Circuit Court for Anne Arundel County
Case No. C-02-CR-16-000329

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2316

September Term, 2016

CHRISTOPHER HARVISON

v.

STATE OF MARYLAND

Woodward, C.J.,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 3, 2017

A jury in the Circuit Court for Anne Arundel County convicted Christopher Harvison, appellant, of multiple traffic offenses, including driving under the influence of alcohol ("DUI") and driving a vehicle with alcohol in the blood in violation of a license restriction.[1] The circuit court refused appellant's request to merge these two offenses and sentenced appellant to three years in prison for the former offense and a consecutive sixty days in prison for the latter. Appellant's sole contention on appeal is that the court erred in failing to merge these convictions for sentencing purposes pursuant to either the rule of lenity or principles of fundamental fairness.[2] Finding no error in the court's sentencing determination, we affirm.

Around 1:00 A.M. on November 16, 2014, Corporal David Witt observed a pick-up truck leave Union Jack's British Pub in Annapolis.[3] Corporal Witt testified that in turning right onto West Street, the vehicle straddled lane lines. In turning right onto Solomons Island Road, the truck, again, straddled lane lines. Corporal Witt followed the truck for approximately two miles and testified that it weaved erratically across the road – crossing lane divisions ten times – and the driver did not maintain a constant rate of

[1] At trial, the parties stipulated that appellant had a restriction on his license prohibiting him from driving with alcohol in his system.

[2] Appellant concedes that the Court of Appeals has held that DUI and the license restriction are different offenses under the required evidence test. *See In re Michael W.*, 367 Md. 181, 186-88 (2001).

[3] All law enforcement personnel in this case are members of the Anne Arundel County Police Department.

speed, driving seven to ten miles per hour below the speed limit. Corporal Witt initiated a traffic stop on Solomons Island Road close to the South River Bridge.

When Corporal Witt approached the driver's window, he detected the odor of alcohol mixed with a "fresh piece" of mint gum. He identified appellant as the driver and observed two other passengers. Corporal Witt asked for appellant's license and registration, and he noticed that appellant's eyes were "glassy" and bloodshot. Additionally, appellant's speech was slow and slurred. Corporal Witt asked appellant to step out of the vehicle, and appellant responded, "I'm not going to do anything you guys ask me to do." Eventually, appellant exited the vehicle, slowly, using the door for support. Corporal Witt testified that appellant then walked to the rear of the truck, swaying and "concentrating intently" on walking. Appellant refused to perform any field sobriety tests and later refused a breathalyzer. Police arrested appellant for DUI. Corporal Eric Trumbauer corroborated Corporal Witt's testimony and testified that he, too, detected a "strong odor" of alcohol on appellant's breath. Both officers opined that appellant was under the influence of alcohol.

This Court has observed that there are three grounds for the merger of sentences: "'(1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness.'" *Johnson v. State*, 228 Md. App. 27, 46 (quoting *Carroll v. State*, 428 Md. 679, 694 (2012)), *cert. denied*, 450 Md. 120 (2016). As noted above, appellant concedes that the required evidence test does not support merger in this case. *See Michael W.*, 367 Md. at 186-88.

Pursuant to the rule of lenity, "'courts occasionally find as a matter of statutory interpretation that the Legislature did not intend, under the circumstances involved, that a person could be convicted of two particular offenses growing out of the same act or transaction.'" *Wiredu v. State*, 222 Md. App. 212, 219 (2015) (quoting *Brooks v. State*, 284 Md. 416, 423 (1979)). This Court has observed that when two crimes arise out of the same act,

> "[i]t is purely a question of reading legislative intent. If the Legislature intended two crimes arising out of a single act to be punished separately, we defer to that legislated choice. If the Legislature intended but a single punishment, we defer to that legislated choice. If we are uncertain as to what the Legislature intended, we turn to the so-called 'Rule of Lenity,' by which we give the defendant the benefit of the doubt."

Id. at 219-20 (quoting *Walker v. State*, 53 Md. App. 171, 201 (1982)). In undertaking this analysis, we ask whether the offenses arose out of the same conduct, and, if so, whether the Legislature has "expressed an intention to impose multiple punishments." *Id.* at 220. Notably, there is no "'rigid or fixed criteria' in applying the rule of lenity[,]" and "we do not create an ambiguity where none exists." *Latray v. State*, 221 Md. App. 544, 556 (2015) (quoting *White v. State*, 318 Md. 740, 745 (1990)).

In this case, appellant contends that the rule of lenity applies to merge his sentences for DUI and driving a vehicle with alcohol in the blood in violation of a license restriction because the Legislature failed to include an anti-merger provision, indicating either that the offenses should merge or that the question of merger is ambiguous. Furthermore, appellant maintains that nothing in the legislative history of the restriction statute indicates that the Legislature intended a separate punishment.

We are not persuaded that the rule of lenity mandates merger of these offenses. As to the absence of an anti-merger provision, this Court has observed: "The absence of an anti-merger provision indicates that the Legislature did not address explicitly the topic of merger in the statutory scheme, **but nothing more may be inferred from it.**" *Id.* at 557 (emphasis added). Moreover, the two offenses are in different sections of the Transportation Article. *See Potts v. State*, 231 Md. App. 398, 412-13 (2016) (noting that the "enactment of [possession of ammunition] as a separate statutory provision [from possession of a firearm] reveal[s] an intent on the part of the Legislature to punish [the offenses] separately"). Maryland Code (1977, 2012 Repl. Vol.), Transportation Article ("Trans."), § 16-113(j) provides that an "individual may not drive or attempt to drive a motor vehicle with alcohol in the individual's blood in violation of a restriction." Trans. § 21-902(a)(1), meanwhile, provides: "A person may not drive or attempt to drive any vehicle while under the influence of alcohol." Furthermore, the Legislature provided different punishments for violations of these statutes. *See Latray*, 221 Md. App. at 556-57 (holding that making a false statement and aggravated robbery do not merge under the rule of lenity because the Legislature proscribed different punishments). Trans. § 27-101(c)(10) permits a fine not exceeding $500 or a prison sentence not exceeding two months or both for violation of Trans. § 16-113(j), whereas Trans. § 27-101(k)(1) provides an escalating series of sentences for DUI.[4] Nothing from the language of the

[4] A first DUI is punishable by a fine not exceeding $1,000, or a prison sentence not exceeding one year, or both; a second DUI is punishable by a fine not exceeding $2,000, or a prison sentence not exceeding two years, or both; and a third DUI is (continued)

statutes indicates that the Legislature intended the offenses to merge, and we do not perceive an ambiguity in the language of the statutes.

Appellant also contends that the offenses should merge under the principle of fundamental fairness. This Court has observed that "[f]airness depends on the circumstances surrounding the convictions, not solely the elements of the crimes." *Latray*, 221 Md. App. at 558. "Merger by virtue of the fundamental fairness test . . . is heavily and intensely fact-driven." *Pair v. State*, 202 Md. App. 617, 645 (2011). This Court has held, however, that fundamental fairness "by itself, rarely is successful in the context of merger." *Latray*, 221 Md. App. at 558. Indeed, our research has revealed only two cases in which fundamental fairness applied to merge two sentences. *Id.* at 558-64. Although DUI and the restriction conviction arose out of the same act of driving, we are not persuaded that it is fundamentally unfair to separately sanction appellant for violating two separate sections of the Transportation Article. We, therefore, find no reason to expand the doctrine of fundamental fairness to this case.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

(continued)
punishable by a fine not exceeding $3,000, or a prison sentence not exceeding three years, or both. Trans. § 27-101(k)(1).