

Circuit Court for Montgomery County
Case No. 111369C

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2078

September Term, 2017

SEBASTIAN HERNANDEZ

v.

STATE OF MARYLAND

Fader, C.J.,
Leahy,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 31, 2018

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

In 2008, Sebastian Hernandez, the appellant, fired a handgun at two men – Jose Arnold Palacios and Arnold Ondongo – hitting Palacios, but not Ondongo. A jury sitting in the Circuit Court for Montgomery County convicted him of three offenses relative to Palacios – one count of attempted second-degree murder (Count I); one count of first-degree assault (Count II); and one count of use of a handgun in the commission of a crime of violence (Count III) (hereinafter “use of a handgun”) – and two offenses relative to Ondongo – one count of first-degree assault (Count IV) and one count of use of a handgun (Count V). Count II merged with Count I for sentencing purposes. The court sentenced the appellant as follows: 10 years for attempted second-degree murder of Palacios (Count I); 5 years consecutive to Count I for use of handgun against Palacios (Count III); 5 years consecutive to Count III for first-degree assault against Ondongo (Count IV); and 5 years concurrent with Count IV for use of a handgun against Ondongo (Count V), for a total aggregate sentence of 20 years. The appellant’s convictions were affirmed by this Court on direct appeal. *See Hernandez v. State*, Sept. Term 2009, No. 1256 (filed Aug. 26, 2010).

In 2017, the appellant filed a motion to correct illegal sentence arguing that his sentence on Count V for use of a handgun is illegal under Md. Code (2002, 2012 Repl. Vol.), § 4-204(c)(2) of the Criminal Law Article because it was required to be run consecutively to the underlying crime of violence. He argued that the sentence was illegal, but that “an increase in sentence” was not permissible “pursuant to double

jeopardy, and Md. common law principles.”¹ He asked the court to “correct” the sentence. The court summarily denied his motion. He appeals that denial.

As pertinent, § 4-204(c) of the statute governing the crime of use of a handgun provides:

(c)(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.

(2) For each subsequent violation, the sentence shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony.

(Emphasis added.) As the State agrees, the appellant’s conviction under Count V was a “subsequent” use of a handgun conviction and his sentence for that count should have been run consecutive to the sentence for Count IV.² Because the only remedy for that illegality would be to vacate the sentence on that count and remand for the circuit court to impose a consecutive sentence, which does not appear to be the relief the appellant was

¹ The appellant is mistaken. See *Hoile v. State*, 404 Md. 591 (2008) (“The correction of an illegal sentence may result in an increase over the erroneous sentence previously imposed on the defendant.”).

² The circuit court had discretion to impose a sentence for the first use of a handgun count (Count III) to run consecutive to or concurrent with the underlying conviction for the crime of violence (Count I). See *Garner v. State*, 442 Md. 226, 253 (2015).

seeking, the circuit court did not err by summarily denying his motion to correct an illegal sentence.

**ORDER OF THE CIRCUIT COURT FOR
MONTGOMERY COUNTY DENYING
MOTION TO CORRECT ILLEGAL
SENTENCE AFFIRMED. COSTS TO BE
PAID BY THE APPELLANT.**