UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1717

September Term, 2014

ANDRE CHAVIS

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Kehoe, J.

Filed: March 3, 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.

Andre L. Chavis filed a motion to correct an illegal sentence in the Circuit Court for Baltimore City. The circuit court denied the motion and this appeal followed. Appellant asserts that the circuit court erred when it denied his motion. We disagree and, for the reasons below, shall affirm.

Background

On December 8, 2001, appellant murdered Adrian Jenkins with a handgun and shot Noah Rich, attempting to kill him but failing to do so. After a jury trial, appellant was convicted of multiple crimes. His convictions and sentences and other dispositions are summarized in the following chart:

Offense	**Sentence/Disposition**
First-degree murder (Adrian Jenkins)	Imprisonment for life
Second-degree murder (Adrian Jenkins)	Merged by trial court w/ first-degree murder conviction
Attempted first-degree murder (Noah Rich)	Imprisonment for life (consecutive)
Attempted second-degree murder (Noah Rich)	Merged by trial court w/ attempted first-degree murder conviction
First-degree assault (Noah Rich)	Merged by Court of Special Appeals w/ attempted first degree murder conviction
Second-degree Assault (Noah Rich)	Merged by trial court w/ attempted first-degree assault conviction
Use of a handgun in the commission of a felony or crime of violence (Adrian Jenkins)	Incarceration for 20 years (consecutive)
Use of a handgun in the commission of a felony or crime of Violence (Noah Rich)	Incarceration for 20 years (consecutive)
Wearing or carrying a handgun (Adrian Jenkins)	Merged by trial court w/ use of handgun in crime of violence conviction
Wearing or carrying a handgun (Noah Rich)	Merged by trial court w/ use of handgun in crime of violence conviction.

Appellant appealed to this Court which held in an unreported opinion that appellant's conviction for first-degree assault merged into his conviction for attempted first-degree murder and affirmed in all other respects. *Andre L. Chavis v. State*, No. 2999, Sept. Term 2002 (filed April 16, 2004).

On June 9, 2014, appellant filed his motion to correct an illegal sentence. He asserted that, under the required evidence test, the sentencing court should have merged his convictions for the use of a handgun in the commission of a felony or crime of violence into the first-degree murder and attempted first-degree murder convictions. He asserts that the separate sentences for the handgun convictions are illegal.

Analysis

To this Court, appellant reiterates the arguments that he presented to the circuit court. Those contentions are unpersuasive for the following reasons.

In assessing whether two offenses should merge for sentencing purposes, we utilize the *Blockburger* test, also known as the required evidence test. *See Blockburger v. United States*, 284 U.S. 299 (1932); *Washington v. State*, 200 Md. App. 641, 653 (2011). We have described this test as:

> focus[ing] 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. Stated another way, the required evidence is that which is minimally necessary to secure a conviction for each [ ] offense. If each offense requires proof of a fact which the other does not, or in other words, if 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. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, and where both offenses are based on the same act or acts, [ ] merger follows [ ].

Washington, 200 Md. App. at 654 (quoting *Abekuto v. State*, 391 Md. 289, 353 (2006) (internal quotation marks omitted; bracketing in original)). "We have generally applied this standard to decide the permissibility of successive trials, as well as multiple punishment, under the double jeopardy clause of the Fifth Amendment, under Maryland common law double jeopardy principles, and as a matter of Maryland merger law." *Wack v. State*, 288 Md. 137, 142 (1980). We will now apply the *Blockburger* test to appellant's convictions.

(1) First Degree Murder and the Use of a Handgun in a Crime of Violence

Murder remains a common law offense in Maryland, but is divided into degrees by statute. *See Thornton v. State*, 397 Md. 704, 721 (2007). First-degree murder requires that the State prove that the homicide was (i) "a deliberate, premeditated, and willful killing;" (ii) "committed by lying in wait;" (iii) committed by poison; or (iv) committed in the course of perpetrating or attempting to perpetrate a variety of other crimes. *See* CL § 2-201(a). On the other hand, CL § 4-204(b) prohibits the use of a handgun or other firearm "in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony[.]"

An examination of the elements of the two crimes reveals that one may commit first-degree murder in a variety of ways that do not involve use of a handgun or other firearm. By the same token, one may use a firearm in the commission of a felony or crime of violence that is not a first-degree murder. Indeed, CL § 4-204(b) prohibits the use of a firearm in the commission of *any* felony, and includes reference to seventeen crimes of violence which qualify for punishment under the statute. Accordingly, appellant's claim fails the *Blockburger* test.

(2) Attempted First Degree Murder and the Use of a Handgun in a Crime of Violence

The same reasoning applies to appellant's contention that his conviction for using a handgun in a crime of violence should merge with his conviction for attempted first degree murder. Attempted first degree murder requires an attempt to commit murder through one of the modalities listed in CL § 2-201(a), together with specific intent to kill. *See State v. Earp*, 319 Md. 156, 164 (1990). Without belaboring the point, one can commit attempted first degree murder without using a handgun, for instance by attempting to poison the victim, and handguns can be used in a variety of crimes that are not attempted murder.

(3) The Legislative Intent to Impose an Enhanced Penalty

Appellant's arguments fail for another reason. The statute that prohibits the use of a handgun or other firearm in the commission of a crime of violence or other felony, also

provides that: "[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." CL § 4-204(c)(1)(i) (emphasis added). This language plainly *requires* that the sentence for using a handgun in committing a felony or crime of violence be imposed *"in addition to"* any sentence imposed for the associated felony or crime of violence. The words of the statute demonstrate that the General Assembly intended to impose an additional sentence for the aggravating factor of using a handgun.

The Court of Appeals has explained:

> Under the Double Jeopardy Clause, a defendant is protected against multiple punishment for the same conduct, unless the legislature clearly intended to impose multiple punishments. **Where the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct, cumulative punishment may be imposed** under the statutes in a single trial. . . . Maryland common law analysis leads to the same conclusion. Under common law principles, merger follows as a matter of course when two offenses are based on the same act and are deemed to be the same under the required evidence test. We noted the only exception in *Frazier v. State*, 318 Md. 597, 614–615 (1990):
>
>> [E]ven if offenses are deemed the same under the required evidence test, the Legislature may punish certain conduct more severely if particular aggravating circumstances are present, by imposing punishment under two separate statutory offenses.

Jones v. State, 357 Md. 141, 156-57 (1999) (some citations omitted; emphasis added).

This principle has been applied repeatedly in the context of Maryland's prohibition against the use of a handgun in a crime of violence. *See, e.g., Wack v. State*, 288 Md. 137, 150 (1980) ("When [the Legislature] expressly shows an intent to punish, under two separate statutory provisions, conduct [involving use of a handgun], the Fifth Amendment's double jeopardy prohibition has not heretofore been regarded as a bar."); *Lancaster v. State* 332 Md. 385, 414 (1993); *Eldridge v. State*, 329 Md. 307, 316-18 (1993).

Even if we were to hold that the elements of the two crimes satisfied the *Blockburger* test, which we do not, the legislature has explicitly provided for dual punishment. Accordingly, appellant's claim must fail.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.