UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2953

September Term, 2011

LARRY ALEXANDER

v.

STATE OF MARYLAND

Krauser, C.J.,
Meredith,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: August 31, 2015

On January 13, 1999, near the intersection of Mount Holley Road and Edmonston Avenue in Baltimore City, Larry Alexander, appellant, engaged in a fight with a Garrett Kellam. During that altercation, Alexander produced a handgun and fired several shots at Kellam, who died as a result of the gunshot wounds. Alexander was thereafter charged with first-degree murder, second-degree murder, use of a handgun in the commission of a felony or crime of violence, and wearing, carrying, or transporting a handgun. After a jury sitting in the Circuit Court for Baltimore City convicted him of all those offenses, the court sentenced him to life imprisonment for first-degree murder and to ten years' imprisonment for the use of a handgun in the commission of a felony, to run concurrently with his life sentence. All of his other convictions were merged for sentencing purposes. Alexander then noted an appeal, whereupon this Court affirmed all of his judgments of conviction. *Larry Alexander v. State of Maryland*, No. 2563, September Term, 2000 (filed June 11, 2002), *cert.denied*, 371 Md. 262 (2002).

In 2011, Alexander filed a *pro se* motion to correct an illegal sentence in which he claimed that his conviction for first-degree murder should have been merged into the use of a handgun offense and, therefore, his life sentence for murder was illegal. The circuit court denied the motion and Alexander filed this appeal. For the reasons that follow, we affirm.

DISCUSSION

"The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution prohibits the State from punishing a defendant multiple times for the same

offense." *Kyler v. State*, 218 Md. App. 196, 225, *cert. denied,* 441 Md. 62 (2014). Hence, ordinarily, "[s]eparate sentences are prohibited when 'a defendant is convicted of two offenses based on the same act or acts and one offense is a lesser-included offense of the other.'" *Id.* (quoting *Sifrit v. State*, 383 Md. 116, 137 (2004), *cert. denied,* 543 U.S. 1056 (2005) (further quotation omitted)). But if two crimes arise out of the same act and "the legislature clearly intended" that the crimes be punished separately, "'we [the courts] defer to that legislated choice.'" *Quansah v. State*, 207 Md. App. 636, 645 (2012) (quoting *Walker v. State*, 53 Md. App. 171, 201 (1982)).

To determine whether one offense merges with another, we initially apply the "required evidence test." *Kyler, supra,* 218 Md. App. at 225 (citation omitted). That test "'focuses upon the elements of each offense; if all the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.'" *Id.* at 225-226 (quoting *Kelly v. State*, 195 Md. App. 403, 440 (2010) (further quotation omitted), *cert. denied*, 417 Md. 502 (2011)). But "'if each offense contains an element which the other does not, there is no merger under the required evidence test even though both offenses are based upon the same act or acts.'" *Id.* at 226 (quoting *Moore v. State,* 198 Md. App. 655, 684 (2011) (further quotation omitted)).

Alexander acknowledges that the use of a handgun offense does not merge into first-degree murder, but asserts that first-degree murder is a "lesser included offense" of the crime of using a handgun in the commission of a felony. He maintains that the two offenses share

the same elements, except that the handgun offense has the additional "handgun" requirement. He therefore maintains that "the felony of first degree murder must merge" with the handgun offense for sentencing purposes and hence his life sentence for murder must be vacated. We disagree.

First-degree murder contains an element – the unlawful killing of another person – which is not a required element of the crime of using a handgun in the commission of a felony or crime of violence. As such, first degree murder does not merge with the handgun offense under the required evidence test. Moreover, the legislature has made clear that a sentence for the handgun offense must be imposed *in addition to* any sentence for the underlying felony.

The handgun statute at issue here provides, in relevant part, that:

> (b) *Prohibited.* – A person may not use a firearm in the commission of a crime of violence as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime.
>
> (c) *Penalty*. – (1)(i) A person who violates this section is guilty of a misdemeanor and, **in addition to ay 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.

Section 4-204 of the Criminal Law Article (2012 Repl. Vol.)[1] (Emphasis added.)

[1] This statute was previously codified as Art. 27, § 36B(d) (1996 Repl. Vol.; 1999 Supp.) and included the same language, that is, that a sentence for violating the statute must be "**in addition to any other sentence** imposed by virtue of commission of said felony or misdemeanor[.]"

In *Whack v. State*, 288 Md. 137, 149 (1980), the Court of Appeals rejected the notion that separate sentences for robbery with a deadly weapon and use of a handgun in the commission of a felony, that is robbery, violated the Double Jeopardy Clause. The Court determined that the legislature, in enacting the handgun statute, clearly intended that separate and distinct sentences be imposed for the use of a handgun in the commission of a felony and the underlying felony, even where the two offenses were based upon the same incident. *Id.* at 270. *Whack* is controlling here. *See also Jones v. State*, 357 Md. 141 (1999) (no violation of the Double Jeopardy Clause where the legislature intended the imposition of separate sentences for offenses arising out of the same act).

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