Citgo gas station at Patapsco Avenue and Eighth Street. By the time Mr. Moore was identified as an alibi witness in April 2016, the surveillance video from that gas station was no longer available.

The trial court instructed the jury from the MSBA Criminal Pattern Jury Instructions on Flight.[3] Although defense counsel did not object to this instruction initially, he did object to the instruction before the jury retired to deliberate. The court overruled his objection.

The jury returned guilty verdicts on all counts, and the court sentenced appellant as indicated. This timely appeal followed.

II.

The State concedes that appellant's sentence for failing to stop at the scene of a fatal

[3] The flight instruction the court read to the jury stated as follows:

> "A person's flight immediately after the commission of a crime or after being accused of a crime is not enough by itself to establish guilt; but it is a fact that may be considered by you as evidence of guilt.
>
> Flight under these circumstances may be motivated by a variety of factors; some of which are fully consistent with innocence. You must first decide whether there is any evidence of flight.
>
> If you decide there is evidence of flight, you must then decide whether this flight shows a consciousness of guilt. The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the Defendant was the person who committed it."

accident (Count 3) must merge with his sentence for failing to remain and return to the scene of a fatal accident (Count 2) on the grounds of lenity. Hence, we need not spend time setting out all of the parties' arguments.

Absent any indication that the General Assembly intended separate punishments for violations of these subsections of § 20-102(b), we agree that Counts 2 and 3 merge. Under Maryland Rule 4-345(a), a "court may correct an illegal sentence at any time." Because "[a] failure to merge a sentence is considered to be an 'illegal sentence' within the contemplation of the rule[,]" *Pair v. State*, 202 Md. App. 617, 624 (2011), we shall vacate appellant's sentence on Count 3.

The sentences in Counts 5 and 6 are simple as well. The trial court imposed a sentence that exceeds the statutory maximum. Therefore, they are illegal sentences. Appellant points out that the court imposed one-year sentences but that statutes provided for a maximum term of imprisonment of two months. The State concedes the error. Each of these statutory offenses carried a maximum penalty of two months, although Count 6 no longer allows a term of incarceration.[4] *See* §§ 20-104(e), 16-303(k)(2). Because the one-

[4] At the time of trial, § 27-101(c) read in part as follows:

> "Any person who is convicted of a violation of any of the provisions of the following sections of this article is subject to a fine of not more than $500 or imprisonment for not more than two months or both:
> (12) § 16-303(h) ('Licenses suspended under certain provisions of Code');
> (16) § 20-104 ('Duty to give information and render aid')"

Effective October 1, 2017, § 27-101(c) was repealed. The recodification moved the subsections to the same section as their respective violations and changed the sentence for § 16-303 violations as follows: (footnote continued . . .)

year sentences imposed on each count exceeded that maximum penalty, both sentences are illegal. We shall vacate these sentences and remand for resentencing in accordance with §§ 20-104(e) and 16-303(k)(2).

III.

We turn next to appellant's argument that the trial court erred in instructing the jury as to flight. Appellant argues that the trial court abused its discretion in propounding a flight instruction to the jury. His argument is that a flight instruction is not appropriate when the charged crime is the flight itself from the crime and that "a separate crime" was necessary to justify a flight instruction. In his brief he argues that "[t]o give a flight instruction in this case suggested that [appellant] fled from a separate crime; that his drinking was in some way criminal."

The State argues that even assuming *arguendo* that appellant's argument states the law correctly, appellant is incorrect in stating that failing to stop and remain at the scene of

"§ 16-303. Actions prohibited while license or privilege to drive is refused, suspended, or revoked
(k)(2) A person convicted of a violation of subsection (h) or (i) of this section:
(i) Is subject to a fine not exceeding $500;
(ii) Must appear in court; and
(iii) May not prepay the fine.

§ 20-104. Duty of driver to render reasonable assistance to persons injured in accident
(e) A person convicted of a violation of this section is subject to imprisonment not exceeding two months or a fine not exceeding $500 or both."

the accident were the only charges. Appellant was charged with driving on a suspended license, an offense requiring a *mens rea* element, and thus his consciousness of guilt was relevant to prove the knowledge of that offense.

Md. Rule 4-325(c) provides that the trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Judges have "broad discretion in determining whether a particular instruction should be given." *Carter v. State*, 366 Md. 574, 584 (2001). In evaluating whether the evidence generated a particular instruction, we look to see if some evidence has been generated to support the instruction. *See Bazzle v. State*, 426 Md. 541, 550–51 (2012).

Appellant concedes that a flight instruction is warranted "when an accused commits a separate crime and then flees the scene of the crime." In addition, he tacitly admits that there was "some evidence" that he fled from the scene of the accident. He argues, nevertheless, that the trial court should not have given the flight instruction, because it was unduly suggestive based on the following circumstances:

> "[T]here was no evidence to establish how the decedent came to be in the path of the truck. The jury was given no information to determine whether pedestrian error or driver error caused the accident. The crime was fleeing, without regard to how the accident happened. To give a flight instruction in this case suggested that [appellant] fled from a separate crime; that his driving was in some way criminal. Where no charge of reckless driving, impaired driving, excessive speed, or any other driving infraction was alleged, it was an abuse of discretion to give a flight instruction. The language of the instruction, 'A person's flight immediately after the commission of a crime,' was simply not applicable where the flight itself was the crime. At a minimum, the court abused its discretion by failing to propound a curative instruction."

The flaw in appellant's argument is, as the State argues, that he was on trial for a separate driving offense, i.e., driving on a suspended license, in violation of § 16-303(h). To prove the offense of driving while suspended, the State must prove "(1) that the defendant was driving a motor vehicle, (2) at the time the defendant was driving, her license was suspended, and (3) that the defendant knew that her license was suspended." *Steward v. State*, 218 Md. App. 550, 560 (2014).

Because the State produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that appellant's flight after the accident was relevant to establishing the State's burden that he knew his license was suspended, the trial court did not abuse its discretion in giving the flight instruction or in denying any remedial instruction.

JUDGMENTS OF CONVICTIONS AFFIRMED. SENTENCE ON COUNT 3 VACATED. SENTENCES ON COUNTS 5 AND 6 VACATED. CASE REMANDED FOR RESENTENCING ON COUNTS 5 AND 6. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.