UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2137

September Term, 2014

CHRISTOPHER MUSCELLI

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 17, 2015

*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.

The Circuit Court for Baltimore City denied a motion to correct illegal sentence filed by Christopher Muscelli, the appellant. He contends that the court erred. We disagree.

In March of 2011, the appellant was convicted by a jury of two counts of attempted voluntary manslaughter, two counts of use of a handgun in the commission of a crime of violence, one count of illegal possession of a regulated firearm, and one count of discharging a firearm. The convictions arose from a road-rage incident in which the appellant fired a handgun into a car occupied by two people. The court sentenced him to two terms of 10 years' imprisonment for the attempted voluntary manslaughter convictions, to be served concurrently; two terms of 10 years' imprisonment for use of a handgun in the commission of a crime of violence convictions, to be served concurrently with each other but consecutive to the sentences for attempted voluntary manslaughter; and a term of 5 years' imprisonment for the illegal possession of a regulated firearm conviction, to be served concurrently with the sentences for attempted voluntary manslaughter. The court did not impose a sentence for discharging a firearm.

In October of 2014, the appellant filed a motion to correct an illegal sentence, arguing that the "court['s] failure to merge the . . . attempted voluntary manslaughter [convictions] with the . . . use of a handgun in the commission of a . . . crime of violence [convictions] for the purpose of sentencing constitutes an illegal sentence." (Capitalization omitted.) By order of October 17, 2014, the court denied the motion.

On appeal, the appellant contends the court erred in denying the motion because, "[u]nder the required evidence test[,] the offense[s] of use of a handgun in the commission

of a . . . crime of violence and . . . attempted voluntary manslaughter constitute[] the same offense for double jeopardy purposes." The State counters that the appellant's "claim fails because the statute prohibiting use of a handgun in a . . . crime of violence contains an express anti-merger provision." Specifically, under Maryland Code (2002, 2010 Supp.), section 4-204(b)(1)(i) of the Criminal Law Article ("CL"), 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" (emphasis added), *later recodified as* CL § 4-204(c)(1)(i).

In *Whack v. State*, 288 Md. 137 (1980), the Court of Appeals explained that "under certain circumstances, multiple punishment . . . for offenses deemed the same under the required evidence test does not violate the Fifth Amendment prohibition against double jeopardy." *Id.* at 149 (internal citation, quotations, and brackets omitted). "The legislature may indicate an express intent to punish certain conduct more severely if particular aggravating circumstances are present by imposing punishment under two separate statutory offenses which otherwise would be deemed the same under the required evidence test." *Id.* (internal citation, quotations, and brackets omitted). For example,

> [t]he Legislature's concern about the use of a weapon to intimidate a robbery victim, and its additional concern when that weapon is a handgun, is certainly not unreasonable. When it expressly shows an intent to punish, under two separate statutory provisions, conduct involving those aggravating factors, the Fifth Amendment's double jeopardy prohibition has not heretofore been regarded as a bar.

Id. at 150.

That is the situation here. By enacting what is now CL section 4-204(c)(1)(i), the legislature expressly directed that the sentence imposed for using a handgun in the commission of a crime of violence or felony shall be separate from the sentence imposed for the crime of violence or felony. Accordingly, the appellant's convictions were not required to be merged for sentencing, assuming they satisfied the required evidence test, and indeed separate sentences were mandated by law. The appellant's sentences were not illegal.[1]

In his reply brief, appellant argues that *Whack* "was erroneously decided." We disagree, and even if we did not, we are bound by Court of Appeals precedent. *Marlin v. State*, 192 Md. App. 134, 151 (2010).

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

[1] The appellant's reliance on *State v. Ferrell*, 313 Md. 291 (1988), is misplaced, because that case involved two successive trials, not one trial.