UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1718

September Term, 2014

OMAR WILKERSON

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Kehoe, J.

Filed: March 3, 2016

Omar Wilkerson moved to correct an illegal sentence in the Circuit Court for Baltimore City. That motion was denied. He has appealed and asserts that the circuit court erred by denying his motion. We disagree and, for the reasons below, shall affirm.

Background

In 2000, appellant was convicted by a jury in the Circuit Court for Baltimore City of first degree murder, use of a handgun in the commission of a felony or crime of violence, and wearing or carrying a handgun. He was sentenced to consecutive sentences of life imprisonment for first degree murder and twenty years' imprisonment for use of a handgun in the commission of a felony or crime of violence. The court merged his conviction for wearing or carrying a handgun with his conviction for use of a handgun in the commission of a felony or crime of violence for sentencing purposes. Appellant then appealed to this Court and we affirmed in *Wilkerson v. State*, 139 Md. App. 557 (2001).

On July 29, 2014, appellant filed a motion to correct an illegal sentence. In his motion, appellant argued that the trial court should have merged his conviction for use of a handgun in the commission of a felony or crime of violence into his conviction for first-degree murder. This is the case, appellant contended, "because the offense of the use of a handgun in the commission of a felony or crime of violence required the State to prove all the elements of the offense of first degree murder with one additional element[, namely that] [u]nder the required evidence test for purposes of double jeopardy those offenses are deemed the same offense and must merge."

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.

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 *Blockburger* argument can afford him no relief.

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.