UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1967

September Term, 2014

ISAIAH TIMOTHY FEASTER

v.

STATE OF MARYLAND

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: December 30, 2015

*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.

From the denial by the Circuit Court for Prince George's County of a Motion to Correct an Illegal Sentence, appellant Isaiah Timothy Feaster presents one question for our review: Did the court err in denying the motion? Because Feaster has completed serving the sentence of which he complains, his motion to correct an illegal sentence is moot. We therefore vacate the circuit court's judgment and remand for that court to dismiss the action.

BACKGROUND

In 1978, Feaster was charged with first degree rape,[1] assault and battery,[2] and related offenses. Feaster elected to be tried by the court without a jury. Following the close of the

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[1] Md. Code (1957, 1976 Repl. Vol., 1977 Supp.), Art. 27 § 462(a) states:

> A person is guilty of rape in the first degree if the person engages in vaginal intercourse with another person by force against the will and without the consent of the other person and:
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> (1) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably concludes is a dangerous or deadly weapon; or
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> (2) Inflicts suffocation, strangulation, disfigurement, or serious physical injury upon the other person or upon anyone else in the course of committing the offense; or
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> (3) Threatens or places the victim in fear that the victim or any person known to the victim will be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
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> (4) The person commits the offense aided and abetted by one or more other persons.

[2] We have stated that "the term of art 'assault' may connote any of three distinct ideas: 1. A consummated battery or the combination of a consummated battery and its antecedent assault; 2. An attempted battery; and 3. A placing of a victim in reasonable apprehension of an imminent battery." *Lamb v. State*, 93 Md. App. 422, 428 (1992) (indentation omitted). *Accord Cruz v. State*, 407 Md. 202, 209 n.3 (2009).

evidence, the trial court stated the facts, then found that Feaster had committed both first degree rape and assault and battery:

> On the night in question [the victim] retired to her bed … dressed in an undergarment which she termed a union suit, and a flannel nightgown, with the front door closed and locked, and the only unlatched window in the apartment being a kitchen window which is of the casement or crank in and crank out variety.
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> * * *
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> An examination of the article of clothing which the witness described as a union suit and which she said she went to the hospital in . . . discloses a hole in the crotch area of that garment[,] an extensive stain which appears to be dried blood, extending somewhat up the front of it but more extensive toward the back.
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> Such a stain, we think, would be appropriate to a process of absorption by this cloth, which is soft and absorbent cloth, made from a type of wound described by the doctor if it were inflicted at a time when the victim was lying on her back, and the hole in this garment is consistent with the type of hole that would be made by someone attempting to make an aperture in this garment through which sexual intercourse could be accomplished.
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> * * *
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> We would like to think that nobody would be so totally depraved or inhuman that they would take a knife to cut an aperture in another human being[']s body [through] which to have sexual intercourse with them. We would much prefer to think that whoever committed this atrocity did it accidentally in an attempt to cut the cloth away from the sexual organ of the victim.
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> * * *
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> Now, there is needed yet another element to satisfy the requirement of first degree rape, and that can be of any of several things listed in the statute. The one we think applicable in this case is the infliction of serious physical injury [because,] it was a massive cut in a very, very important part of the victim's anatomy. … Two to three inches in the vaginal area of a seventy-seven-year-old woman is an incredible type of cut.
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> * * *

> We conclude, therefore, … that somebody committed the offense of first degree rape on this victim, and that the other charges which are lesser and included offenses in that charge … all merge into that charge.
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> * * *
>
> With respect to the assault and battery, we think there is clear showing in the evidence that there was an assault and battery and that that assault and battery was not involved in the perpetration of the rape but in the attempt to prepare to commit it, and that involved the making of an opening in the under garment of the victim. That, we think, constitutes a separate assault and battery and the evidence discloses it to be a separate act, although part of the ongoing transaction.

(quotations and emphasis omitted).

The trial court sentenced Feaster to life imprisonment for the first degree rape and 20 years imprisonment for the assault and battery, to be served concurrently. The court ordered that the sentences commence on April 28, 1978.

In 2013, Feaster filed a motion to correct an illegal sentence, in which he contended that "the sentence for assault and battery was required to have been merged into the sentence for first degree rape," because "the same conduct that formed the basis of the assault and battery was also used to support the 'serious physical injury' element of first degree rape." Alternatively, Feaster contended that "the sentences should merge under the rule of lenity." Following a hearing, the circuit court denied the motion.

ANALYSIS

Feaster alleges that his 20-year sentence for assault and battery should have been merged into his life sentence for first degree rape and is, thus, an illegal sentence. As was recited above, Feaster began serving his 20-year sentence on April 28, 1978 and had concluded serving it by no later than April 28, 1998. He is no longer serving that sentence.

As a result, his motion to correct an illegal sentence is now moot. *Barnes v. State*, 423 Md. 75, 88 (2011).[4] Following *Barnes*, we have no choice but to vacate the decision of the Circuit Court for Prince George's County and remand the matter with instructions to dismiss Feaster's action. [5]

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[4] We have carefully considered whether the plurality opinion of the Court of Appeals in *Barnes* is a mandatory precedent, requiring our fidelity. We employ the so-called *Marks* Rule to determine the Court's holding: "'[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [four judges], the holding of the court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" *Wilkerson v. State,* 420 Md. 573, 594 (2011) (quoting *Marks v. United States,* 430 U.S. 188, 193 (1977)). In *Barnes*, Judge Adkins wrote for a three-judge plurality (Adkins, Harrell, & Barbera, JJ.) that Barnes's motion was moot and must be dismissed. *Barnes*, 423 Md. at 88. Judge Greene concurred in the judgment only. *Id*. Judge Murphy dissented, stating that he would have reached the merits and affirmed. *Id*. at 89. Judge Eldridge, writing for himself and Chief Judge Bell, dissented from the dismissal but specifically declined to discuss the merits. *Id*. Thus, we do not know whether they would have voted to affirm or reverse. We do know, however, that Judge Greene concurred in the judgment, i.e., he voted for dismissal. And, as far as we can see, there was no basis for dismissal other than mootness. Therefore, we must assume that Judge Greene's disagreement with the plurality was stylistic, and did not go to the merits. Thus, applying the *Marks* Rule, we view the narrowest ground agreed upon by four judges in *Barnes* is that a motion to correct an illegal sentence is moot once the movant concludes serving the sentence.

[5] Although not necessary to the disposition of this appeal, we also note that under none of the three tests used by our courts to determine whether sentences should merge—the required evidence test; the rule of lenity; and the fundamental fairness test—should Feaster's sentences have merged even if he had brought his motion while still serving the sentence for assault and battery. Under the required evidence test, "two convictions must be merged when … 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). And "the convictions [must be] based on the same act or acts[.]" *Id.* Here, the trial court explicitly found that the assault and battery was based on the cutting of the victim's undergarment, and the rape was in the first degree based on the infliction of serious physical injury upon the victim, specifically the cutting of the victim's person, in the course of committing vaginal intercourse with the victim by force, against her will, and without her consent. Feaster contends that merger is required because the cutting of the victim's undergarment and cutting of the victim's person "stem[] from one course of action," specifically "preparation." But the Court of Appeals has stated that "separate acts resulting in separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or

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(...Continued)

transaction." *State v. Boozer*, 304 Md. 98, 105 (1985). Although the cutting of the victim's undergarment and cutting of the victim's person occurred in very close proximity to each other and were part of a single criminal episode or transaction, they were separate acts that resulted in separate insults to the person of the victim. The trial court was allowed to separately punish the acts and, hence, under the required evidence test, the convictions do not merge. While the second test, the rule of lenity, can result in the merger of sentences, it only applies to resolve ambiguity in legislative intent regarding sentences and has no application in Feaster's case. *See Latray v. State*, 221 Md. App. 544 (2015). The third test, the fundamental fairness test, asks whether a defendant serving separate sentences offends our sense of fundamental fairness. *Id*. Here, it does not.