Circuit Court for Baltimore City
Case Nos.: 199356004,16,18, 22

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1496

September Term, 2020

LARRY HIGH

v.

STATE OF MARYLAND

Fader, C.J.,
Wells,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: September 30, 2021

Larry High, appellant, is serving time for convictions incurred in 2001. This appeal centers on (1) the legality of his sentence based on an alleged ambiguity in its pronouncement regarding whether the sentences are to run consecutively or concurrently and (2) the circuit court's granting of the State's 2020 motion to correct the commitment record. We conclude that the sentences imposed in case no. 199356016 run consecutive to the sentences imposed in 199356018, and the sentences imposed in 199356022 run concurrently with the other sentences. For reasons to be discussed, we shall vacate the court's order amending the commitment record and remand for clarification and further proceedings consistent with this opinion.

BACKGROUND

Trial and Sentencing

In 2001, a jury in the Circuit Court for Baltimore City found Mr. High guilty of three counts of first-degree assault, two counts of robbery with a deadly weapon, three counts of use of a handgun in the commission of a crime of violence, and related offenses. On direct appeal, this Court rejected Mr. High's challenge to the sufficiency of the evidence to establish his criminal agency and affirmed the convictions. *High and Brooks*, No. 709, September Term, 2001 (filed October 21, 2002). In that appeal, we summarized the relevant evidence as follows:

> Angela Tanner was in the New York Chicken restaurant when two men armed with guns entered and told everyone to get on the floor. One of them took about $150 from her. She did not see the robbers well and did not identify anyone as one of the robbers.

> Michael Cottingham identified appellant High as the gunman who hit him in the head with a gun. He identified appellant Brooks as the other robber.
>
> Major Ronald Savage of the Baltimore City Police Department was on patrol when a call came over the police radio regarding an armed assault and robbery at the New York Chicken on East North Avenue. When he arrived, he saw through the large plate glass window numerous people lying on the floor. He also saw appellant High pistol whipping a man [later identified as Mr. Cottingham]. When High emerged from the restaurant, the officer pointed his pistol at him and told him to get on the ground. When High appeared to draw a gun, the officer shot him twice.
>
> Andre Mines testified at trial, as he had at the suppression hearing, that he was drunk and high at the time of the robbery. He admitted that he signed Brook's photograph [identifying him as the assailant when shown a photo array], but said he did so because the officer told him to do it.

Slip op. at 9.

Mr. High was charged under multiple indictments with offenses involving various individuals in the restaurant at the time of the robbery.[1] With respect to victims Angela Tanner (indictment "016") and Andre Mines (indictment "018"), the jury found him guilty of robbery with a dangerous weapon, robbery, assault in the first degree, assault in the second degree, theft of property having a value less than $300, use of a handgun in the commission of a crime of violence, and wearing, carrying, transporting a handgun upon his person. With respect to victim Michael Cottingham (indictment "022"), the jury found Mr. High guilty of attempted robbery, assault in the first degree, assault in the second degree,

[1] The charges against Mr. High were brought pursuant to multiple indictments, including 199356016 (victim Angela Tanner); 199356018 (victim Andre Mines); and 199356022 (victim Michael Cottingham). As we note later, charges were also brought against Mr. High related to his encounter with Major Savage outside the restaurant.

use of a handgun in the commission of a felony or crime of violence, and wearing, carrying, transporting a handgun upon his person.

At sentencing, the State informed the court that the sentencing guidelines were 100 years "on the low end" and 175 years "on the high end" when the guidelines for each offense were added together. The State, noting that this was "a horrible crime of violence" that "involved numerous people who were held up at gunpoint[,]" urged the court to impose "at least the minimum recommended guideline sentence" and to run the "sentences all consecutive to each other[.]" The State also told the court "that the handgun charges should be consecutive. And, of course, the first five years of the handgun [sentences] would be without parole."[2]

The court then inquired whether the convictions for first-degree assault and robbery with a deadly weapon merge for sentencing purposes. The State conceded that those convictions would merge in 016 (Ms. Tanner) and 018 (Mr. Mines), but argued against merger of attempted robbery and first-degree assault in 022 (Mr. Cottingham) because it viewed the assault of Mr. Cottingham as separate from the attempted robbery because his assault was based on the pistol whipping.

[2] Criminal Law § 4-204(b) of the Md. Code (formerly Article 27, § 36B(d)) provides that a person convicted of use of a handgun in the commission of a felony or crime of violence shall be sentenced to a minimum of five years and not exceeding 20 years, with the first five years to be served without the possibility of parole. The statute provides that for each "subsequent violation," the sentence "shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony." It is not clear from the record before us whether Mr. High had previously violated the statute. But even if this was Mr. High's first violation, the court had the discretion to run the sentence for the use of a handgun concurrent with or consecutive to the sentence for the underlying crime of violence or felony.

Defense counsel did not advocate for a particular sentence, but instead urged the court when imposing time to "make an affirmative recommendation to the Patuxent Program." In personally addressing the court, Mr. High maintained his innocence, asked for leniency, and asserted that the jury had "railroaded" him because, in his view, there was "no really substantial evidence" of his guilt.

The court then imposed the sentence, stating as follows:

> Well, Mr. High, I heard the evidence, and I think the jury was right in finding you guilty. I think it's a pretty impressive set of evidence that indicates your guilt, so I'm going to sentence you in accordance with that.
>
> In the case ending in **018** charging you with assault in the first degree, I commit you to the Division of Correction to serve a term of imprisonment of 25 years.
>
> I find that the general robbery, robbery deadly weapon merge, as does assault second degree, as does the theft felony. And I find that the handgun on person will merge with the handgun in use of a felony.
>
> On the charge of handgun in use of a felony in the case ending in 018, I commit you to the Division of Correction to serve a term of imprisonment of 20 years, the first five of those without parole. *Those sentences will be consecutive; that is, the sentence on the handgun is consecutive to the robbery deadly weapon*.
>
> On the case – and those cases, 018, involve the various assaults on Andre Mines.

(Emphasis added.)

The court apparently misspoke when it said that the "sentence on the handgun is consecutive to the robbery deadly weapon," as the court had imposed a sentence on first-degree assault (not robbery with a dangerous weapon) and then seemed to state that it found

the remaining convictions under 018 merged with the first-degree assault for sentencing purposes. It appears that no one over the years has disputed that conclusion.

The court continued:

> On the case ending in **016** involving the various assaults on Angela Tanner, the charge of assault in the first degree, I commit you to the Division of Correction to serve a term of imprisonment of 25 years. And the robbery deadly weapon merge, the general robbery merge - - will merge, the assault in the second degree will merge, the handgun on person will merge into handgun use in a felony, the sentence of which will be a 20-year sentence, the first five without parole. *And those sentences will be consecutive to each other*.
>
> On the charge in the case ending in **022** relating to the robberies and assaults on Michael Cottingham, I - - on the charge of assault in the first degree, I commit you to the Division of Correction to serve a term of imprisonment of 25 years. Assault in the second degree will merge.
>
> Robbery deadly weapon, handgun on person will merge into handgun in the commission of a crime of violence.[3] The sentence is a 20-year sentence, the first five without parole.
>
> *Those sentences will run concurrently with all of the sentences; that is, they will run at the same time as the other sentences*.
>
> On the case ending in **004** relating to the assault on Major Savage, the jury acquitted you of the assaults on Major Savage, accordingly, I grant the motion for judgment of acquittal on the use of a handgun in the commission of felony in that case and merge the handgun on person conviction into the other offenses. **[4]**

[3] In case 022 involving victim Cottingham, Mr. High was convicted of attempted robbery, not robbery with a deadly weapon.

[4] Under indictment 199356004 ("004"), the State charged Mr. High with offenses against the police officer, Major Ronald Savage, who had confronted him outside the restaurant. The jury acquitted Mr. High of attempted murder, first-degree assault, and second-degree assault of Major Savage. The jury found him guilty of use of a handgun in the commission of a felony or crime of violence and wearing, carrying, transporting a handgun on his person.

To recap, the sentence is a 90-year sentence to serve.

(Emphasis added.)

As noted, on direct appeal Mr. High challenged the sufficiency of the evidence to support the convictions. He did not raise any issues related to his sentence.

Post-Conviction

In an amended petition for post-conviction relief, filed in 2004, Mr. High asserted that, "based upon the specific language employed by" the sentencing court, "it is ambiguous whether his sentences should run consecutively or concurrently to each other." He argued, therefore, that the court should issue an amended commitment record "that runs his sentences in each of his cases concurrently and not consecutively[.]"

Following a hearing, the post-conviction court denied relief. In its Memorandum and Opinion, the post-conviction court concluded that the sentence was not ambiguous. The court reasoned:

> A close reading of the transcript of the disposition and a review of the entire sentencing pronouncement leaves no ambiguity. Even if ambiguous, it does not rise to the level of impermissiveness. It is clear that the trial court did not sentence Petitioner to the maximum time as permitted by statute. Specifically, with respect to the indictment ending in 022, the trial court made the sentence of twenty-five years as to Count 2 concurrent and not consecutive to other counts. The commitment orders reflect that [sic] the leniency of the trial court.
>
> Therefore, this Court finds that the sentence as recorded is not ambiguous and, therefore, not illegal.

Mr. High's application for leave to appeal was summarily denied. *High v. State*, No. 2884, September Term, 2006 (filed September 24, 2007).

Motion to Correct Illegal Sentence
and
2011 Amendment to Commitment Record

In 2010, Mr. High, representing himself, filed a Rule 4-345(a) motion to correct an illegal sentence. He focused on the sentencing court's comment, following pronouncement of sentence in 022 (Mr. Cottingham): "Those sentences will run concurrently with all of the sentences; that is, they will run at the same time as the other sentences." Mr. High seemed to interpret the comment as meaning that the individual sentences for the convictions under all the indictments would run concurrently with each other, but in any event argued that the comment imparted ambiguity into the sentencing scheme.

In an initial response, the State asserted that there was no ambiguity, and "to the extent the sentence was not as clear as it could have been, the entirety of the record makes clear that [the sentencing court] intended to impose a 90-year sentence." The State supported its position with the sentencing court's concluding statement: "To recap, the sentence is a 90-year sentence to serve." In order to reach an aggregate term of 90 years imprisonment, the consecutively run sentences in 016 (25 years + 20 years) and the consecutively run sentences in 018 (25 years + 20 years) would need to run consecutively to each other.

In a supplemental response, the State asserted that Mr. High's sentence "is illegal insofar as [the sentencing court] merged the convictions for robbery with a dangerous weapon into the convictions for first-degree assault and sentenced [him] to 25 years for each of the first-degree assault convictions." The State stated that, "[u]nder the facts of this case, it appears that each of the convictions for assault in the first degree was a lesser

included offense of robbery with a dangerous weapon." But the sentencing court in 016 and 018 had merged robbery with a dangerous weapon into first-degree assault. Accordingly, the State asked the court to issue a corrected commitment record "indicating that [Mr. High] should receive a sentence of 20 years for each of the convictions for robbery with a dangerous weapon and that each of the convictions for assault in the first degree merges into the convictions for robbery with a dangerous weapon." The State, therefore, requested that the commitment record be corrected to reflect the aforementioned mergers and a total term of 80 years' imprisonment. The State continued to maintain, however, that the sentences in 016 and 018 should run consecutively.

The circuit court apparently granted the State's request, as an amended commitment record was issued on October 25, 2011, which was replaced by another commitment record on December 2, 2011. The amended commitment record stated that it was a "sentencing modification" and reflected a total term of 80 years' imprisonment: 20 years for robbery with a dangerous weapon and a consecutive term of 20 years, the first five years without parole, for the handgun offense in case 018 and the same sentence in case 016, with the sentence in 016 run consecutively to the sentence in 018. The remaining convictions in 016 and 018 were merged for sentencing purposes.[5]

[5] Based on the amended commitment record, it appears that the sentences in 022 were also modified, seemingly in error. The amended commitment record reflects that the conviction for first-degree assault merged with the conviction for robbery with a dangerous weapon, but the verdict sheet in the record before us indicates that the jury convicted Mr. High of *attempted* robbery of the victim (Mr. Cottingham) in 022. Also, the State had informed the court at sentencing that the first-degree assault of Mr. Cottingham should not merge into the attempted robbery because the assault was based on a pistol whipping and, (continued)

2019 Motion to Correct Illegal Sentence[6]

In 2019, Mr. High, represented by counsel, filed a "Motion To Correct An Illegal Sentence Or, In The Alternative, To Correct The Commitment Record." Counsel asserted that the commitment record in this case is "overall, simply incomprehensible" and stated that in 2011 the court had "reduced the first-degree assault sentence under indictment ending in 018 to fifteen years, reducing it by ten years."[7] Looking at the pronouncement of sentence in 2001, counsel pointed out that the sentencing court had imposed a total term of 45 years' imprisonment in 016 and the same sentence in 018, but had failed to state that the sentences in 016 and 018 would run consecutively to each other and, therefore, argued that they are deemed to run concurrently with each other. In sum, believing that the court

therefore, was not a lesser included offense of attempted robbery with a dangerous weapon. Moreover, although the amended commitment record for the sentence for robbery with a dangerous weapon in 022 states that it is to run concurrently with the sentence in 016, it reflects that the sentence for use of a handgun in 022 was to run consecutive to the sentence in 016 – contrary to the sentencing court's pronouncement that the sentences in 022 "will run at the same time as the other sentences."

[6] The docket entries reflect that in 2013, Mr. High filed another motion to correct an illegal sentence, which the circuit court denied based on *res judicata*. There are no documents in the record before us related to that motion, despite this Court's order dated June 17, 2021 directing the circuit court to transmit to this Court "any and all files in its possession" in this case.

[7] We find counsel's statement curious, as the record before us does not reflect that the court in 2011 reduced the sentences for first-degree assault from 25 years to 15 years. Rather, as discussed, the record before us reflects that in 2011 the court granted the State's request to merge the first-degree assault convictions with the robbery with a dangerous weapon convictions. Because the maximum sentence for robbery with a dangerous weapon was 20 years' imprisonment (versus the 25 years that had been imposed for first-degree assault), the total sentencing term was reduced by 10 years, that is, from 90 years to 80 years.

in 2011 had reduced the sentences for first-degree assault to 15 years, counsel maintained that the commitment record should be corrected to reflect a total term of 35 years' imprisonment: 15 years (first-degree assault) + 20 years (use of a handgun) for both 018 and 016, run concurrently.

In its response to the motion, the State asserted that the sentencing court had imposed a total term of 90 years' imprisonment and maintained that the commitment record "should be corrected only in part." The State then proposed what corrections should be made, including that the convictions in 016 and 018 for robbery with a dangerous weapon should be merged into the convictions for first-degree assault. The State did not provide any explanation or authority for its position.[8]

Looking at the transcript from the 2001 sentencing hearing, the State maintained that the court had "clearly indicated" that the sentences in 016 and 018 were run consecutively to each other and the only sentences that were run concurrently were those imposed in 022. Thus, the State maintained that a total term of 90 years was legal. The State did agree that the commitment record "seem[s] to be certainly confusing" and, as noted, suggested certain amendments be made thereto.

A hearing was held on October 25, 2019, which apparently has not been transcribed—or if it has been, the transcript is not in the record before us. On September

[8] Curiously, although the State reviewed some of the motions to correct the sentence filed previously, the State failed to mention that in 2011 the court had granted the State's request to amend the commitment record to reflect the merger of the first-degree assault convictions into the convictions for robbery with a dangerous weapon, which reduced the aggregate term of 90 years' imprisonment to 80 years. Rather, the State simply stated that, following an October 25, 2011 hearing, the court "ruled that the sentence be the same."

15, 2020, the court issued an Order denying Mr. High's motion to correct an illegal sentence and granting the State's motion to correct the commitment record. The court's Order was accompanied by an Opinion in support of its rulings.[9]

In its Opinion, the court stated that "it is clear that" the sentencing judge's "intent was a sentence of ninety (90) years to the Division of Correction" and pointed out that the judge had concluded its pronouncement of sentence with the statement: "To recap, the sentence is a 90-year sentence to serve." The court specifically found:

> The sentences for case numbers 199356016 and 199356018 are consecutive to each other for an aggregate sentence of ninety (90) years. The resulting sentences are not illegal. The sentences are specific. That is, the Petitioner received 2, 45-year sentences for which the Court pronounced, "a 90-year sentence to serve."

The court agreed with the State that the commitment record should be corrected in the manner proposed by the State. Its Order reads as follows:

> As to indictment 199356018, Count 1 of Robbery Deadly Weapon, should be corrected to "merged with Count 3 of 018." Count 3 should only read "25 years consecutive to Count 7 of 018 and to Count 3 of 016." Count 7 of Handgun Use in a Felony or Crime of Violence should read "20 years, first five without parole, consecutive to Count 3 of 018." As to indictment 199356016, Count 1 of Robbery Deadly Weapon should read "merged with Count 3 of 016." Count 3 of First Degree Assault should read "25 years consecutive to Count 7 of 016." Count 7 of Handgun Use in a Felony or Crime of Violence should read[] "20 years consecutive to Count 3 of 016." As to indictment 199356022, Count 1 of Attempted Robbery Deadly Weapon should read "merged with Count 2 of 22." Count 2 of First Degree Assault should read "25 years concurrent with 016, 018, and Count 5 of 022." Count

[9] In its Opinion, the circuit court stated that the State had filed both a response to the motion to correct illegal sentence and a supplemental response thereto. The State's response (docketed on July 8, 2019) is in the record before us, but a supplement response is not. Moreover, the docket entries in the record do not reference a supplemental response filed by the State.

> 5 of Handgun Use in a Felony or Crime of Violence should read "merged with Count 2 of 22." There should be no Count 7 in 199356022.

The court gave no explanation as to why it was reversing course with respect to the merger of Count 1 (robbery with a dangerous weapon) and Count 3 (first-degree assault) in 016 and 018 and the resultant reduction of the aggregate term of 90 years to 80 years. In fact, the court failed to even acknowledge that it was undoing what it had done at the State's request in 2011.

Mr. High appeals the court's ruling.

This Appeal

A. Parties' Contentions

Mr. High, representing himself on appeal, asserts that the sentencing judge never "stated or indicated that indictment 199356016 would be consecutive to 199356018." He also claims that the judge "concluded his sentencing by saying all of 'those sentences will run concurrently; that is, they will run at the same time as the other sentences.'" Accordingly, Mr. High maintains that his sentence was "clearly ambiguous" and, therefore, by operation of law his sentences must run concurrently. He also states that the "sentence imposed on record is not 80 or 90 years it's 35 years as pronounced by [the sentencing judge]."

The State responds that, it "is clear" from the sentencing pronouncement that: the court "unambiguously ordered an overall sentence of 90 years"; the court "ordered a 45-year total sentence in Case 018, despite [its] inadvertent mention of a 'robbery deadly weapon sentence'"; the court "ordered a 45-year total sentence in Case 016, running the

two sentences in that case 'consecutive to each other'"; and the court "explicitly made the sentences in Case 022 concurrent." The State asserts, therefore, that, "[b]y necessary implication," the court "ordered consecutive sentences in Cases 016 and 018" because "the only way to order a 90-year sentence was for the first-degree assault and 'use of a handgun' convictions in Cases 016 and 018 to all run consecutively to one another."

B. Analysis

We agree with Mr. High that the sentencing court did not explicitly order the sentences in 016 and 018 to run consecutively to each other. But we agree with the State that, when the court announced that—"Those sentence will run concurrently with all of the sentences; that is, they run at the same time as the other sentences[]"—it was referring *only* to the sentences it had just imposed in 022 (first-degree assault of Mr. Cottingham and use of a handgun in the commission of a felony or crime of violence in the offenses against Mr. Cottingham). Had the court said nothing else, we would agree with Mr. High that the sentences in 016 and 018 run concurrently. But the court concluded its sentencing pronouncement by explicitly stating: "To recap, the sentence is a 90-year sentence to serve." Thus, we agree with the State that the court ran the sentences in 016 consecutively to the sentences in 018, which is the only way to reach a 90-year sentence to serve. As this Court stated in *Collins v. State*, "[c]ourts are encouraged to phrase their sentences with the word 'consecutive' when successive terms are intended so that the accused and those charged with the execution of the sentence are advised of its duration." 69 Md. App. 173, 197 (1986). "We do not, however, regard the term 'consecutive' a talisman and where the duration of a sentence is otherwise discernible from the record, it will be upheld without

resort to the presumption of leniency." *Id*. Accordingly, we hold that the sentences in 016 run consecutively to the sentences imposed in 018.

That, however, does not end our analysis. The State asserts that there is a "possibility" that the court modified Mr. High's sentence in 2011 and that the court in 2020 may have "inadvertently ignored its prior modification of High's sentence and therefore incorrectly amended the commitment record[.]" The State, therefore, suggests that we "remand the case to the circuit court to determine whether High's sentence was modified in 2011 and, if so, to issue a commitment record reflecting his current sentence and amend the docket entries as needed."

The State points out that "the computerized and handwritten docket entries conflict as to whether High's sentences in Cases 016 and 018 were modified in 2011." For sure, the computerized docket entry in 016 and 018 for October 25, 2011 states "sentence to remain the same," whereas the handwritten docket entries and the 2011 amended commitment record reflect that the sentences were modified as discussed above. Although in our view it appears that the computerized docket entries may be in error, given that and the host of other errors or inconsistencies in the record, coupled with the lack of transcripts from the 2011 and 2020 hearings on the motions to correct, we shall adopt the State's suggestion and remand the case to the circuit court for clarification and amendment of the docket entries and commitment record, as needed. In doing so, we point out that merger of the first-degree assault convictions into the robbery with a dangerous weapon conviction in 016 and 018, as purportedly done in 2011 at the State's request, may be required. *See Morris v. State*, 192 Md. App. 1, 39-40 (first-degree assault is a lesser included offense of

robbery with a deadly weapon where the two offenses arose out of the same act); *Williams v. State*, 187 Md. App. 470, 476-77 (2009) (vacating 25-year sentence for first-degree assault because it was a lesser included offense of robbery with a dangerous and deadly weapon and remanding for re-sentencing on the latter offense to no more than the statutory maximum of 20 years). *See also Pair v. State*, 202 Md. App. 617, 624, *cert. denied*, 425 Md. 397 (2012) (A sentence is inherently illegal and subject to correction pursuant to Rule 4-345(a) where the conviction should have merged, under the required evidence test, with another offense for sentencing purposes.).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY DATED SEPTEMBER 15, 2020 GRANTING THE STATE'S MOTION TO CORRECT THE COMMITMENT RECORD VACATED; JUDGMENT DENYING MOTION TO CORRECT AN ILLEGAL SENTENCE AFFIRMED ONLY AS TO THE CONCLUSION THAT THE SENTENCE IN CASE NO. 199356016 RUNS CONSECUTIVELY TO THE SENTENCE IN CASE NO. 199356018.

CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

APPELLANT TO PAY HALF THE COSTS; THE MAYOR AND CITY COUNCIL OF BALTIMORE TO PAY THE OTHER HALF.