

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2776

September Term, 2013

HAVEN NAVONTE SIMMONS

v.

STATE OF MARYLAND

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: August 19, 2015

* 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.

In this case, we shall hold that the Circuit Court for Somerset County erred in denying a motion filed by Haven Navonte Simmons, appellant, seeking correction of an illegal sentence.

On August 27, 2008, at the conclusion of a jury trial in the Circuit Court for Somerset County, Simmons was convicted of armed robbery, first-degree assault, use of a handgun in the commission of a felony or violent crime, and a number of related lesser offenses arising from events that occurred on June 12, 2007. In our unreported opinion affirming the convictions, we described the incidents that gave rise to the convictions as follows:

Taking that version of the evidence most favorable to the State, the following facts were established. The appellant was one of three men who, along with a female accomplice, invaded a private residence on the morning of June 12, 2007; perpetrated armed robberies against a grandmother and her adult daughter; recklessly endangered the life of the grandson; and fled out a back door on the approach of the police. Seven uniformed officers took up the pursuit, which progressed through a wooded area directly behind the violated home, across an open field, and into another wooded area. As the chase was in progress, Corporal Robert Lambden repeatedly yelled at the fugitives, "Stop[! P]olice!" It was the appellant who had a handgun and who turned and fired a volley of as many as six shots at the pursuing officers. The officers dropped and took cover.

Haven Navonte Simmons v. State, No. 2414, September Term 2008, slip op. at 4-5 (filed July 28, 2010).

Eleven separate cases were filed in Somerset County, charging Simmons with various offenses. One of the cases (K-08-008762) was nol prossed. But the jury convicted Simmons of multiple offenses in the other ten cases. On December 1, 2008, the trial court sentenced Simmons. In the motion that is the subject of this appeal, Simmons claimed that cumulatively the sentences imposed in the ten cases subjected him to a total of 20 years' imprisonment: 15 years for Count No. 4 in Case No. K-08-008760 (armed robbery), and a consecutive 5

years without parole for Count No. 7 in that same case for use of a handgun in the commission of a felony or crime of violence. The commitment record for Case No. K-08-008760 states: “The total time to be served is 20 years, 0 months, 0 days, 0 hours, to run: X [*i.e.*, Option A. selected] A. concurrent with any other outstanding or unserved sentence and begin on 11/16/07.” (The beginning date had the effect of giving Simmons credit for time served through the date of sentencing.) Simmons does not contest the two sentences imposed in Case No. K-08-008760, but he contends that all subsequently announced sentences in the remaining nine cases were concurrent to the two sentences imposed in Case No. K-08-008760, and that he was sentenced to a total of 20 years to be served for all the convictions in all of the ten cases.

Indeed, when we review the transcript of the sentencing hearing, the commitment records and the docket entries, we conclude that Simmons is correct that one rational interpretation of those three records is that the sentences in all of the other nine cases run concurrently with the sentences imposed in Case No. K-08-008760. *See Dutton v. State*, 160 Md. App. 180, 191 (2004) (in analyzing whether there is ambiguity in a sentence, we look to three sources of information: (1) the transcript of the sentencing proceedings; (2) the docket entry; and (3) the order for commitment or probation). If analysis of those records leads us to conclude that there is ambiguity regarding the sentences that were imposed, the defendant is entitled to the benefit of the more lenient interpretation. *Robinson v. Lee*, 317 Md. 371, 379-80 (1989) (“Fundamental fairness dictates that the defendant understand clearly what debt he must pay to society for his transgressions. If there is doubt as to the

penalty, then the law directs that his punishment must be construed to favor a milder penalty over a harsher one.”).

In the present case, the transcript of the sentencing hearing reflects that the sentences were announced as follows:

So let’s begin with [Case No. K-08-008760]. The court is going to merge assault in the first degree, assault in the second degree, reckless endangerment and robbery into armed robbery because I think they do merge. The court is going to merge wear and carrying and transporting a handgun into Count 7 handgun use in a felony or a violent crime. The court is going to merge theft into burglary . . . and burglary for purposes of sentencing will merge into the armed robbery. . . . So the Defendant is going to [be] sentenced as to Count 4 and Count 7.

As to Count 4 [armed robbery] the Defendant is sentenced to serve fifteen years in the custody of the Commissioner of Correction. As to Count 7 [use of a handgun in commission of a felony or crime of violence] the Defendant is sentenced to serve five years in the custody of the Commissioner of Correction. That sentence is consecutive to the sentence imposed in Count 4.

* * *

The sentence will begin to run on November the 16th, 2007. He will be given credit for time served from that day.

And as to the handgun use, felony [or] crime of violence the sentence clearly will be consecutive. And it’s noted the Defendant is not eligible for parole.

As to the case ending 8761 [*i.e.*, Case No. K-08-008761] the court is going to merge Counts 1, 2 and 3, assault in the first degree, second degree and reckless endangerment. And Count 6 the robbery conviction into Count 7 the armed robbery. We’ll merge Count 8 into Count 7 for purposes of sentencing.

As to Count 7 [armed robbery] the Defendant is sentenced to serve fifteen years in the custody of the Commission of Correction. *That sentence is concurrent.* As to Count 5 handgun use in a felony or violent

crime the Defendant is sentenced to serve five years. *That sentence is consecutive.*

* * *

In [Case No. K-08-008763] assault in the first degree as to Trooper Jonischek the court is going to merge Counts 4 and 3 reckless endangerment and assault in the second degree into Count 2 assault in the first degree.

The sentence for assault in the first degree is fifteen years. *That sentence is concurrent. As to Count 5 handgun use in a felony or crime of violence that sentence is five years. That sentence is consecutive.*

[Case No. K-08-008764] the assault on Trooper Salvas the court is going to merge Counts 4 and 3 reckless endangerment and assault in the second degree into Count 2 assault in the first degree.

The sentence for assault in the first degree is *fifteen years concurrent. As to Count 5 handgun use in a felony or crime of violence that sentence is five years consecutive.*

As to [Case No. K-08-008765] Trooper Morton the court is going to merge Counts 4 and 3 reckless endangerment and assault in the second degree into Count 2 assault in the first degree.

The Defendant is sentenced to serve fifteen years. *That sentence is concurrent. As to Count 5 handgun use in a felony or a crime of violence the sentence will be five years. And that sentence will be consecutive.*

As to [Case No. K-08-008766] Trooper Wagner the court will merge Counts 4 and 3 . . . into Count 2 assault in the first degree.

That sentence will be *fifteen years concurrent. As to Count 5 handgun use in a felony or crime of violence the sentence will be five years. And that sentence will be consecutive.*

As to [Case No. K-08-008767] the victim is Trooper Price the court is going to merge Counts 4 and 3 . . . into Count 2 assault in the first degree.

The sentence is *fifteen years concurrent. As to Count 5 handgun use in a felony or crime of violence the sentence is five years consecutive.*

As to [Case No. K-08-008768] Trooper Bramble the court is going to merge Counts 4 and 3 . . . into Count 2 assault in the first degree.

The sentence for the assault in the first degree is *fifteen years concurrent*. As to Count 6 handgun use in a felony or a crime of violence the sentence is *five years consecutive*.

As to [Case No. K-08-008769] the court is going to merge Counts 4 and 3 into Count 2 assault in the first degree.

And the sentence for assault in the first degree is *fifteen years concurrent*. As to Count 5 handgun use in a felony or crime of violence the sentence will be *five years consecutive*.

(Emphasis added).

After imposing these individual sentences, the trial judge gave the following summary of the sentences being imposed:

So the sentences active incarceration is armed robbery in [Case No. K-08-008760] fifteen years. Thereafter all of the other charges for armed robbery and assault in the first degree will be concurrent fifteen year sentences. The [sic] *handgun use felony, crime of violence will be five years consecutive to each one of the cases*.

(Emphasis added). But the judge made no statement during the sentencing regarding the cumulative total amount of active prison time being imposed upon Simmons.

The docket entries recording the sentences are consistent with the above pronouncement. A single docket entry was recorded in each of the cases on December 2, 2008, to reflect that the following sentences had been imposed on December 1, 2008:

Criminal Open Court Proceedings 12/01/08 12/02/08 000 DML
Case called. Defendant, Defendant's Attorney William R. Hall and State's Attorney present in court. Sentencing Hearing held.

As to case K08008760, Court merges Counts #1, #2, #3 & #5 into Count #4. Court merges Count #6 into Count #7. Court merges Count #8 into Count #4

for purposes of sentencing. Court merges Count #10 into Count #8. Court sentences the Defendant as to Count #4 to a term of 15 years in the custody of the Commissioner of Corrections and as to Count #7 to a term of 5 years in the custody of the Commissioner of Corrections, consecutive to Count #4, not eligible for parole. Sentence to begin 11-16-07 with credit given for time served.

As to case K08008761, court merges Counts #1, #2, #3, & # 6 into Count #7. Court merges Count #8 into Count #7 for purposes of sentencing. Court sentences the Defendant as to Count #7 to a term of 15 years, custody of the Commissioner of Corrections, concurrent and as to Count #5 to a term of 5 years, consecutive.

As to case K08008759 court sentences the Defendant as to Count #4 to a term of 5 years in the custody of the Commissioner of Corrections, concurrent.

As to case K08008763 Court merges counts #3 and #4 into Count #2. Court sentences the Defendant as to Count #2 to a term of 15 years, concurrent and as to Count #5 to a term of 5 years, consecutive.

As to case K08008764, Court merges Counts #3 and #4 into Count #2. Court sentences the Defendant as to Count #2 to a term of 15 years, concurrent and to Count #5 to a term of 5 years, consecutive.

As to case K08008765, Court merges Counts #3 and #4 into Count #2. Court sentences the Defendant as to Count #2 to a term of 15 years, concurrent and as to Count #5 to a term of 5 years, consecutive.

As to case K08008766, Court merges Counts #3 and #4 into Count #2. Court sentences the Defendant as to Count #2 to a term of 15 years, concurrent and as to Count #5 to a term of 5 years, consecutive.

As to case K08008767, Court merges Counts #3 and #4 into Count #2. Court sentences the Defendant as to Count #2 to a term of 15 years, concurrent and as to Count 5 to a term of 5 years, consecutive.

As to case K08008768, Court merges Counts #3 and #4 into Count #2. Court sentences the Defendant as to Count #2 to a term of 15 years, concurrent and as to Count #6 to a term of 5 years, consecutive.

As to case K08008769, Court merges counts #3 and #4 into Count #2. Court sentences the Defendant as to Count #2 to a term of 15 years, concurrent and to Count #5 to a term of 5 years, consecutive.

In accordance with CL 4-204 all handgun sentences are not eligible for parole. Court costs waived. Oral instructions. etc. given.

[The above text appears as a single long paragraph in the docket entry; paragraph formatting has been added to provide additional readability.]

As noted above, the commitment record in Case No. K-08-008760 reflected that Simmons was being sentenced “to a term of 5 years in the custody of the Commissioner of Corrections, consecutive to Count #4, not eligible for parole.” But none of the commitment records in the other cases provided any specific indication of when the “consecutive” five year sentence for the handgun offense would commence. The commitment records for most of the other cases contained a blank space with no information filled in after the sentences on the form which began: “The jail sentence in this count is Consecutive to the jail sentence imposed in Case(s): _____” and “The jail sentence in this count is Concurrent with the jail sentence imposed in Case(s): _____.”

By letter dated December 31, 2008, a “Commitment Records Specialist Supervisor” from the Department of Public Safety and Correctional Services asked the clerk of court for the Somerset County Circuit Court to clarify the length of Simmons’s sentences. The letter asked the clerk to “advise this office, by means of an amended commitment, if the total time to be served is 15 years.” Ultimately, the trial judge sent a Commitment Records Specialist a letter dated May 22, 2009, which stated:

Dear Ms. Boucher:

Jacqueline Johnson, the Criminal Clerk Supervisor in the Clerk of Court's office, forwarded your recent e-mail to me for response. You requested clarification of the sentences imposed in the cases of Haven Simmons. After reviewing your e-mail and my notes from Mr. Simmons' sentencing hearing, I am convinced that your analysis of the sentences is correct except that his start date in Case # K-08-008760 should be November 16, 2007, not December 1, 2008 (the date Mr. Simmons was sentenced). All other sentences were intended to run consecutive to Case # K-08-008760 and consecutive to each other. So that there is no misunderstanding it was the intention of this Court that the combined total of Mr. Simmons' sentences would be 60 years.

If you need further information, please feel free to contact my office.

(The referenced "recent e-mail" from Ms. Boucher does not appear in the record.)

On October 28, 2013, Simmons, acting *pro se*, filed a motion to correct an illegal sentence. He argued that any ambiguity in the sentences had to be resolved in his favor, and that the sentencing judge could not legally alter the sentence by issuing a "clarification" letter to the Department of Public Safety and Correctional Services. He asserted that his sentence had been illegally increased from 20 years to 60 years.

The circuit court granted Simmons's request for a hearing, but declined to alter the sentence from the 60-year total reflected in the court's letter of May 22, 2009. The court stated: "I think the clear intent from the sentencing at the time you were sentenced was that the handgun violations would be consecutive to each other[;] everything else was to be concurrent." The motion to correct an illegal sentence was denied. This appeal followed.

APPELLEE’S MOTION TO DISMISS

As preliminary matter, we note that the State has “move[d] pursuant to Rule 8-602(a)(1) to dismiss Simmons’s Appeal because he does not assert that his sentence is ‘intrinsically illegal.’” Maryland Rule 8-602(a)(1) provides that this Court may dismiss an appeal based upon a motion “[if] the appeal is not allowed by these rules or other law[.]” In essence, the State argues that we should dismiss this appeal because, in the State’s view, Simmons has made an argument he cannot win. Even if the State was correct in its assertion as to the controlling legal principles regarding the correction of Simmons’s sentence (which, we conclude, it is not), the fact that an appellant has put forth a losing argument is not a proper basis for us to summarily dismiss an appeal pursuant to Rule 8-602(a)(1).

In support of its motion that Simmons’s appeal should be dismissed, the State relies, *inter alia*, upon *State v. Wilkins*, 393 Md. 269, 284-86 (2005), in which the Court of Appeals ruled that the alleged illegality asserted in that case was not properly attacked by way of a motion to correct illegal sentence. As a consequence, the Court of Appeals vacated the judgment of the Court of Special Appeals, and the case was “remanded to th[is] Court with directions to dismiss the appeal.” *Id.* at 285-86. But the fact that the Court of Appeals ordered us to dismiss an appeal after that Court had fully litigated all issues and determined that the defendant was entitled to no further relief in that case does not support the State’s motion for us to summarily dispose of appeals claiming illegal sentences by way of motions to dismiss pursuant to Rule 8-602(a)(1).

Accordingly, the State’s motion to dismiss is denied.

DISCUSSION

Simmons argues that the cumulative sentence he is presently serving, as interpreted in the circuit court’s letter of May 22, 2009, is illegal because it has been increased from the cumulative sentence that was announced on December 1, 2008. Pursuant to Rule 4-345(a), a court may correct an illegal sentence at any time, and the denial of a motion to correct an illegal sentence is appealable. *Wilkins, supra*, at 273; *State v. Kanaras*, 357 Md. 170, 184 (1999). In addition to arguing that the announced sentence was ambiguous, Simmons asserts that the circuit court’s clarification letter violated Rule 3-345(e), which provides that a court “may not increase the sentence” originally imposed on the defendant, as well as the requirement of Rule 4-345(f) that a revision of a sentence may take place only after a hearing in open court.

The Court of Appeals has said that a sentencing court has an obligation to avoid ambiguities regarding the time to be served: “The trial judge’s obligation is to articulate the period of confinement with clarity so as to facilitate the prison authority’s task.” *Robinson, supra*, 317 Md. at 379. Once a sentencing hearing is concluded, reviewing courts must resolve any dispute based upon the statements made by the court at the time of the sentencing proceeding. *Dutton, supra*, 160 Md. App. at 191. See *State v. Sayre*, 314 Md. 559, 565 (1989) (“[O]nce sentence has been imposed, there can be no inquiry into intention or inadvertence. The sentence, for Rule 4-345(b) purposes, stands as pronounced.”). To the extent that the language of a sentencing judge creates ambiguity with respect to the sentence

imposed, ambiguity must be resolved in the favor of the defendant. *Robinson, supra*, 317 Md. at 379-80. *Accord Mateen v. Saar*, 376 Md. 385, 397 (2003).

Simmons contends that the sentencing court’s references to the handgun sentences as being “consecutive” were all ambiguous because, with the exception of the first such sentence imposed with respect to Case No. K-08-008760, the court failed to specify a time or event when the consecutive sentence would commence. In other words, there court did not specify what it was that the handgun sentences were supposed to be consecutive to. Although the sentencing court used the word “consecutive,” the court never answered the question “consecutive to what?” *Cf. Gatewood v. State*, 158 Md. App. 458, 481-82 (2004) (“without having spoken the word ‘consecutive’, the sentence is, perforce, concurrent”), *aff’d*, 388 Md. 562 (2005); *Nelson v. State*, 66 Md. App. 304, 312-13 (1986) (trial judge’s failure to designate whether sentences “were to be rendered concurrently or consecutively, rendered them concurrent”).

This Court recently said in *Huggins v. Huggins & Harrison, Inc.*, 220 Md. App. 405, 418 (2014): “[A] written contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning.” (Quoting *Calomiris v. Woods*, 353 Md. 425, 436 (1999).) Similarly, a criminal sentence is ambiguous if it is reasonably susceptible to more than one interpretation. We agree with Simmons that one reasonable interpretation of the court’s sentences in this matter is that the sentence imposed for the top felony count in each case was 15 years, all concurrent with the sentence for armed robbery in Case No. K-08-008760, and a 5-year sentence for the handgun count was imposed consecutive to the

15-year sentence in each case. If read in that manner, all of the handgun sentences would be concurrent with each other. Because this is one reasonable reading of the sentences that were announced, we conclude that the sentences were ambiguous, and Simmons is entitled to have the sentences “construed to favor a milder penalty over a harsher one.” *Robinson, supra*, 317 Md. at 380.

This reading is also consistent with the language of the statute that imposes a mandatory minimum penalty for use of a handgun in the commission of a felony or crime of violence. At the time Simmons was sentenced, Section 2-402(b) of the Criminal Law Article of the Maryland Code provided:

(b)(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.

(ii) The court may not impose less than the minimum sentence of 5 years and, except as otherwise provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole in less than 5 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.)

The statute requires that, for the first violation of § 2-402, the court must impose an additional sentence of a minimum of five years; and further, that for any “subsequent violation,” the sentence must be consecutive to the sentence imposed “**for the crime of violence or felony**.” But the statute does not require all sentences under § 2-402(b) to be consecutive to other sentences imposed under § 2-402(b).

Based upon our review of the sentencing transcript, after resolving ambiguity in favor of Simmons, we conclude the trial judge sentenced Simmons to total prison time of twenty years to be served. This total sentence consists of nine concurrent sentences of 15 years for the felony counts in cases -8760 through -8769, plus a concurrent 5-year sentence in case -8759, all to be consecutively followed by nine concurrent five-year-without-parole sentences for using a handgun in the commission of the felony in those cases (other than -8759, which did not include a separate handgun sentence). In summary, the sentences imposed by the sentencing court were as follows:

Case No. K-08-008760: 15 years for count 4 felony offense; and 5 years for handgun use, consecutive to felony offense in case 8760.

Case No. K-08-008759: sentence of 5 years only as to Count #4, concurrent with the 15-year sentence entered in case 8760.

Case No. K-08-008761: sentence of 15 years for felony, concurrent with 15-year sentence entered in case 8760; and 5 years for handgun use, consecutive to felony sentence in case 8761, but concurrent with the 5-year sentence entered in case 8760.

Case No. K-08-008763: sentence of 15 years for felony, concurrent with 15-year sentence entered in case 8760; and 5 years for handgun use, consecutive to felony sentence in case 8763, but concurrent with the 5-year sentence entered in case 8760.

Case No. K-08-008764: sentence of 15 years for felony, concurrent with 15-year sentence entered in case 8760; and 5 years for handgun use, consecutive to felony sentence in case 8764, but concurrent with the 5-year sentence entered in case 8760.

Case No. K-08-008765: sentence of 15 years for felony, concurrent with 15-year sentence entered in case 8760; and 5 years for handgun use, consecutive to felony sentence in case 8765, but concurrent with the 5-year sentence entered in case 8760.

Case No. K-08-008766: sentence of 15 years for felony, concurrent with 15-year sentence entered in case 8760; and 5 years for handgun use, consecutive to felony sentence in case 8766, but concurrent with the 5-year sentence entered in case 8760.

Case No. K-08-008767: sentence of 15 years for felony, concurrent with 15-year sentence entered in case 8760; and 5 years for handgun use, consecutive to felony sentence in case 8767, but concurrent with the 5-year sentence entered in case 8760.

Case No. K-08-008768: sentence of 15 years for felony, concurrent with 15-year sentence entered in case 8760; and 5 years for handgun use, consecutive to felony sentence in case 8768, but concurrent with the 5-year sentence entered in case 8760.

Case No. K-08-008769: sentence of 15 years for felony, concurrent with 15-year sentence entered in case 8760; and 5 years for handgun use, consecutive to felony sentence in case 8769, but concurrent with the 5-year sentence entered in case 8760.

Because we agree with Simmons that this result represents one reasonable interpretation of the sentences which were announced on December 1, 2008, we reverse the court's denial of Simmons's motion to correct illegal sentence, and we remand the cases for entry of orders correcting the sentences in accordance with this opinion.

**APPELLEE'S MOTION TO DISMISS
DENIED.
JUDGMENT OF THE CIRCUIT COURT
FOR SOMERSET COUNTY REVERSED
AND CASES REMANDED FOR
SENTENCING IN ACCORDANCE WITH
THIS OPINION;
COSTS TO BE PAID BY SOMERSET
COUNTY.**