Circuit Court for Baltimore County
Case No. 03-K-95-003092

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1792

September Term, 2021

ANTWON LIMBERRY

v.

STATE OF MARYLAND

Berger,
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: December 16, 2022

Antwon Limberry appeals from the denial of his motion to correct an illegal sentence. Because Limberry's sentence is not illegal, we affirm.

BACKGROUND

In 1996, a jury in the Circuit Court for Baltimore County found Limberry guilty of rape in the first degree, rape in the second degree, sexual offense in the first degree, sexual offense in the second degree, and kidnapping.

On November 14, 1996, the circuit court imposed a term of life imprisonment for first-degree rape, a concurrent term of life imprisonment for the first-degree sexual offense, and a consecutive term of ten years' imprisonment for kidnapping. The court merged the remaining convictions for sentencing purposes. On the same day, the clerk issued a commitment record indicating the correct sentence and giving Limberry 191 days' credit for time served between his arrest and the imposition of the sentence.

Pursuant to Maryland Rule 4-344, Limberry filed a timely motion for sentence review by a three-judge panel within 30 days of the imposition of the sentence.

On May 12, 1997, a three-judge panel, acting under the misconception that all of Limberry's sentences were consecutive to one another,[1] purported to modify Limberry's sentence. Under the panel's ruling, the sentence for the first-degree sexual offense would run concurrently with the sentence for first-degree rape, and the sentence for kidnapping

[1] In his brief, Limberry attributes the misconception to the docket entries, in which the sentences for rape and first-degree sexual offense "were erroneously recorded as consecutive" to one another. The State agrees that the panel's "misimpression" was "[d]ue to an apparent error in the court's docket entries at the time."

would run consecutively to the others. Although the three-judge panel did not realize it, the ruling left Limberry's sentence unchanged.

In 2019, Limberry filed a motion to correct an illegal sentence and a request for a hearing. In his motion, he argued that the 1997 panel had decided his motion for modification without conducting a hearing, that he had been denied credit for time served, and that his kidnapping conviction should have merged with the conviction for first-degree rape.

The administrative judge referred the motion to a three-judge panel consisting of the successors to the judges on the 1997 panel. On December 17, 2021, after briefing but without a hearing, the new panel ordered that "Limberry's credit for time served should be amended" to reflect 281 days of credit, rather than the 191 days that he had received under the original commitment record.[2] The panel denied his motion in all other respects.

Limberry noted this timely appeal. He raises the following issues, which we quote:

> 1. Did the 1997 three-judge panel err by denying a hearing when it modified the term and substance of Mr. Limberry's sentence?
>
> 2. Did the 1997 three-judge panel and 2021 three-judge panel err by failing to award Mr. Limberry credit for all time spent in custody and state such credit on the record?
>
> 3. Did the 2021 three-judge panel violate procedural due process rights or otherwise err by granting the motion to correct illegal sentence without holding an open court hearing?

[2] The 281 days consist of: one day (July 10, 1995) when Limberry was taken into custody, but was released on bond; and 280 days (from February 8, 1996, until November 14, 1996) from Limberry's return to custody until his sentencing. It is unclear why he was originally credited with only 191 days.

4. Did the 1996 sentencing court err by failing to merge the kidnapping conviction into the convictions for the underlying offenses?

DISCUSSION

Governing Law

Under Md. Rule 4-345(a), a "court may correct an illegal sentence at any time." "[T]he scope of the court's authority under this Rule," however, "is 'narrow.'" *State v. Bustillo*, 480 Md. 650, 664 (2022) (quoting *Bailey v. State*, 464 Md. 685, 697 (2019)).

"The Rule is designed to correct 'inherently illegal' sentences, not sentences resulting from 'procedural error[s].'" *State v. Bustillo*, 480 Md. at 665 (quoting *Bailey v. State*, 464 Md. at 696). Thus, "'a sentence, proper on its face,'" does not "'become[] an "illegal sentence" because of some arguable procedural flaw in the sentencing procedure.'" *Bratt v. State*, 468 Md. 481, 497 (2020) (quoting *Corcoran v. State*, 67 Md. App. 252, 255 (1986)). Instead, for a sentence to be "illegal," within the meaning of Rule 4-345(a), "the illegality must inhere in the sentence itself, rather than stem from trial court error during the sentencing proceeding." *Matthews v. State*, 424 Md. 503, 512 (2012); *accord State v. Bustillo*, 480 Md. at 665.

A sentence is inherently illegal when "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful." *Chaney v. State*, 397 Md. 460, 466 (2007); *accord State v. Bustillo*, 480 Md. at 665. Because the legality of a sentence is a question of law, our

review is de novo. *State v. Crawley*, 455 Md. 52, 66 (2017); *accord State v. Bustillo*, 480 Md. at 665.

ANALYSIS

I.

Limberry contends that the three-judge panel violated Rule 4-345(f) in 1997 because it modified his original sentence without holding a hearing. He further contends that this alleged violation resulted in an illegal sentence. Limberry's argument fails because, under the applicable law in 1997, the three-judge panel was not required to hold a hearing in order to reduce Limberry's sentence, as it purported to do, or to keep the sentence in place, as it actually did.

In 1997, the Review of Criminal Sentences Act, the statute governing sentence review, provided in relevant part:

> *The panel shall consider each application for review and shall have the power, with or without holding a hearing, to order a different sentence to be imposed or served*, including, by way of illustration and not by way of limitation, an increased or decreased sentence, or a suspended sentence to be served in whole or in part, or a sentence to be suspended with or without probation, upon such terms and conditions as the panel may deem just and which could lawfully have been imposed by the sentencing court at the time of the imposition of the sentence under review, or the panel may decide that the sentence under review should stand unchanged; *except that the panel, without holding a hearing, shall not increase any sentence, or order any suspended sentence or any suspended part of a sentence to be served*; and except further that no sentence for life or term of years may be increased to death by the panel with or without holding a hearing. The decision of the panel in each review shall be rendered by a majority of the members of the panel and shall be rendered within thirty days from the filing date of the application for review. If the panel orders any different sentence, the panel shall resentence and notify the convicted person in accordance with the order of the panel. Time served on any sentence under review shall be deemed to have been served on the sentence substituted.

Md. Code (1957, 1996 Repl. Vol.), Art. 27, § 645JC (emphasis added).

In other words, under the statute in effect in 1997, a panel could order that "a different sentence" be imposed or served "with or without holding a hearing," as long as the panel did not "increase any sentence, or order any suspended sentence or any suspended part of a sentence to be served."

The implementing rule, Rule 4-344(e), provided then (and still provides) in pertinent part:

> *Unless a hearing is required by the Review of Criminal Sentences Act, the Review Panel may render its decision without a hearing if it affords the parties an opportunity to present relevant information in writing.* If a hearing is to be held, the Review Panel shall serve the defendant, defendant's counsel, and the State's Attorney with reasonable notice of the time and place of the hearing. At the hearing the Review Panel may take testimony and receive other information.

(Emphasis added.)

The 1997 panel neither increased Limberry's sentence nor ordered that any suspended sentence or any suspended part of a sentence be served. Instead, the panel purported to reduce the sentence, but actually left the original sentence in place. Limberry does not allege that the 1997 panel failed to "afford[] the parties an opportunity to present relevant information in writing," as required by Rule 4-344(e). Therefore, under the 1997 version of the Review of Criminal Sentences Act and Rule 4-344(e), the

1997 panel was not required to hold a hearing. The panel did not impose an illegal sentence when it failed to hold a hearing that it had no obligation to hold.[3]

Limberry relies, incorrectly, on Md. Rule 4-345(f), which states that a "court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant."[4] Rule 4-345 generally applies to revisory motions that can be filed at any time, such as motions to correct an illegal sentence and motions to revise a sentence because of fraud, mistake, or irregularity, or because of a mistake in the announcement of a sentence. Rule 4-345 does not apply to motions to modify a sentence, which is what the 1997 panel had before it. Those motions are, and in 1997 were, governed by Rule 4-344. As stated above, Rule 4-344 did not require the 1997 panel to conduct a hearing, because the 1997 version of the Review of Criminal Sentences Act permitted the panel to dispense with a hearing so long as it afforded the parties an opportunity to present relevant information in writing and neither increased the sentence nor ordered that any suspended sentence or any suspended part of a sentence be served.

[3] In reaching this decision, we assume, solely for the sake of argument, that if the 1997 panel had been required to hold a hearing under the governing law, its failure to do so would have been something more than an "'arguable procedural flaw in the sentencing procedure'" (*Bratt v. State*, 468 Md. at 497, quoting *Corcoran v. State*, 67 Md. App. at 255), and would have affected the legality of the entire sentence. *See Mateen v. Saar*, 376 Md. 385 (2003).

[4] In 1997, similar language appeared in Rule 4-345(c): "The court may modify, reduce, correct, or vacate a sentence only on the record after notice to the parties and an opportunity to be heard."

Limberry relies prominently on *Mateen v. Saar*, 376 Md. 385 (2003), in which a court was held to have erred when it attempted to correct an illegal sentence without conducting the hearing that was required under Rule 4-345. In 1997, however, the three-judge panel did not decide a motion to correct an illegal sentence under Rule 4-345; it decided a motion for sentence modification under Rule 4-344. Once again, Rule 4-344 did not require the 1997 panel to conduct a hearing.

Limberry observes that in 2001 the General Assembly amended the Review of Criminal Sentences Act to require a hearing whenever a review panel orders that a different sentence be imposed. He suggests that "procedural and remedial statutes," such as this one, "may be applied retroactively." We fail to see how the 1997 panel could be expected to apply a law that did not take effect until more than four years after it made its decision. Ordinarily, "'a court is to apply the law in effect at the time it renders its decision[.]'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994) (quoting *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974)). "Generally, the use of the term retroactive does not mean that the [new law] applies to matters that were finally adjudicated or settled prior to the [enactment of the new law]." *Polakoff v. Turner ex rel. Whittington*, 155 Md. App. 60, 66 (2004), *aff'd*, 385 Md. 467 (2005).

In summary, in 1997, the three-judge panel was not required to hold a hearing on Limberry's motion to modify his sentence. The panel did not impose an illegal sentence when it purported to reduce Limberry's sentence without holding a hearing.

II.

Limberry contends that in 1997 and in 2021 the three-judge panels erred by failing to award him credit for all time spent in custody.[5] He relies on *Gardner v. State*, 420 Md. 1, 14 (2011), which held that, when a three-judge panel modifies a sentence, the modified sentence "supplants the original sentence." Thus, he argues that he was entitled to credit, not only for the 281 days that he served while he was awaiting his trial, but also for the additional 179 days that he served from the original imposition of sentence, on November 14, 1996, until the first panel issued its ruling, on May 12, 1997.

As an argument in support of a motion to correct an illegal sentence, Limberry's claim fails, because the claim that a prisoner is "entitled to credit for time served, and that the trial judge failed to award credit when he issued the corresponding commitment record, is a defect in sentencing *procedure* that does not render the sentence itself inherently illegal." *Bratt v. State*, 468 Md. at 499. Although a prisoner has a statutory right to credit for time served before trial (Maryland Code (2001, 2018 Repl. Vol.), § 6-218(b) of the Criminal Procedure Article), "the allegation that the trial judge failed to award appropriate credit for time served is not an allegation that the *substance* of the sentence itself was unlawful." *Bratt v. State*, 468 Md. at 499. In other words, the

[5] He also contends that both panels erred because they failed to state the amount of the credit on the record, as required by (Maryland Code (2001, 2018 Repl. Vol.), § 6-218(e)(1) of the Criminal Procedure Article. His brief, however, contains no argument in support of that contention. Consequently, we shall not consider it. *DiPino v. Davis*, 354 Md. 18, 56 (1999) ("if a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it") (citing *Health Servs. Cost Review Comm'n v. Lutheran Hosp.*, 298 Md. 651, 664 (1984)).

"[f]ailure to follow proper sentencing procedure as mandated by [§ 6-218 of the Criminal Procedure Article] does not render the substance of the sentence illegal." *Id.* at 501-02. Therefore, even if the 1997 and 2021 three-judge panels erred in failing to award Limberry credit for all time spent in custody, those purported errors would not render his sentence illegal within the meaning of Rule 4-345(a).

In any event, the factual premise for Limberry's argument is incorrect. He argues that he is entitled to additional credit for time served through the date of the 1997 panel decision, because he contends that the panel imposed a new sentence that replaced the original sentence. In fact, the 1997 panel did not change Limberry's sentence at all, even though it mistakenly believed that it was doing so. Both before and after the 1997 panel ruled, Limberry's sentence remained the same: he had two, concurrent life sentences and a consecutive, 10-year sentence.

In short, the 1997 panel's decision did not "supplant[] the original sentence." *Gardner v. State*, 420 Md. at 14. It follows that the 2021 panel did not err in declining to give Limberry credit for the time that he served between the date of his original sentencing and the date when the 1997 panel rendered its decision.

III.

Limberry, relying upon Rule 4-345(f), contends that the 2021 panel violated his procedural due process rights because it did not hold a hearing before granting his motion to correct his illegal sentence to increase his credit for time served from 191 days to 281 days. His argument fails because the panel did not change the pronounced sentence when

it corrected the earlier failure to award the proper amount of credit. *Bratt v. State*, 468 Md. at 505.

The 2021 panel ordered that Limberry be given the proper credit for time served; i.e., the panel ordered that his commitment record be corrected. "A change of the commitment record is," however, "not a 'modification' of an illegal sentence under Rule 4-345." *Id.* at 504 (footnote omitted); *accord Lawson v. State*, 187 Md. App. 101 (2008) (holding that correcting the commitment record was not a modification of the sentence). To put it another way, "[c]orrecting the commitment record to add credit is not the type of modification contemplated by Rule 4-345." *Bratt v. State*, 468 Md. at 505.

Therefore, the 2021 panel was not required to hold a hearing before it ordered an increase in the amount of credit for time served. There was no error and no inherent illegality in Limberry's sentence as a result of the 2021 panel's decision. Nor did the panel violate Limberry's right to due process when it declined to conduct a hearing before ordering that his commitment record be corrected to give him the additional credit that he had requested.

IV.

Limberry contends that his separate, consecutive sentence for kidnapping is illegal because, he says, that offense should have merged for sentencing purposes into his conviction for first-degree rape. Relying on *State v. Stouffer*, 352 Md. 97 (1998), a case that was not decided until two years after his conviction, he complains of the trial court's failure to instruct the jury that a kidnapping cannot occur unless the movement (or "asportation") of the victim is more than merely "incidental" to the commission of

another crime (in his case, first-degree rape and first-degree sexual offense). In the absence of a jury instruction to that effect, he argues that "it is impossible to know for certain" whether the jury "found that the movement [of the victim] was more than incidental" to the rape. In view of this alleged ambiguity about whether the kidnapping conviction was based on conduct separate and distinct from the rape or the sexual offense, Limberry argues that the kidnapping conviction must merge under the "required-evidence test" or the "rule of lenity."[6]

Limberry's argument resembles an unpreserved challenge to the sufficiency of the evidence to support the kidnapping conviction or an unpreserved challenge to the jury instructions given at his trial. Indeed, *Stouffer*, on which he largely relies, is Maryland's leading case about the sufficiency of the evidence to support a kidnapping conviction. Under *Stouffer*, if the evidence was insufficient to permit a reasonable jury to find that the movement of Limberry's victim was more than merely incidental to the rape, then the jury could not properly convict him of kidnapping. In that case, the court could not merge the kidnapping conviction into the rape conviction, because there could be no kidnapping conviction in the first place.[7]

[6] Limberry also argues that the conviction merges under the "doctrine of fundamental fairness." The "failure to merge a sentence based on fundamental fairness does not," however, "render the sentence illegal." *Koushall v. State*, 479 Md. 124, 163 (2022).

[7] Before *Stouffer*, Maryland courts considered merging kidnapping into rape "when the victim was moved and confined only slightly, as would be necessary to complete the crime of rape." *Rice v. State*, 9 Md. App. 552, 566 (1970) (declining to merge the convictions where "the victim was dragged from her apartment and carried

(continued)

Nonetheless, we shall assume, solely for the sake of argument, that Limberry's arguments are cognizable in the guise of a motion to correct an illegal sentence. We do so because the failure to merge sentences where merger is required will result in an illegal sentence. *Koushall v. State*, 479 Md. 124, 148 (2022); *Pair v. State*, 202 Md. App. 617, 624 (2011).

"The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment, prohibits 'multiple punishment upon a single conviction for the same offense[.]'" *Koushall v. State*, 479 Md. at 157 (quoting *Newton v. State*, 280 Md. 260, 264 (1977)). Merger, "the common law principle that derives from the protections afforded by the Double Jeopardy Clause[,]" *State v. Frazier*, 469 Md. 627, 641 (2020), "protects a convicted defendant from multiple punishments for the same offense." *Brooks v. State*, 439 Md. 698, 737 (2014).

"'[U]nder both federal double jeopardy principles and Maryland merger law, the test for determining the identity of offenses is the required evidence test.'" *Koushall v. State*, 479 Md. at 157 (quoting *Newton v. State*, 280 Md. at 268). "The required evidence test focuses on the elements of each crime in an effort to determine whether all the elements of one crime are necessarily in evidence to support a finding of the other, such that the first is subsumed as a lesser included offense of the second." *Monoker v. State*,

several blocks into the accused's apartment"); *see also Hawkins v. State*, 34 Md. App. 82, 92 (1976) (merging false imprisonment into rape where "the victim was detained only a sufficient time to accomplish the rape"). In light of *Stouffer*, one may question the continued viability of those cases.

321 Md. 214, 220 (1990). "If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge." *Newton v. State*, 280 Md. at 268. But if only one of the offenses requires proof of an additional fact, so that all elements of one offense are present in the other, and if both offenses are based on the same act or acts, the two offenses merge. *See, e.g.*, *State v. Lancaster*, 332 Md. 385, 392 (1993). When the required evidence test is satisfied, "'a sentence may be imposed only for the offense having the additional element or elements[,]' *i.e.*, the greater offense." *State v. Frazier*, 469 Md. at 646 (quoting *Lancaster v. State*, 332 Md. at 392).[8]

If charges of false imprisonment and rape are based on the same act or acts, false imprisonment merges into rape. *Brooks v. State*, 439 Md. at 737-39. Kidnapping consists of false imprisonment combined with some asportation or movement of the victim. *Paz v. State*, 125 Md. App. 729, 739 (1999). Thus, we shall assume, solely for the sake of argument, that if a kidnapping and a rape are based on the same act or acts, *and* the movement of the victim is merely incidental to the rape, the kidnapping would merge into the rape.[9]

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

[8] The only exception to this rule, not applicable in this case, is where the legislature has expressly authorized multiple punishments for two offenses that would otherwise be the "same" offense for double jeopardy purposes. *Missouri v. Hunter*, 459 U.S. 359, 365-69 (1983).

[9] We indulge this assumption even though under *Stouffer* a jury could not convict a defendant of kidnapping unless the movement of the victim was more than merely incidental to the rape.

convictions also satisfy the required evidence test." *Brooks v. State*, 439 Md. at 739. In determining whether the factual basis for a jury verdict is readily apparent, a court considers the charging document, opening statements, closing arguments, jury instructions, the verdict sheet (if any), and the evidence adduced at trial, among other things. *See Nicolas v. State*, 426 Md. 385, 410-12 (2012).

In their summary of the evidence in Limberry's direct appeal from his criminal conviction, our predecessors detailed the means by which he committed the crimes of which he was convicted. On the basis of that summary, there is not a shadow of a doubt about the basis for the jury's verdict: the movement of the victim was not merely incidental to the rape.

According to the summary, the victim, a dancer at a club in downtown Baltimore, was unable to find a cab to take her home at 3:30 a.m. Two men offered to give her a ride home. She accepted.

Limberry, who was the driver, missed a turn at Route 40 and Moravia Park Drive, near the Baltimore County line. The victim pointed out the error. The driver told her that he would turn around. Instead, he got onto the Baltimore Beltway, heading towards Essex, in Baltimore County.

The victim pointed out this error as well. The driver told her that he would get back onto Route 40, but as they traveled down a ramp toward the Essex exit, he stopped the car, turned around, and said, "[Y]ou are going to take care of me before you leave."

The driver continued driving, but the victim was now too upset to tell where they were going. Eventually, the driver stopped the car in parking lot. The passenger took his

place in the driver's seat, and the driver got into the back seat with the victim. He forced the victim to perform fellatio on him and raped her, apparently as his accomplice was driving. Then the accomplice parked the car, got into the back seat, and forced the victim to perform fellatio on him.

After the sexual assaults had ended, the men drove the victim to her neighborhood. The driver threatened to kill her if she looked at the license plate or at the car.

This is not a close case. There is no ambiguity on this record. The asportation of the victim in this case far exceeded what was incidental to the rape and sexual offense. The victim was driven many miles from where she was picked up, and many miles from her residence; because she was driven a great distance, she was detained considerably longer than the time necessary to commit the sexual offenses; the movement was neither inherent as an element, nor, as a practical matter, necessary to the commission of the other crimes; and the asportation of the victim had the independent purpose of avoiding detection by others, including law enforcement officers.

On these facts, no reasonable jury could have found that the movement of the victim in this case was merely incidental to the sexual assaults. The original sentencing court was completely justified in imposing a separate sentence for kidnapping, and neither three-judge panel which subsequently reviewed Limberry's sentences erred in declining to disturb that sentence. Merger was not required in this case.[10]

[10] Because we assume that kidnapping with merely incidental movement of the victim merges into rape and related sexual offenses under the required evidence test when both offenses are based on the same act or acts, we do not address Limberry's contention (continued)

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

that the kidnapping merges into rape under the rule of lenity. The rule of lenity applies only where the offenses do not merge under the required evidence test. *Monoker v. State*, 321 Md. at 222. Even if we assumed that kidnapping with merely incidental movement of the victim does not merge into rape and related sexual offenses under the required evidence test when both offenses are based on the same act or acts, the rule of lenity would not apply in this case because we conclude, in substance, that the kidnapping and rape here were separate crimes.