UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2629

September Term, 2013

CHAUNCEY A. HILL

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 7, 2015

On October 4, 2007, a jury in the Circuit Court for Anne Arundel County convicted Chauncey Antonio Hill, the appellant, of child abuse, second-degree rape, and third-degree sexual offense.[1] The offenses were committed between 1981 and 1986. The victim was Hill's minor step-daughter.

On December 6, 2007, the court sentenced Hill to 15 years for child abuse, a consecutive ten years for second-degree rape, and a consecutive five years for third-degree sexual offense.

On January 15, 2014, Hill filed a motion to correct illegal sentence, challenging his sentences for second-degree rape and third-degree sexual offense. The State filed an opposition. On February 6, 2014, the court entered an order denying Hill's motion. Hill filed a timely notice of appeal.

We condense and rephrase Hill's issues into a single question: Did the circuit court err in denying Hill's motion to correct illegal sentence?[2] For the reasons stated below, we

[1]The jury acquitted Hill of unnatural and perverted sexual practice.

[2]Hill's questions presented verbatim are:

> 1. Does Mr. Hill's conviction for Third Degree Sex Offence and Second Degree Rape merge into his conviction for Child Abuse, making his sentence for Third Degree Sex Offense and Second Degree Rape illegal, should the rule of lenity apply?
> 2. Assuming, arguendo, that the Lower Court properly concluded that the Third Degree Sex Offense and the Second Degree Rape convictions do not merge into the Child Abuse convictions because of Article 27 35C (b)(3) Criminal Law Article 27 35C (b)(3) 3-601 (d) that was not establish in Defendant's time period and cause an Ex Post Facto violation. Did the Lower Court nonetheless erred by imposing (3) separate sentence consecutive?

answer that question in the affirmative and shall reverse the order of the circuit court.

We shall include additional facts as necessary to our discussion.

DISCUSSION

Hill contends the circuit court erred by imposing sentences for second-degree rape and third-degree sexual offense, because, under *Nightingale v. State*, 312 Md. 699 (1988), those convictions merged into the child abuse conviction for purposes of sentencing.

The State responds that the court did not err in imposing separate sentences for the three convictions because, in 1990, the legislature "disavowed the Court's *Nightingale* ruling" and expressly authorized trial courts "to separately punish child abuse," in addition to the punishment for the "underlying offenses." *See* Md. Code (1957, 1987 Repl. Vol, 1990 Cum. Supp.), Art. 27 § 35A(b)(2).[3] The State argues that, even though the offenses were committed before 1990, Hill's separate sentences are legal. The State concedes "that its argument . . . is contrary to" this Court's recent opinion in *Twigg v. State*, 219 Md. App. 259 (2014), *cert. granted on other grounds*, 441 Md. 217 (2015), but "maintains . . . that [its]

[3]Subsection (b)(2) was added to section 35A in 1990. It reads:

> The sentence imposed under this section may be imposed separate from and consecutive to or concurrent with a sentence for any offense based upon the act or acts establishing the abuse.

Today, the substance of section 35A ("Causing abuse to child") is codified in Md. Code (2002, 2012 Repl. Vol.) section 3-601 of the Criminal Law Article ("CL") ("Child abuse"), and CL section 3-602 ("Sexual abuse of a minor"). Both sections permit a circuit court to sentence a defendant for any underlying offenses constituting the abuse.

argument . . . is the proper analysis with respect to the separate sentences imposed in Appellant's case."

In *Twigg*, in 2011, a jury convicted the defendant of second-degree rape, third-degree sexual offense, incest, and child abuse. The crimes were committed between 1974 and 1979. For the first three convictions, the court imposed consecutive sentences totaling 40 years. It imposed a 15-year suspended sentence for the child abuse conviction. Twigg noted an appeal.

On appeal, Twigg argued that, for sentencing purposes, his convictions for second-degree rape, third-degree sexual offense, and incest all merged into his conviction for child abuse.

We first held that, under *Nightingale,* "if a child abuse conviction is based solely on underlying sex offenses, the underlying offenses will merge into child abuse for sentencing purposes." 219 Md. App. at 272. We then held "that the 1990 Amendment to the child abuse statute" does not apply retroactively and, for offenses committed before the Amendment, "does not override the teachings of *Nightingale* . . . ." *Id.* at 278-79. We remanded the case for re-sentencing on the child abuse conviction. The Court of Appeals granted *certiorari* on issues solely related to re-sentencing.

In the case at bar, the jurors were instructed that in order to convict Hill of child abuse, they must find that he "sexually molested or exploited [the victim] by committing acts such as a second degree rape . . . or a third degree sex offense." Hill's child abuse conviction

clearly was based on the sexual offenses he committed.[4] Moreover, under *Nightingale*, even if "we cannot tell whether . . . verdicts of guilty were based on the use of sexual offenses as lesser included offenses (or elements) of child abuse, or whether [they] were based on other reasons[,] . . . we resolve the ambiguity in favor of the defendants and set aside the judgments on the sexual offense counts." 312 Md. at 708.

Accordingly, as in *Twigg*, in this case Hill's convictions for second-degree rape and third-degree sexual offense should have merged into his conviction for child abuse, for sentencing. We shall vacate the sentences for those two convictions.[5]

ORDER OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. SENTENCES FOR SECOND-DEGREE RAPE AND THIRD-DEGREE SEX OFFENSE VACATED. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.

[4]The State's theory of the case was sexual child abuse. In closing, after the prosecutor explained the elements of second-degree rape and third-degree sexual offense, she stated that for a child abuse conviction she needed to prove that Hill "sexually molested or exploited the victim by committing either second degree rape . . . or the third degree sex offense . . . ."

[5]Hill's conviction and sentence for child abuse stands. His 15-year sentence for child abuse was the statutory maximum under Md. Code (1957, 1982 Repl. Vol., 1984 Cum. Supp.), Article 27, section 35A. Unlike in *Twigg*, there is no reason to remand for re-sentencing on the child abuse conviction.