

Circuit Court for Baltimore City
Case No. 102011047

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1844

September Term, 2017

KEVIN VAUGHAN

v.

STATE OF MARYLAND

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

JJ.

Opinion by Raker, J.

Filed: January 4, 2019

*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 Kevin Vaughan was convicted in February 2003 by a jury in the Circuit Court for Baltimore City of first degree felony murder, kidnapping, armed carjacking, conspiracy to commit second degree arson, and second degree arson. He appeals from the circuit court's denial of his Motion to Correct an Illegal Sentence, presenting the following questions for our review, which we have rephrased:

1. Did the Circuit Court err in denying the Motion to Correct Illegal Sentence because the sentencing court failed to merge felony murder with the underlying felony?
2. Did the Circuit Court err in denying the Motion to Correct Illegal Sentence because the sentencing court failed to merge the kidnapping and carjacking sentences under the doctrine of fundamental fairness?

We shall hold that the trial court erred in imposing separate sentences for both kidnapping and carjacking. We shall remand for further proceedings consistent with this opinion.

I.

This case has a long procedural history in the courts of Maryland.¹ In 2003, appellant was convicted of first degree felony murder, kidnapping, armed carjacking,

¹ Appellant's procedural history follows:

On July 21, 2006, appellant filed a Petition for Post-Conviction Relief. On January 30, 2008, the Circuit Court for Baltimore County denied his petition. This Court denied appellant's Application for Leave to Appeal on March 17, 2009. On August 7, 2015, the State filed a Motion to Correct Illegal Sentence. The State requested that the circuit court modify appellant's sentence to life imprisonment, suspend all but forty years, followed by a period of probation. On January 14, 2016, the circuit court agreed with the State that the sentence was illegal and imposed the following sentence: a term of incarceration of life, all but thirty years suspended, two years supervised probation, for felony murder; eighteen years for kidnapping, consecutive; eighteen years for carjacking, concurrent; ten years for conspiracy to commit second degree arson, concurrent; and five (footnote continued . . .)

conspiracy to commit second degree arson, and second degree arson. The circuit court sentenced appellant to a term of incarceration of forty years for felony murder, eighteen years for kidnapping, consecutive; eighteen years for carjacking, concurrent; ten years for conspiracy to commit second degree arson; and five years for second degree arson, concurrent. On direct appeal, this Court affirmed. *Vaughan v. State*, No. 328, Sept. Term 2003 (filed April 6, 2005).

We review in this case appellant’s most recent motion to correct an illegal sentence. As background to the issues in this case, we set out a brief recitation of the facts. Appellant was a member of a group of young men who stole Marlin Hopkins’ vehicle and then murdered him. Appellant, who was seventeen years old at the time of this crime, got into the driver’s seat of Mr. Hopkins’ vehicle. Other people put Mr. Hopkins into the trunk and shot him. Appellant drove off in the victim’s car along with the other men, later setting the vehicle on fire. Firefighters found the car engulfed in flames. After the Baltimore City Fire Department extinguished the fire, they found Mr. Hopkins in the trunk. The police detained

years for second degree arson, concurrent. Appellant appealed, and we affirmed. *Vaughan v. State*, No. 2678, Sept. Term 2015 (filed Dec 14, 2016).

On November 12, 2016, appellant filed another Motion to Correct Illegal Sentence and a Motion to Reopen Post-Conviction Proceedings. Appellant raised eight issues—one alleging illegality of his sentence and seven related to ineffective assistance of counsel. He argued that his sentence was illegal because the court should have merged, for sentencing purposes, the kidnapping conviction into the felony murder conviction. The trial court denied appellant’s Motion to Correct Illegal Sentence, and appellant noted an appeal of the circuit court’s denial to this Court. He filed an Application for Leave to Appeal for the motion to reopen his Petition for Post-Conviction Relief. This Court stayed the application pending the outcome of this appeal. *Vaughan v. State*, No. 1844, Sept. Term 2017 (filed March 5, 2018).

appellant for an unrelated offense, and he confessed to this crime at that time. As indicated above, the jury convicted appellant, and the court imposed his sentence.

II.

Before this Court, appellant argues that his sentence is illegal because the sentencing court did not merge, for sentencing purposes, an underlying felony with the felony murder. He was convicted of felony murder and three felonies—kidnapping, armed carjacking, and second degree arson. Either kidnapping or armed carjacking may serve as the predicate felony for felony murder. The court imposed separate sentences for the murder and for each of the felonies.

Appellant notes that the jury in this case did not specify which felony was the predicate for felony murder and argues that in such a case, based on Maryland law and *State v. Johnson*, 442 Md. 211, 214 (2015), the conviction for the felony with the greatest maximum sentence merges into the felony murder for sentencing purposes. Because both kidnapping and carjacking carry the same maximum penalty, he argues that this Court should merge the predicate felony with the greatest *imposed* sentence, i.e., the kidnapping sentence should merge with the felony murder sentence because the court imposed the kidnapping sentence consecutive to the felony murder sentence.

Appellant also argues that the sentencing court should have merged kidnapping with carjacking for sentencing purposes and that “[s]ince these merge, then the carjacking conviction should merge with the felony murder.” He argues as a basis for this merger the doctrine of fundamental fairness.

The State concedes that the sentencing court should have merged one of the underlying felonies into the felony murder. Where the State and appellant diverge is that the State maintains that it is within the trial court's discretion to determine which felony merges. The State rejects appellant's argument that kidnapping should merge as a matter of law, arguing that because kidnapping and carjacking carry the same maximum sentence, it is within the trial court's discretion to decide which of the two felonies should merge. To merge kidnapping would be giving appellant a windfall based on timing, the State claims.

The State maintains that appellant failed to raise the fundamental fairness argument on direct appeal or in the earlier Motion to Correct Illegal Sentence, and as such, he waived the argument. Relying on *Pair v. State*, 202 Md. App. 617, 649 (2011), the State asserts that an argument based on fundamental fairness does not enjoy the procedural dispensation of Md. Rule 4-345(a), under which “[t]he court may correct an illegal sentence at any time.” In the alternative, the State argues that the merger claim fails on the merits based on the plain language of the carjacking statute. The State requests that this Court affirm the judgments of conviction and remand the case to the circuit court for that court to exercise its discretion as to which felony should merge into the felony murder.

III.

We review the circuit court's decision to deny appellant's motion to correct an illegal sentence *de novo*. *Blickenstaff v. State*, 393 Md. 680, 683 (2006). Pursuant to Rule 4-345(a), the court may correct an illegal sentence at any time.

In Maryland, a murder is a felony murder when it is “(4) committed in the perpetration of or an attempt to perpetrate: . . . kidnapping under § 3-502 or § 3-503(a)(2) of this article; . . . [or] robbery under § 3-402 or § 3-403 of this article . . .” Md. Code, Crim. Law Article § 2-201(a)(4).² A court may not punish a defendant both for felony murder and for the underlying “predicate” felony. *Johnson*, 442 Md. at 214. For sentencing purposes, the underlying felony supporting a conviction for felony murder merges into the murder conviction. *Id.* at 220–21. The Court of Appeals explained the reasons underlying merger for sentencing purposes as follows:

“The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law. Merger protects a convicted defendant from multiple punishments for the same offense. Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other.”

Brooks v. State, 439 Md. 698, 737 (2014).

In *Johnson*, the defendant was sentenced for felony murder and both of the underlying felonies, kidnapping and robbery. *Id.* at 215. The Court of Appeals held that “one predicate felony conviction merges for sentencing purposes with the felony murder conviction; and, absent an unambiguous designation that the trier of fact intended a specific felony to serve as the predicate felony, the conviction for the felony with the greatest maximum sentence merges for sentencing purposes.” *Id.* at 214. As kidnapping carried

² All subsequent statutory references herein shall refer to Md. Code, Criminal Law Article.

the greater maximum sentence, the Court remanded the case for the sentencing court to merge the kidnapping. *Id.* at 225.

As both parties agree that the trial court sentence is illegal because the court did not merge a predicate felony into the felony murder, the issue before us is which felony should merge into the felony murder. Where, as here, there is an absence of an unambiguous designation by the jury, the predicate felony with the greatest maximum sentence merges for sentencing purposes with the felony murder conviction, and the appellant may be sentenced separately for the remaining felonies. Applying this rule to the instant case, under § 3-502(b), the maximum sentence for kidnapping is thirty years incarceration; under § 3-405(d), the maximum sentence for armed carjacking is thirty years incarceration; under § 6-103(b), the maximum sentence for second degree arson is twenty years incarceration.

Maryland’s carjacking statute states, “A sentence imposed under this section *may* be separate from and consecutive to a sentence for any other crime that arises from the conduct underlying the carjacking or armed carjacking.” Section 3-405(e). Kidnapping, as outlined in § 3-502, does not contain a similar provision. While either option is available by law, the Legislature has provided explicitly that carjacking need not merge with another offense committed at the same time as the carjacking.

The jury did not indicate whether armed carjacking or kidnapping formed the basis for the felony murder conviction. Without a doubt, one of these sentences must be vacated. Significantly, the maximum penalties for kidnapping and carjacking are the same—thirty years incarceration. Section 3-502(b); § 3-405(d). Appellant is wrong in his assertion that because the circuit court ran the kidnapping sentence consecutive to the felony murder

sentence, the kidnapping is therefore the greater sentence and hence, must be merged as a matter of law.

At appellant’s initial sentencing, the court had the discretion to merge either the kidnapping or the carjacking. The court, erroneously, merged neither. Appellant stood silent at the time, neither correcting the court nor suggesting to the court that one or all of the felonies should merge. To argue now that the court is *required* to merge the kidnapping sentence because the court chose to make that sentence consecutive to the felony murder sentence rewards appellant for his silence at the initial sentencing.

The circuit court had the discretion to merge either the kidnapping or the carjacking sentence and retains the discretion to determine which felony should merge. The circuit court did not forfeit that discretion by its error in failing to merge either. It is for the circuit court, on remand, to determine which offense should merge with the felony murder sentence. Accordingly, we shall remand this case with directions for the circuit court to vacate either the armed carjacking sentence or the kidnapping sentence.

IV.

We next address appellant’s argument that kidnapping merges with carjacking based upon the doctrine of fundamental fairness. Appellant argues that fundamental fairness requires that the kidnapping sentence merge with the carjacking sentence because under a factual analysis of the crimes, kidnapping “ripened” from the armed carjacking. *Marquardt v. State*, 164 Md. App. 95, 152–53 (2005).

The State argues that appellant’s fundamental fairness argument is not preserved for our review. We agree. Appellant did not raise until now the argument that kidnapping and carjacking should merge based upon the doctrine of fundamental fairness. We are not here on direct appeal, but on motion under Rule 4-345. The procedural dispensation of Rule 4-345(a), allowing review of an illegal sentence regardless of preservation, does not apply to a fundamental fairness argument. *Pair v. State*, 202 Md. App. 617, 649 (2011).³ His fundamental fairness argument is not preserved for our review. Further, appellant acknowledges that neither the required evidence test nor the rule of lenity applies.

Assuming preservation *arguendo*, appellant is wrong. The Legislature was clear that any sentence imposed for carjacking *may* be separate from and consecutive to a sentence for any other crime that arises from the conduct underlying the carjacking.⁴ Section 3-502(e). As such, appellant’s kidnapping sentence need not merge with his carjacking sentence, and the sole issue for the circuit court to decide upon remand is which felony should merge with the felony murder for sentencing purposes.

³ To the extent that the State suggests that *Pair v. State* and *Latray v. State*, 221 Md. App. 544 (2015), are inconsistent, we disagree. *Pair* is a correct statement of the law. *Latray* is consistent. *Latray* was a direct appeal; *Pair* was a collateral proceeding and a Motion to Correct an Illegal Sentence pursuant to Rule 4-325.

⁴ The Supreme Court of the United States holds that, where a legislature expresses clearly its intent to proscribe and punish the same conduct under two separate statutes, a trial court in a single trial may impose cumulative punishments under the two statutes. *See Missouri v. Hunter*, 459 U.S. 359, (1983).

CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY TO VACATE THE SENTENCE FOR EITHER ARMED CARJACKING OR KIDNAPPING. ALL OTHER JUDGMENTS OF CONVICTION AFFIRMED. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.