UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0080

September Term, 2016

RAYMOND R. EVANS

v.

STATE OF MARYLAND

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

JJ.

Opinion by Arthur, J.

Filed: December 19, 2016

*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.

On April 14, 2015, a Cecil County jury convicted appellant Raymond Evans of robbery and second-degree assault. On March 4, 2016, the circuit court sentenced Evans to ten years' imprisonment on the robbery conviction and to five years' imprisonment, all of it suspended, on the second-degree assault conviction. The two sentences were to run consecutively. The court also sentenced Evans to five years' probation, but his commitment record states that the term of probation is attached to the robbery conviction, on which he has no suspended time.

Evans filed this timely appeal.

QUESTIONS PRESENTED

Evans presents three questions for review, which we quote:

1. Are separate sentences for robbery and second-degree assault illegal?
2. Did the trial court err in attaching a term of probation to a sentence with no suspended time?
3. Did the trial court err in imposing conditions of probation with no relation to the facts of the offenses?

We hold that the court should have merged the convictions for robbery and second-degree assault, but in accordance with *Twigg v. State*, 447 Md. 1 (2016), we remand for resentencing on the robbery conviction. On remand, the court may address any error regarding the term and conditions of probation.

FACTS AND LEGAL PROCEEDINGS

In May 2014, Joe Wilmot advertised a dirt bike for sale. After exchanging telephone calls and text messages with a man who expressed interest in purchasing the

bike, Wilmot made arrangements to meet with the prospective purchaser. He believed that two men were to meet him, but four men arrived at the meeting place in a Toyota Camry.

The men asked to "test ride" the bike. Wilmot said that they could test ride the bike, but only with "money in hand so something doesn't happen." One of the men "came up behind" him, however, and "rode off" with the bike.

The men who stayed with Wilmot received a call that the bike was out of gas and that the other men needed to come get it. Wilmot decided to accompany the men because he was concerned that they would take his bike. He and three men drove in the Camry to retrieve the bike. When they arrived, the men loaded the bike into the Camry's trunk using bungee cords.

The men told Wilmot that they would drive him back, but before they arrived at the destination, the driver stopped the car. Wilmot was sitting in the back seat on the driver's side when the man sitting to his right pulled out a gun and demanded that he surrender his phone. Wilmot refused, and Evans, who was sitting in the front passenger seat, turned around and punched Wilmot in the face. Wilmot let go of his phone and was kicked out of the car, and the Camry drove away.

Wilmot ran to his neighbor's house and called the police. When they arrived, he described the four men. Wilmot later identified each of the men, including Evans, using photo arrays. Wilmot also identified Evans and two of the other men in video footage

taken at a store near the time and location of the incident. The footage shows the men buying bungee cords.

DISCUSSION

I. Merger of Robbery and Second-Degree Assault

Evans contends that the court erred when it imposed separate sentences and failed to merge the second-degree assault and robbery convictions. The State agrees, as do we.

A court violates the double jeopardy clause of the Fifth Amendment if it imposes multiple punishments for the same offense. *See Twigg v. State*, 447 Md. 1, 14 (2016) (citing *Nightingale v. State*, 312 Md. 699, 705 (1988); *Newton v. State*, 280 Md. 260, 273-74 (1977)). If multiple offenses are deemed to be the same for double jeopardy purposes, they merge upon the defendant's conviction. *See*, *e.g*., *Newton*, 280 Md. at 265.

In determining whether two offenses are the same, Maryland courts apply the required evidence test. *See*, *e.g*., *Snowden v. State,* 321 Md. 612, 616 (1991). Under that test:

> If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited.

Twigg, 447 Md. at 13 (quoting *Nightingale*, 312 Md. at 703, which quoted *Newton*, 280 Md. at 268).

Robbery entails a taking by force or threat of force. Md. Code (2002, 2012 Repl. Vol.), § 3-401(e) of the Criminal Law Article ("CL"); *see Spencer v. State*, 422 Md. 422,

428-29 (2011). The varieties of second-degree assault include common-law battery (*Snyder v. State*, 210 Md. App. 370, 380 (2013)), which "is the unlawful unjustified, offensive and non-consensual application of force to the person of another." *Hickman v. State*, 193 Md. App. 238, 256 (2010). Robbery, therefore, requires the "nonconsensual application of force" – i.e., "the battery form of assault." *Id.* It follows that Evans's conviction for second-degree assault must merge into the conviction for robbery, unless the assault charge was clearly based on an act that was separate and distinct from the acts on which the robbery charges were based. *See Snowden*, 321 Md. at 619; *see also Morris v. State*, 192 Md. App. 1, 44 (2010); *Gerald v. State*, 137 Md. App. 295, 312 (2001).

The evidence at trial confirms that the robbery and assault amounted to the same offense. When asked why he gave his cell phone to the assailants, the victim, Wilmot, responded, "Because I was hit in the face." In short, the assault on Wilmot was the taking by force that supported a robbery conviction. The court, therefore, should have merged the sentence for assault into the sentence for robbery. *See Snowden*, 321 Md. at 619.

Ordinarily, we would vacate the sentence for second-degree assault (five years' imprisonment, all suspended, to run consecutively to the ten-year sentence for robbery). In that event, Evans would be left with a ten-year sentence, followed, perhaps, by five years of probation. *See infra* section II.

The State observes, however, that the original, 15-year sentencing "package" (*see Twigg*, 447 Md. at 28) did not exceed the 15-year maximum penalty that the court could

have imposed on the greater offense of robbery. CL § 3-402(b). Citing *Twigg*, the State argues that because we have "unwrap[ed] the package" and removed one of the charges "from its confines" (*Twigg*, 447 Md. at 28), we should remand the case to the circuit court for resentencing.

Md. Rule 8-604(d)(2) states that, "[i]n a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing." In *Twigg*, 447 Md. at 20-21, the Court of Appeals approved the propriety of remanding a case for resentencing on a greater offense after the merger of a lesser-included offense, as has happened here.

Because "'the sentencing judge, herself, is in the best position to assess the effect of the withdrawal [of the assault conviction from the sentencing package] and to redefine the package's size and shape (if, indeed, redefinition seems appropriate)'" (*id.* at 28 (quoting *United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1989)), we shall remand the case to the circuit court for resentencing. The court ordinarily may not impose a sentence greater than the 15-year sentence that it originally imposed. *Id.* at 30 (citing Md. Code (1988, 2013 Repl. Vol.), § 12-702(b) of the Courts and Judicial Proceedings Article).

II. Term of Probation Attached to Sentence With No Suspended Time

Evans's commitment record states that his five-year term of probation is attached to his robbery conviction, on which he had no suspended time, and not to his assault conviction, on which the court suspended the entire term of incarceration. He contends

that the sentence is illegal, because "a period of probation must be attached to a suspended sentence[.]" *Rankin v. State*, 174 Md. App. 404, 411 (2007); *see also Miles v. State*, 88 Md. App. 248, 262-63 (1991) ("probation may not be imposed unless at least a part of the sentence is suspended"); Md. Code (2001, 2008 Repl. Vol., 2016 Supp.), § 6-221 of the Criminal Procedure Article ("[o]n entering a judgment of conviction, the court may suspend the imposition or execution of sentence and place the defendant on probation on the conditions that the court considers proper").

The State asserts, and we agree, that this claim of error is moot. "'A question is [rendered] moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide.'" *Alston v. State*, 433 Md. 275, 285 (2013) (quoting *Att'y Gen. v. Anne Arundel Cnty. Sch. Bus Contractors Ass'n, Inc.*, 286 Md. 324, 327 (1979)). In section I, we held that this matter is to be remanded for resentencing. Upon resentencing, a new commitment record will replace the current commitment record, rendering any claim of error as to the original commitment record moot. *See Conyers v. State*, 345 Md. 525, 576 (1997). Therefore, we decline to address the alleged error in the commitment record.

III. <u>Conditions of Probation</u>

The trial court has broad discretion when imposing conditions of probation. *Allen v. State*, 449 Md. 98, 111 (2016). The discretion, however, is not unlimited. *Id.* Conditions of probation may "'not be arbitrary or capricious[,]'" *id.* (citing *Smith v. State*,

80 Md. App. 371, 375 (1989)), and they "'must be reasonable and have a rational connection to the offense[.]'" *Id.* (citing *Meyer v. State*, 445 Md. 648, 680 (2015)).

The court placed Evans on five years of supervised probation. The terms of probation state, in pertinent part, that Evans "must complete a drug and alcohol evaluation and successfully complete treatment. He is not to use or possess any controlled dangerous substance. He will be subject to random testing."

Evans contends that there was no evidence that his offense involved drugs or alcohol. Therefore, he argues the conditions of probation are improper because they are not rationally related to his offense.

We have not been provided with any information, including a presentence investigation report, that indicates that Evans has any history of drug or alcohol abuse or that his offense was linked to either drugs or alcohol. Upon resentencing, if the court wishes to impose this condition of probation, it must articulate a rational basis for doing so.

JUDGMENTS OF THE CIRCUIT COURT FOR CECIL COUNTY VACATED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY CECIL COUNTY.