UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0507

September Term, 2014

ANTHONY L. HOWES

v.

STATE OF MARYLAND

Eyler, Deborah S.
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: June 3, 2016

On June 4, 2007, right before trial and with a jury waiting, Anthony Howes, appellant, and the State entered into a plea agreement. It was agreed that Howes would enter an *Alford* plea to one count of third-degree sexual offense and one count of second-degree assault and would be sentenced to not more than fifteen years in prison, with the right to argue for a lesser sentence.[1] The Circuit Court for Baltimore County accepted the plea agreement and found Howes guilty on both charges. Over defense counsel's objection that the two convictions should be merged for the purposes of sentencing, the court sentenced appellant to a term of imprisonment of ten years for the sexual offense and a consecutive term of five years for the assault.

Howes did not file a timely Application for Leave to Appeal, but in December of 2013, he filed a Petition for Post-Conviction Relief, requesting leave to file a belated Application for Leave to Appeal. The petition was granted on April 11, 2014, and his subsequent Application for Leave to Appeal to this Court was granted on October 27, 2014.

On appeal, Howes presents a single question for our consideration:

> Did the circuit court err in finding that the agreed statement of facts was sufficient to establish a separate second-degree assault so that the sentence for assault did not merge into the sentence for third-degree sex offense?

[1]An *Alford* plea is a guilty "plea containing a protestation of innocence," *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), where a "defendant does not contest or admit guilt." *Jackson v. State*, 207 Md. App. 336, 361 (2012) (quoting *Bishop v. State*, 417 Md. 1, 18 (2010)). At the sentencing hearing, defense counsel characterized Howes's plea as "an *Alford* plea in the true sense of an *Alford* plea."

We hold that Howes's convictions should have merged for the purposes of sentencing, and therefore, the separate sentence imposed by the court for the offense of second-degree assault. We further conclude that merger would not result in a material breach of the plea agreement. Because Howes received the maximum sentence legally available for the sexual offense, a remand for a new sentencing is not necessary.

FACTUAL AND PROCEDURAL HISTORY

In February of 2006, Howes was indicted, on charges of sexual abuse of a minor, second-degree rape, fourth-degree sexual offense, and second-degree assault. Under the terms of the last-minute agreement reached after a jury had been empaneled to hear his case, the State amended the charge of second-degree rape to third-degree sexual offense, Howes entered an *Alford* plea to third-degree sexual offense and second-degree assault, and the circuit court agreed to bind itself to a maximum sentence of fifteen years, with Howes's attorney free to argue for a lesser sentence. The terms of the plea agreement were presented to the trial court as follows:

> [Prosecutor]: Your Honor, the pleas that I have offered that I believe the Defense is going to accept, I would amend the second count from second degree rape to third degree sex offense and then Count Four, which is second degree assault, and *I'll ask that Your Honor impose a sentence of 15 years and I believe [Defense Counsel] is going to ask you to bind, that that is a cap and she's free to argue for the sentence she thinks is appropriate, but you would agree not to go above that in terms of sentence*, is that accurate?
>
> [Defense Counsel]: Yes, this would be an *Alford* plea.

(Emphasis added). The following statement was submitted to the circuit court:

Thank you, Your Honor. This came to the attention of the authorities in January of 2006 and the matter that brings us here today involves [K.H.], for the record her date of birth September 30, 1989 and the man who was her mother's long time boyfriend, this Defendant, Anthony Howes, date of birth, February 11, 1969. The police became involved when they got the call from the school nurse, . . . at the school that [K.H.] attended at the time . . . . [The school nurse] had had contact with [K.H's] then boyfriend, who reported to the nurse that [K.H.] had been raped the weekend before. [K.H.] was asked to come to the Child Advocacy Center, where she was interviewed by Katie DeVilbiss, working as a social worker at the time. She was asked to tell Ms. DeVilbiss why she was there. She said because of what my Mom's ex-boyfriend did. She said on the previous Friday, she was at his home with her younger brother, who is the [D]efendant's biological child. They were watching a movie. Her brother was in a different room asleep. She was watching the movie, sitting on the floor of the Defendant's bedroom. The Defendant was on his bed. She said he started playing with her hair, joined her on the floor. She told Ms. DeVilbiss, we then just started doing it. When asked who he is, she said Anthony Howes. They live up the street from him and see him frequently because he's involved in her brother's life.

Defendant's home is . . . in Baltimore County. When asked to explain to Ms. DeVilbiss what "doing it" means, she was able to say having sex, he's done it before, I tried to stop him but it's hard because he's much bigger than I am. She elaborated it happened in his bedroom. Other people were in the house. The grandfather, who is hard of hearing, could not hear her or anything really that was going on in the house. Asked to explain what she meant by having sex, she said, I don't want to talk about it. It happened before and it's very hard. It should be noted by Ms. DeVilbiss, [K.H.], who was 16 and in 10th grade, had a difficult time discussing what was happening because she was crying. She was able to say that Ms. DeVilbiss said to her, sex means different things to different people; could you elaborate to me, tell me what you mean so I am sure we are talking about the same thing. She said, his penis touched my vagina. When asked if he touched the inside or outside of the vagina, she said inside. She described the Defendant was wearing a T shirt, orange football shorts. He took his clothes off as he got on the floor. He did not use any protection and he ejaculated on her stomach and wiped that off with a towel. When she was asked what color the towel was, she said she did not know. Asked what happened to the towel, she did not know. She was asked if she tried to say anything to him? She said, I tried to say something; he wouldn't get off me. I was trying to say, get off me, get off me, but he

wouldn't get off. She described the clothes she was wearing, which was a T shirt with dancers on it and . . . flannel pajama pants and underpants with a princess on them and a new bra. He pulled her pants down. She told her boyfriend last night and he's the one who went to the school nurse.

She was able to say that her clothing was still in the Defendant's bedroom in a closet in a pile at his home. Your Honor should understand for the record there was frequent visitations with, although this Defendant was not this child's biological father, she frequently stayed with him along with her brother for custody arrangements between the parties. She would spend nights. She had clothing in the room where she slept and the Defendant's bedroom as well. The clothing just stayed in the bedroom.

She was transported to the Greater Baltimore Medical Center for a safe exam. She ultimately refused. The exam was not done, but they drew her blood. After they got the information from Ms. DeVilbiss about the interview, the Baltimore County Police were able to execute a warrant on the Defendant's bedroom. They seized from the bedroom orange shorts on the bed matching the description she gave. Her clothing matched the description exactly on the floor by the Defendant's closet and a pink towel with the letter H on it also in a heap near the clothes. The forensic biologist from the Baltimore County Police Department Forensic Lab, Jodine Zane, tested the towel and found it did, in fact, have semen on it. The further testing revealed that there was a testable amount of DNA. Another search warrant was executed. The police retrieved a couple swabs from the inside of the Defendant's cheek. They had an opportunity to extract a DNA profile from the Defendant, the cutting of the towel, and in the Child Victim Care Unit, [K.H.] had given blood during the course of the exam. Ms. Zane was able to make a comparison with those results. She was able to determine the mixture of the sperm component came from the Defendant to a reasonable degree of probability. In fact, the number is one in 4.2 quintillion that someone other than the Defendant was responsible for the sperm being a fraction of that stain. Additionally, she was able to further examine the non sperm fraction of the stain. If she were called to testify, she would testify that the likelihood of [anyone other than K.H.] being the contributor was one in 26 million, so [K.H.], through a reasonable degree of scientific certainty was the contributor of the stain on the towel in the Defendant's bedroom.

> [K.H.] is here this afternoon. If she was called to testify before this Jury we had picked, she would tell you the Defendant at the trial table was the man she knew as her father for extended period of time, engaged in the act with her against her will in his bedroom . . . in Baltimore County. And that would be the statement of facts.

The circuit court, without further explanation, found Howes guilty of the third-degree sex offense and the second-degree assault, and the State entered a *nolle prosequi* to the charges of sexual abuse of a minor and fourth-degree sexual offense.

At sentencing the next day, Howes's attorney argued that, based on the statement of facts presented by the State, Howes's convictions for third-degree sex offense and second-degree assault should merge for sentencing purposes because both were part of a single continuous act. Therefore, according to defense counsel, the only sentence that the court could impose was a single sentence for the third-degree sex offense that did not exceed the statutory maximum of ten years. The court, rejecting the merger argument, explained:

> My recollection of the statement of facts was that subsequent to the sexual intercourse, there was touching, unconsented to touching by the Defendant of the victim and that included, this is based on my recollection, that after the event involving the towel, the victim told the Defendant to get off of her, suggesting or implying or inferring that he was on top of her and holding her down. I view that as a separate and distinct event or occurrence connected with the original sex offense, but not so connected to it so as to say they were the same event. So, I do not believe the rule of lenity requires me to merge sentencing with regard to the second degree assault charge with the third degree sex offense charge.

DISCUSSION

Merger

Howes contends that the circuit court "erred in finding that the statement of the factual basis for the plea was sufficient to establish a separate second degree assault so that the sentence for assault did not merge into the sentence for third degree sex offense." In finding the statement of facts sufficient to support two separate sentences, he argues that the court's interpretation of the statement of facts was incorrect and unreasonable, and thus, its application of the law to the facts constituted an abuse of discretion.

Howes does not challenge the underlying validity of his guilty plea and his convictions for both the sexual offense and the assault charge. His challenge is that the statement of facts presented by the State did not support the court's determination that the second-degree assault was a sufficiently separate and distinct act from the third-degree sexual offense as to permit a separate sentence. The State asserts that "grabbing the towel and using it to wipe the semen from the victim's stomach" was an act separate from the third-degree sexual offense, but should we determine that the convictions merge for sentencing purposes, the State contends that the "length of the imprisonment was an integral part of the deal" and therefore merger would cost the state the benefit of the negotiated plea bargain. In that event, the State argues that the "proper remedy is to permit the State to elect whether to move for vacation of the plea in its entirety . . . or to accept the reduced cap on Howes's sentence."

The statement of facts as presented by the State supports a finding that over some period of time and on more than one occasion, Howes had engaged in sexual intercourse with K.H., and did so most recently and specifically while she was staying at his home during the weekend of January 13 to January 15, 2006.[2] The statement indicates that on the evening in question, even though she tried to stop him and told him to "get off," Howes "play[ed] with [K.H's] hair[,]" "pulled her pants down," "just started doing it," and after ejaculating on her stomach, he wiped the ejaculate off with a towel. Viewed in the light most favorable to the State, any unwanted touchings of K.H. in that situation would be offensive and, thus, constitute an assault. The question is whether the statement of facts established any assaultive contact by Howes that was separate from the third-degree sexual offense, which was characterized by the State at sentencing as the "sexual intercourse."

The merger of multiple convictions for sentencing purposes is required by the protection against double jeopardy afforded by the Fifth and Fourteenth Amendments of the United States Constitution and by Maryland common law, and protects criminal defendants from incurring multiple punishments for acts that constitute part of the same offense or transaction. *Brooks v. State*, 439 Md. 698, 737 (2014). But, "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

[2]In the statement of facts, K.H. is quoted as saying that "he's done it before," and "it happened before."

single criminal episode or transaction." *State v. Boozer*, 304 Md. 98, 105 (1985). We review *de novo* a trial court's failure to merge offenses for sentencing purposes. *See Blickenstaff v. State*, 393 Md. 680, 683 (2006) ("We shall address the legal issue of the sentencing in the case at bar under a *de novo* standard of review.").

The "double jeopardy analysis is a two step process . . . . [W]e must first determine whether the charges arose out of the same act or transaction, and second, whether the crimes charged are the same offense." *Purnell v. State*, 375 Md. 678, 694 (2003) (citations and internal quotation marks omitted); *Morris v. State*, 192 Md. App. 1, 39 (2010). "The 'same act or transaction' inquiry often turns on whether the defendant's conduct was one single and continuous course of conduct, without a break in conduct or time between the acts." *Morris*, 192 Md. App. at 39 (citation omitted).

If we determine that the charges stem from the same act or transaction, we employ the required evidence test to determine whether the different offenses are the same for double jeopardy purposes. *Purnell*, 375 Md. at 693. "The required evidence test focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Snowden v. State*, 321 Md. 612, 617 (1991) (citation and internal quotation marks omitted); *see also Brooks v. State*, 439 Md. 698, 737 (2014) ("[T]wo 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."). "If the offenses merge

and are thus deemed to be one crime, separate sentences for each offense are prohibited." *Snowden*, 321 Md. at 617 (citation omitted). It is well established that in cases of rape or sexual assault, a concurrently committed physical assault or battery merges for the purposes of sentencing. *See, e.g.*, *Green v. State*, 243 Md. 75, 80-81 (1966) (merging assault into rape when both offenses were based on the same facts); *Biggus v. State*, 323 Md. 339, 350-51 (1991) (merging battery into third-degree sex offense).

In this case, the focus of the statement of facts was on Howes's vaginal intercourse with K.H. The circuit court justified the imposition of a consecutive sentence for second-degree assault on its recollection that "subsequent to the sexual intercourse," and "after the event involving the towel," there was "unconsented to touching . . . that included, . . . the victim [telling] the Defendant to get off of her, suggesting or implying or inferring that he was on top of her and holding her down." The court viewed this implied or inferred act of holding K.H. down after intercourse and wiping off the semen as "a separate and distinct event or occurrence connected with the original sex offense, but not so connected to it so as to say they were the same event."

To be sure, it was not crystal clear in the State's recitation of facts exactly when K.H. told Howes to get off of her or otherwise objected to being held down, but we find no support in the statement of facts for the circuit court's finding that after Howes wiped the semen off of K.H.'s body that, separate from the intercourse and despite her objection, he continued to hold her down. We are not persuaded that any of the offensive touchings described in the

statement of facts were so factually or temporally distinct from the third-degree sexual offense that any of them were not part of a continuous course of conduct.[3] Therefore, Howes's convictions for second-degree assault and third-degree sexual offense merge for the purposes of sentencing. *Snowden*, 321 Md. at 617 ("If the offenses merge and are thus deemed to be one crime, separate sentences for each offense are prohibited.") (citation omitted).

The Plea Agreement

Because the convictions in this case were the result of a plea agreement, we must consider the effect of merger for sentencing purposes on the viability of that agreement. The parties agreed that Howes would plead guilty to one count of third-degree sexual offense and one count of second-degree assault. It was also made clear, in the court's acceptance of the agreement, that conviction on the third-degree sexual offense would require Howes to register as a sex offender. In reference to sentencing, the parties agreed to a maximum sentence of fifteen years with the understanding that Howes could argue for a lesser sentence. Overall, the plea agreement allowed Howes to avoid a potentially longer sentence were he to be found guilty of the offenses with which he was originally charged, and also assured the

[3]Plea agreements and the statements of facts supporting them need to be carefully crafted and thought out. As Judge Moylan has written for this Court,"[e]ntrusting the legal sufficiency to a sometimes hastily composed statement of fact can turn out to be a case of the State sailing dangerously close to the wind. It can be done, but it should be done with great care." *Polk v. State*, 183 Md. App. 299, 301 (2008).

State a conviction with a possible prison sentence of fifteen years in addition to sex offender registration.

When there is a binding plea agreement, as there was in this case, the court is to "embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement." Md. Rule 4-243(c)(3). Section (d) of the rule requires that the material terms of the agreement be placed on the record to ensure meaningful appellate review. *See Poole v. State*, 77 Md. App. 105, 120 n.7 (1988), *aff'd*, 321 Md. 482 (1991). When a question arises regarding the meaning of a sentencing provision of a binding plea agreement, we look to the record of the plea proceeding and construe the agreement in accordance with the defendant's reasonable understanding of the sentence to be imposed. *Cuffley v. State*, 416 Md. 568, 582 (2010). And, if our "examination of the record leaves ambiguous the sentence agreed upon by the parties, then the ambiguity must be resolved in the defendant's favor. " *Id*. at 583 (citations omitted).

We review de novo whether the merger of the two convictions for the purposes of sentencing would violate a material term of the plea agreement. *Id*. at 581. If the terms of a plea agreement are breached or are otherwise unenforceable due to illegality or a change in circumstances, the decision of what should be done is "guided by the circumstances of each case." *State v. Parker*, 334 Md. 576, 599 (1994) (citing *Santobello v. New York*, 404 U.S. at 257, 263 (1971)).

This is not a case of breach. Each party did what it had agreed to do. The question is whether merger for sentencing purposes creates an illegality or a change of circumstances that renders the agreement unenforceable. That, in turn, depends on whether the availability of a fifteen-year sentence, and its imposition, was a material term of the agreement that is precluded by merger for sentencing purposes. The State argues that the "length of imprisonment was a material term of the plea agreement" and that the maximum fifteen-year term depended on separate and consecutive sentences for the two convictions. We agree that a fifteen-year sentence in this case depended on separate and consecutive sentences (each offense carries a maximum ten-year sentence), but its availability depended on the establishment of separate assaults in the statement of facts.

Based on our review of the record, we are persuaded that merger of Howes's convictions for second-degree assault and third-degree sexual offense for sentencing purposes and the resulting ten-year sentence does not violate a material term of this particular plea agreement. The agreement in regard to the *length* of imprisonment is clear. The period of incarceration would not *exceed* fifteen years. There is, however, no provision for a *minimum* sentence, and the agreement explicitly permits Howes to request a lesser sentence and explicitly permits the court to impose a lesser sentence. The possible merger of convictions for sentencing, which is not uncommon in sexual assault cases, was not addressed in the plea agreement and presumably not even considered in the last-minute plea negotiations.

The issue was first raised on the record by defense counsel at sentencing. She advised the court that, although the "intention and spirit" of the agreement was that "15 years be available," she had discussed merger for sentencing purposes with the State's Attorney prior to the sentencing hearing. We do not know exactly what was discussed off the record, but the record is clear that, when the issue was raised, the State's Attorney did not argue that "length of imprisonment was an integral part of the deal" and that merger of the convictions for sentencing would cause the agreement to be withdrawn. The State argued that the "sexual intercourse," which was the third-degree sex offense, and Howes "wiping his ejacula off of her stomach" were "separate assault[s]." If the State considered the availability of the fifteen-year term as an "integral part of the deal," that was the time to say so. Otherwise, the parties could not easily be "placed in their original position, unprejudiced by the mistake of law." *Rojas v. State*, 52 Md. App. 440, 446 (1982).

The State's proffer of the sentencing guidelines of between three and eight years for each of the two convictions also indicated that the availability of a fifteen-year sentence was not a material term or "integral part" of the plea agreement.[4] Assuming separate offenses, and had the circuit court imposed an aggregate sentence of ten years for the two convictions, that sentence would have been within the proffered guidelines and would have also satisfied the express terms of the plea agreement.

[4]We note that the ten-year sentence for the third degree sexual offense exceeded the sentencing guidelines proffered by the State.

For these reasons, vacating the consecutive five-year sentence imposed by the court for second-degree assault and allowing the ten-year sentence imposed for third-degree sexual offense to stand does not, in our view, deny the State a penalty within the express terms of the plea agreement or undermine the public's interest in incarcerating and registering a convicted sex offender.

CONSECUTIVE SENTENCE IMPOSED FOR SECOND DEGREE ASSAULT VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID BY BALTIMORE COUNTY.