Circuit Court for Cecil County
Case No. C-07-CR-19-000812

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2391

September Term, 2019

KEITH ALEXANDER WILSON

v.

STATE OF MARYLAND

Reed,
Friedman,
Alpert, Paul S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: July 8, 2021

Under Maryland Code (2002, 2012 Repl. Vol), § 9-405(a)(2) of the Criminal Law Article prohibiting second degree escape, "[a] person may not knowingly fail to obey a court order to report to a place of confinement." After Keith Alexander Wilson, ("Appellant"), failed to report as ordered to begin serving a sentence for a firearm conviction, a jury in the Circuit Court for Cecil County convicted him of second-degree escape. In this appeal, Appellant presents one question for appellate review:

I. Did the circuit court err in denying Appellant's Motion to Dismiss based on double jeopardy?

Because we conclude that Appellant's escape conviction and sentence did not constitute an impermissible second prosecution or punishment based on the same conduct for which he was convicted and punished in the firearm case; we shall affirm this escape judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal involves two separate cases in the Circuit Court for Cecil County. In Case No. C-07-CR-18-1394, Appellant entered a guilty plea to one count of violating Md. Code (2003, Repl. Vol 2018), § 5-133(b) of the Public Safety Article, prohibiting possession of a regulated firearm by certain persons. He was sentenced to three years, with all but ten days suspended, plus four years of supervised probation. As Appellant's commitment record stated, he was permitted to serve that sentence at the Cecil County Detention Center ("CCDC") in nonconsecutive 48 hour periods, *i.e.*, on weekends pursuant

to an authorized work release program, beginning at noon on Wednesday, May 15, 2019.[1] The commitment record included an attachment stating that if Appellant "fail[ed] to report on time . . . the sentence is to **IMMEDIATELY** convert to straight time with no work release." (Emphasis in original.)

Because Appellant failed to report as ordered to begin serving his firearm sentence, a bench warrant was issued. On May 23, 2019, Appellant appeared with counsel via two-way video before a Cecil County judge, as follows:

> THE COURT: Can we do Keith Wilson next?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> [PROSECUTOR]: The State is not in on that case, Your Honor.
>
> THE COURT: He's not yours either?
>
> [PROSECUTOR]: No, sir.
>
> (Pause.)
>
> [DEFENSE COUNSEL]: This is Mr. Wilson, Your Honor.
>
> (Defendant enters the video.)
>
> THE COURT: Mr. Wilson, you're here on this case, C-07-CR-19-1812, [2] because you received a sentence in that case and you failed to report to the

[1] Under Md. Code (1999, Repl. Vol. 2017), § 11-801(a) of the Correctional Services Article, a "weekend inmate" is "an inmate sentenced to a local correctional facility for nonconsecutive periods of 48 hours or less per week."

[2] In contrast to the State, we do not read the hearing court's reference to the number of the escape case as apparently inadvertent error, but we do agree that the court's comments about Appellant's sentence related solely to his ten-day sentence in the firearms case. As we understand these remarks, made during a hearing in the firearms case, the court merely referred to the docket number in the escape case in order to acknowledge why Appellant "was here" – meaning incarcerated, rather than being on work release. The court

> detention center to serve that sentence. So that sentence will be imposed. Ten days in Cecil County Detention Center, credit for any time that you have in.
>
> [DEFENSE COUNSEL]: Did you have something you wanted to say?
>
> THE DEFENDANT: Yes. Yes, sir. When I left the courthouse, I think it was May 18th, I went straight to the probation officer, and the probation officer told me that I had to report back to them the next day. And I was unaware that I didn't – I was unaware that I had to show up that Wednesday, so –
>
> THE COURT: Well, that's okay. You'll get a ten-day sentence so you'll just serve the ten days. That's all. All right.

On May 24, 2019, the State charged Appellant, alleging that he violated Crim. § 9-405(a)(2), by "knowingly fail[ing] to obey a court order to report to a place of confinement."

On the morning of the scheduled trial date, defense counsel orally moved to dismiss the escape charge on double jeopardy grounds. In support, he argued that the "practical effect" of the May 23 hearing, which was identified as a "will-call hearing," was that the court had held Appellant "in contempt for failure to turn himself in at the time and imposed an arguably harsher sentence of straight time as opposed to weekends." Defense counsel contended that second-degree escape and contempt have the same elements under the required evidence test established by *Blockburger v. United States*, 284 U.S. 299 (1932), so that Appellant had already "been punished for the same offense earlier."

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then proceeded to explain that, regardless of whether Appellant's failure to report for confinement as ordered was inadvertent rather than knowing, he would serve the ten days on his firearm sentence consecutively, rather than nonconsecutively.

The prosecutor disagreed, arguing that the 10-day sentence merely had been converted from a sentence to be served nonconsecutively on weekends, to the same number of days to be served consecutively. Double jeopardy was not implicated, the State contended, because Appellant was being separately punished for the firearm offense and for the second-degree escape.

The court rejected Appellant's "pretty novel" double jeopardy argument. Concluding that Appellant had neither been charged with contempt, nor found in contempt, the court explained that he had not "been placed in jeopardy at all for the second-degree escape charge[.]"

A jury trial on the escape charge ensued. The State presented documentary evidence that Appellant was instructed to report to the Cecil County Detention Center by noon on May 15, 2019, to begin serving the sentence on his firearm conviction, but that he failed to report as ordered. Apparently rejecting Appellant's claim that after reporting to a probation officer on the firearm offense, he became confused about reporting for his weekend confinement, the jury convicted him of second degree escape, for which he was sentenced to 90 days.

STANDARD OF REVIEW

We review the challenged order denying Appellant's pretrial motion to dismiss under Md. Rule 8-131(c), which provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witness.

Whether double jeopardy principles bar prosecution of the charges at issue here is a question of law that we review *de novo*, granting "no deference to the [circuit] court's resolution of the matter." *Scriber v. State*, 437 Md. 399, 407 (2014).

DISCUSSION

A. Parties' Contentions

Appellant contends that he "was punished twice for the same conduct: his failure to report to the Detention Center on May 15, 2019." In his view, "[b]oth the sentence modification in Case No CR-19-0001394 and the prosecution for escape in Case No. CR-19-812 relied upon the same elements" in that Appellant "knowingly fail[ed] to obey a court order to report to a place of confinement." Appellant contends that "under the required evidence test, the sentence modification . . . and the prosecution for escape . . . constituted the same offense." According to Appellant, the court could impose either a "heightened sentence" in the firearm case or "a conviction and sentence for escape," but "double jeopardy barred imposing both." Alternatively, "because the modified sentence was functionally a punishment for contempt, the substantive escape prosecution was barred on double jeopardy grounds."

The State counters that "the trial court properly rejected [Appellant]'s claim that he would be placed in double jeopardy if he was convicted and sentenced for second-degree escape." Arguing that "[Appellant] was charged with and convicted of only one offense for failing to report[,]" *i.e.*, "second-degree escape, for which he received a 90-day sentence[,]" the State maintains that Appellant's attempt to conduct a required evidence analysis based on a claim of former jeopardy "founders on the fact that he was not

sentenced to 10 days of straight time in the firearms case based on any new charge or conviction, including criminal contempt." Nor was "an 'enhanced' sentence . . . imposed in the firearms case after Appellant failed to report to the CCDC" because his original sentence was ten days, to be served on weekends subject to the express condition that he would have to serve those days consecutively if he "fail[ed] to report on time."

B. Analysis

Double Jeopardy Principles

The Court of Appeals recently summarized double jeopardy principles and precedent pertinent to this appeal, as follows:

> The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides that no individual shall be tried or punished more than once for the same offense. *See* U.S. CONST., AMEND. V. Double jeopardy rights "protect[ ] against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." Additionally, "[t]he Supreme Court has held that states may impose cumulative punishment if it is clearly the intent of the legislature to do so." The Supreme Court has also indicated that the protection against multiple punishments derived from the Double Jeopardy Clause "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."
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> Merger is the common law principle that derives from the protections afforded by the Double Jeopardy Clause. It is the mechanism used to "protect[ ] a convicted defendant from multiple punishments for the same offense." This Court has required merger "when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Id*. Both elements must be satisfied before merger is required.

State v. Frazier, 469 Md. 627, 640-41 (2020) (citations omitted).

As this Court has explained,

> [t]he standard outlined by the Supreme Court in deciding whether two offenses are deemed to be one in the same for double jeopardy purposes is the *Blockburger* test. *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). The "required evidence test," the name by which the rule was originally known, as explained in *Blockburger*, stands as follows:
>
> > The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.
>
> *Blockburger*, 284 U.S. at 304, 52 S. Ct. 180.
>
> Maryland law has also expounded on the required evidence test, with a focus on the elements of the offenses. In *Thomas v. State*, the Court of Appeals elaborated:
>
> > 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, the offenses are not the same for double jeopardy purposes even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes.
>
> *Thomas v. State*, 277 Md. 257, 267 (1976); *see also Newton*, 280 Md. at 268; *Nightingale v. State*, 312 Md. 699, 703 (1988). Therefore, if offenses are required to merge according to the required evidence test, then a defendant cannot be penalized under separate sentences. *See McGrath v. State*, 356 Md. 20, 24 (1999).

Clark v. State, 246 Md. App. 123, 131-32, *cert. granted on other grounds*, 470 Md. 205 (2020).

Appellant's Double Jeopardy Claim

We agree with the circuit court that Appellant was neither prosecuted nor punished twice for the same act. To the contrary, the record we have detailed above establishes that

Appellant was convicted and sentenced to ten days for illegally possessing a regulated firearm, then convicted and sentenced to 90 days for the later offense of failing to report for confinement. Consequently, Appellant's prior conviction and sentence for the firearm offense did not constitute prosecution or punishment for Appellant's subsequent failure to report for confinement on May 15, 2019.

We are not persuaded by Appellant's contention that the conversion of his firearm sentence – from nonconsecutive days, to consecutive days – constituted a sentencing enhancement or revision. Both before and after he failed to report for confinement, Appellant's sentence for illegally possessing a firearm was the same – 10 days executed time. Although the interval during which Appellant served those ten days changed, it did so in accordance with the original terms of the sentence stating that if Appellant did not timely report for weekend confinement, his weekend sentence would "**IMMEDIATELY** convert to straight time with no work release."

We recognize that the revised commitment record characterized this change as a "Sentencing Modification" that "supersedes [the] commitment issued on: 05/14/2019." Yet the court itself did not modify, enhance, or otherwise alter Appellant's sentence. As discussed, the court expressly anticipated and provided for this immediate conversion from weekend confinement to straight time in the event that Appellant failed to report as ordered to serve his firearm sentence. The revised commitment record reflecting that conversion does not amount to either a sentencing enhancement or a sentencing modification because it is merely an administrative record created by the court clerk, not an order issued by the court. *See* Md. Rule 4-351(a). *Cf. Scott v. State*, 379 Md. 170, 190-91 (2004) ("When

Judge Byrnes corrected Scott's commitment records, however, Rule 4-345 [governing hearings on sentence modification] did not apply; rather, Rule 4-351(a), regarding commitment records, governed his actions.").

Nor did the change from "weekend time" to "straight time" amount to being held in direct criminal contempt for failing to report for confinement. As the State points out, none of the many substantive and procedural requirements for criminal contempt was satisfied in these circumstances.[3] Instead, the State charged Appellant's failure to report as the statutory crime of second-degree escape. *See* Crim. § 9-405(a)(2).

[3] Md. Rule 15-203 establishes the following requirements for a finding of criminal contempt:

> (a) **Summary Imposition of Sanctions.** The court against which a direct . . . criminal contempt has been committed may impose sanctions on the person who committed it summarily if (1) the presiding judge has personally seen, heard, or otherwise directly perceived the conduct constituting the contempt and has personal knowledge of the identity of the person committing it, and (2) the contempt has interrupted the order of the court and interfered with the dignified conduct of the court's business. The court shall afford the alleged contemnor an opportunity, consistent with the circumstances then existing, to present exculpatory or mitigating information. If the court summarily finds and announces on the record that direct contempt has been committed, the court may defer imposition of sanctions until the conclusion of the proceeding during which the contempt was committed.
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> **(b) Order of Contempt.** Either before sanctions are imposed, or promptly thereafter, the court shall issue a written order stating that a direct contempt has been committed and specifying:
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> (1) whether the contempt is civil or criminal,

CONCLUSION

Because Appellant committed two different illegal acts at two different times, by illegally possessing a firearm in 2018, and then failing to report for confinement in 2019, he has not been prosecuted or punished twice for the same act. For that reason, the circuit court did not err in denying Appellant's motion to dismiss this case on double jeopardy grounds.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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(2) the evidentiary facts known to the court from the judge's own personal knowledge as to the conduct constituting the contempt, and as to any relevant evidentiary facts not so known, the basis of the court's findings,

(3) the sanction imposed for the contempt, . . . [and]

(5) in the case of criminal contempt, (A) if the sanction is incarceration, a determinate term, and (B) any condition under which the sanction may be suspended, modified, revoked, or terminated.

(c) Affidavits. In a summary proceeding, affidavits may be offered for the record by the contemnor before or after sanctions have been imposed.

(d) Record. The record in cases of direct contempt in which sanctions have been summarily imposed shall consist of (1) the order of contempt; (2) if the proceeding during which the contempt occurred was recorded, a transcript of that part of the proceeding; and (3) any affidavits offered or evidence admitted in the proceeding.