

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0971

September Term, 2014

ANTHONY JOHNSON

v.

STATE OF MARYLAND

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

JJ.

Opinion by Kenney, J.

Filed: March 16, 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.

After the Circuit Court for Prince George’s County denied his motion to correct an illegal sentence, Anthony Johnson, appellant, appealed. For the reasons to be discussed, we affirm.

BACKGROUND

Following a jury trial in 2006, Johnson was convicted of first-degree murder and the use of a handgun in the commission of a crime of violence. The murder victim had been shot to death. Johnson was sentenced to life imprisonment for the murder and to a consecutive twenty year term for the handgun offense. Johnson appealed and this Court affirmed the judgments. *Anthony Johnson v. State of Maryland*, No. 1188, Sept. Term, 2006 (filed June 3, 2008), *cert. denied*, 405 Md. 507 (2008).

In 2013, Johnson filed a *pro se* motion to correct an illegal sentence in which he asserted that his sentences were illegal “because of [a] double jeopardy violation.” Specifically, he argued that he should not have “received separate sentences for the same offense.” He maintained that the murder conviction should have merged with the handgun offense and for that reason he requested that the life sentence for murder be vacated. The circuit court denied the motion, prompting this appeal.

DISCUSSION

Johnson makes the same argument on appeal that he did below. Johnson’s contention has no merit.

“The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution prohibits the State from punishing a defendant multiple times for the same

offense.” *Kyler v. State*, 218 Md. App. 196, 225 (2014), *cert. denied*, 441 Md. 62 (2014).

Hence, ordinarily, “[s]eparate sentences are prohibited when ‘a defendant is convicted of two offenses based on the same act or acts and one offense is a lesser-included offense of the other.’” *Id.* (quoting *Sifrit v. State*, 383 Md. 116, 137 (2004) (internal quotation marks omitted), *cert. denied*, 543 U.S. 1056 (2005)). But if two crimes arise out of the same act and the legislature clearly intended that the crimes be punished separately, we “defer to that legislated choice.” *Quansah v. State*, 207 Md. App. 636, 645 (2012) (quoting *Walker v. State*, 53 Md. App. 171, 201 (1982)); *accord Jones v. State*, 357 Md. 141, 163 (1999) (observing that the U.S. Supreme Court “has held that states may impose cumulative punishment [for conduct that arises out of single act and violates two or more statutes] if it is clearly the intent of the legislature to do so.”).

To determine whether one offense merges with another, we initially apply the “required evidence test.” *Kyler*, 218 Md. App. at 225. That test “focuses upon the elements of each offense; if all 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.” *Id.* at 225-26 (quoting *Kelly v. State*, 195 Md. App. 403, 440 (2010)). “[I]f each offense contains an element which the other does not, there is no merger under the required evidence test even though both offenses are based upon the same act or acts.” *Kyler*, 218 Md. App. at 226 (alteration in original) (quoting *Moore v. State*, 198 Md. App. 655, 684 (2011)).

First-degree murder contains an element – the unlawful killing of another person – which is not a required element of the crime of using a handgun in the commission of a felony or crime of violence. As such, first-degree murder does not merge with the handgun offense under the required evidence test. But even if the offenses would merge under this test, the legislature has mandated that a sentence for the handgun offense must be imposed *in addition to* any sentence for the underlying felony.

The handgun statute at issue – Section 4-204 of the Criminal Law Article of the Maryland Code – in relevant part, provides:

(b) *Prohibited.* – A person may not use a firearm in the commission of a crime of violence as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime.

(c) *Penalty.* – (1)(i) A person who violates this section is guilty of a misdemeanor and, **in addition to any other penalty imposed for the crime of violence or felony**, shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years.

(Emphasis added).

In *Whack v. State*, 288 Md. 137, 149 (1980), the Court of Appeals rejected the notion that separate sentences for robbery with a deadly weapon and use of a handgun in the commission of a felony (the robbery) violated the Double Jeopardy Clause. The Court determined that the legislature, in enacting the handgun statute, clearly intended that separate and distinct sentences be imposed for the use of a handgun in the commission of a felony and the underlying felony, even where the two offenses were based upon the same incident. *Id.* at 149-50.

In sum, the circuit court did not err in denying Johnson's motion because the sentences imposed were legal.

**JUDGMENT OF THE CIRCUIT
COURT FOR PRINCE GEORGE'S
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**