

Circuit Court for Baltimore City
Case Nos. 202036002 &
202036003

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2075

September Term, 2016

JAMES BROWN

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: January 2, 2018

*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.

On September 12, 2002, a jury in the Circuit Court for Baltimore City convicted James Brown, appellant, of robbery with a dangerous weapon, two counts of first-degree assault, two counts of second-degree assault, first-degree burglary, third-degree burglary, and malicious destruction of property. The court subsequently sentenced appellant to twenty years in prison, with all but fifteen years suspended, for first-degree burglary, a consecutive twenty years for robbery, all suspended, and a consecutive ten years for first-degree assault, all suspended, to be followed by a five-year period of probation upon his release from incarceration. The remaining convictions merged. In an unreported opinion, this Court reversed appellant's convictions and sentence for first-degree assault and remanded for re-sentencing, but otherwise affirmed. *See Brown v. State*, No. 2082, Sept. Term 2002 (filed Jan. 13, 2004). Upon remand, on March 22, 2004, the circuit court imposed the same sentence for first-degree burglary and robbery with a dangerous weapon.

On August 27, 2013, Brown appeared before the circuit court for a violation of probation proceeding. Brown waived his right to a hearing and admitted the violation. The court revoked his probation and ordered the execution of the suspended five years of his sentence for burglary and a consecutive fifteen years of his previously suspended sentence for robbery, all to be served consecutive to any sentence appellant was then currently serving.¹

¹ From the briefs and record, it appears that appellant was sentenced on January 10, 2013, to twenty years in prison as the result of a proceeding in the Circuit Court for Worcester County, consecutive to any other sentence appellant was then serving.

On June 6, 2016, appellant filed a motion to correct an illegal sentence. He argued that his sentence was illegal for any or all of three reasons: 1) that his conviction for robbery with a dangerous weapon should merge with the conviction for first-degree burglary; 2) that there was an error with the calculation of his sentences and time served; and 3) that there was an error on his commitment record as to the beginning of his probation period. On October 13, 2016, the court denied this motion, and appellant noted this appeal. For the reasons stated below, we affirm.

The Court of Appeals has observed that whether a sentence is illegal is a question of law which we review *de novo*. *State v. Crawley*, 455 Md. 52, 66 (2017). An illegal sentence is “one in which the illegality ‘inheres in the sentence itself; *i.e.*, there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful.’” *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)).

Prior to any consideration of the merits of appellant’s case, the State urges us to dismiss the appeal due to appellant’s failure to provide relevant transcripts – specifically of the 2002 trial and/or any subsequent hearings. From a review of the docket entries, it does not appear that the court held a hearing on appellant’s motion to correct an illegal sentence. In any event, the inclusion of the trial transcripts is not necessary to a decision on the merits of appellant’s case. *See McAllister v. McAllister*, 218 Md. App. 386, 399 (2014) (observing that the “‘preferred alternative’ is always ‘to reach a decision on the

merits of the case” (quoting *Joseph v. Bozzuto Mgmt. Co.*, 173 Md. App. 305, 348 (2007))).

Turning to the merits, appellant first contends that his sentence is illegal because his convictions for robbery with a dangerous weapon and first-degree burglary should merge. The circuit court concluded that the offenses do not merge pursuant to the required evidence test. Appellant does not challenge this determination on appeal. Rather, he contends that the offenses merge pursuant to the rule of lenity and/or the principles of fundamental fairness.

Pursuant to the rule of lenity, “a court confronted with an otherwise unresolvable ambiguity in a criminal statute that allows for two possible interpretations of the statute will opt for the construction that favors the defendant.” *Bellard v. State*, 452 Md. 467, 502 (2017) (quoting *Oglesby v. State*, 441 Md. 673, 681 (2015)). Stated another way, “[i]f the intent of the legislature to impose separate punishments for multiple convictions arising out of the same conduct or transaction is unclear, then the rule of lenity generally precludes the imposition of separate sentences.” *Paige v. State*, 222 Md. App. 190, 207 (2015). The rule of lenity, however, only applies when at least one of the offenses is a statutory crime. *See Potts v. State*, 231 Md. App. 398, 413 (2016). Because both robbery with a dangerous weapon and first-degree burglary are common law crimes, the rule of lenity is inapplicable. *See Miller v. State*, 185 Md. App. 293, 314-15 (2009) (burglary); *Fetrow v. State*, 156 Md. App. 675, 687 (2004) (robbery).

This Court has observed that merger pursuant to the principles of fundamental fairness “is a defense that, by itself, rarely is successful in the context of merger.” *Latray*

v. State, 221 Md. App. 544, 558 (2015). Moreover, this Court has noted that the issue of merger pursuant to principles of fundamental fairness is not entitled to the same “procedural dispensation of Rule 4-345(a)” as other arguments for merger. *Pair v. State*, 202 Md. App. 617, 649 (2011). Therefore, we decline to review this issue.

Appellant next contends that the sentence is illegal because of an error in the calculation of the sentences. Specifically, appellant seems to argue that when he was released from incarceration on January 8, 2010, he continued to serve the fifteen year sentence imposed in 2004. Thus, when he was convicted of a different burglary in January 2013, he maintains that he was still serving the fifteen year sentence from the previous conviction. Appellant believes that his January 2013 sentence did not begin to run until November 2016, meaning that his violation of probation sentence will not begin to run until 2032.²

Appellant’s argument is not cognizable in a motion to correct an illegal sentence because if there is an error, it does not inhere in the sentence, itself. *See* Rule 4-351(b) (governing errors in commitment records); *Alston v. State*, 425 Md. 326, 339 (2012) (noting requirement for a motion to correct an illegal sentence that the illegality must inhere in the sentence, itself).

Finally, appellant argues that his sentence is ambiguous because he alleges that his original commitment record led him to believe that his probation would begin after his parole, but in the commitment record – which appellant maintains he did not receive –

² Appellant includes a chart in his appendix which graphically represents his argument.

written after his 2004 resentencing, the court indicated that appellant’s probation would begin upon his release from incarceration. Accordingly, appellant argues that the court did not comply with Rule 4-346(a), and he was unaware that he was on probation when he was released and subsequently violated that probation.³

Again, appellant’s argument is not cognizable on a Rule 4-345(a) motion. Moreover, a review of the commitment records demonstrates that appellant was on notice that his probation would begin upon his release from incarceration.

**APPELLEE’S MOTION TO DISMISS
DENIED.**

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

³ This rule provides: “When placing a defendant on probation, the court shall advise the defendant of the conditions and duration of probation and the possible consequences of a violation of any of the conditions. The court also shall file and furnish to the defendant a written order stating the conditions and duration of probation.”