

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1071

September Term, 2015

KENDALL JONES

v.

WARDEN, NBCI

Wright,
Graeff,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: April 6, 2016

*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.

Appellant Kendall Jones appeals from a judgement in the Circuit Court for Baltimore City denying his motion to correct an illegal sentence and petition for *habeas corpus* relief.

He presents one question for our review, which we have rephrased as follows:¹

Does a conviction of first-degree assault merge with a conviction of use of a handgun in the commission of a felony or crime of violence?

We shall hold that they do not merge and shall affirm.²

I.

Because the facts leading up to appellant’s conviction were stated sufficiently in *Jones v. State*, No. 148, Sept. Term, 2005 (filed June 5, 2007) (*Jones I*), his direct appeal to this Court, we include only the facts relevant to this appeal. On July 14, 2003, Delvonna Smoot hosted a birthday party for her daughter. Following an altercation at the party between some children and an adult, the police were called and a police report was filed. Later in the day,

¹ Appellant’s original question presented is as follows:

“Did the Lower Court err, when it failed to consider whether the trial court erred in imposing separate sentences for Kendall’s convictions for first degree assault and the use of a handgun in the commission of a crime of violence, based on plain errors of manifest injustice, where Kendall was found not guilty in Count 2, in indictment 203248039, and where the original sentence for the 1st degree assault count was imposed pursuant to Criminal Law Article CR 2, §202, rather than 3-202, which would have been obvious in the sentencing and commitment?”

²Appellant has filed an “Exceptional Traverse of Appellee's Late Brief.” It is hereby denied.

appellant, accompanied by a neighborhood woman, arrived at the Smoot residence in a van. Appellant exited the van and engaged in a fifteen-minute “standoff” with Delvonna. Eventually, appellant and the neighborhood woman left. Later that evening, appellant and another man returned to the Smoot house. Appellant approached Delvonna and said, “bitch, what’s up now?” The man with appellant then fired a gun. Delvonna’s relative, Dianna Smoot, testified at trial that after the man with appellant opened fire, he gave the gun to appellant. Appellant then walked toward the Smoot house and fired several shots at the house.

Appellant was charged by criminal information in the Circuit Court for Baltimore City with attempted first-degree murder; first-degree assault; second-degree assault; reckless endangerment; unlawfully wearing, carrying, or transporting a handgun; and use of a handgun in the commission of a crime of violence. The jury convicted appellant of first-degree assault; second-degree assault; use of a handgun in the commission of a crime of violence; four counts of reckless endangerment; and four counts of wearing, carrying or transporting a handgun. The jury acquitted him of attempted first-degree murder. The circuit court sentenced appellant to a term of incarceration of twenty five years for first-degree assault, twenty years for use of a handgun in the commission of a crime of violence, and five years for one count of reckless endangerment. For two of the reckless endangerment

convictions, the court sentenced appellant to two concurrent five-year terms of imprisonment. The court merged the remaining convictions.

On direct appeal, this Court affirmed. *See Jones I.* On March 24, 2015, appellant filed a motion to correct an illegal sentence and petition for *habeas corpus* relief. In relevant part, appellant argued that his sentence for first-degree assault should not have been imposed by the circuit court,³ and that the circuit court’s failure to merge his sentences for first-degree assault and use of a handgun in the commission of a crime of violence violated his protections against double jeopardy set out in the Federal Constitution and Maryland’s common law. The circuit court denied appellant’s motion by order dated May 4, 2015, and appellant filed this appeal.

II.

Inasmuch as appellant is self-represented, we will read his brief liberally. Appellant contends that the circuit court erred in denying his motion to correct an illegal sentence. He claims that his twenty-five year sentence for first-degree assault should have merged with his

³ Appellant’s basis for this claim is unclear. He implies that he was sentenced to a twenty-five year period of incarceration for attempted first-degree murder even though the jury acquitted him of that charge. While there may have been some brief confusion during sentencing, the State aptly points out in its brief that the circuit court judge orally clarified appellant’s sentence through the following two remarks: (1) “[w]ith respect to the first degree assault . . . I’m imposing 25 years” and (2) “[I]et me start over. First degree assault which is count two is 25 years”

twenty-year sentence for use of a handgun in the commission of a crime of violence under the required evidence test because all of the elements of first-degree assault are included in use of a handgun in the commission of a crime of violence. Appellant also argues that, even if his sentences do not merge under the required evidence test, they should merge under the rule of lenity, and principles of fundamental fairness.⁴ Appellant’s final argument, in the last sentence of his brief, baldly asserts that the illegal sentencing was “compounded by ineffective assistance of trial counsel.” Because this argument has not been briefed with sufficient particularity, we will not consider it in this appeal. *Klauenberg v. State*, 355 Md. 528, 552 (1999).

The State argues that appellant’s convictions for first-degree assault and use of a handgun in the commission of a crime of violence do not merge under the required evidence test, rule of lenity, or principles of fundamental fairness. According to the State, the offenses do not merge under the required evidence test because each offense contains separate elements. The State also claims that appellant’s reliance on the rule of lenity and principles of fundamental fairness are waived because appellant did not raise these arguments in his direct appeal in *Jones I* and neither argument is the proper subject of a motion to correct an illegal sentence. Moreover, on the merits, the State argues that if appellant’s arguments are not waived, the rule of lenity and principles of fundamental fairness do not apply because the

⁴ We will assume for argument’s sake that appellant intends to refer to the fundamental fairness doctrine when he discusses “manifest injustice.”

Legislature intentionally and unambiguously imposed separate punishments for the offenses of first-degree assault and use of a handgun in the commission of a crime of violence.

III.

We address appellant’s sole contention before this Court—that his convictions of first-degree assault and use of a handgun in the commission of a crime of violence merge for sentencing purposes. We disagree with appellant, and conclude that they do not.

The gravamen of appellant’s position is that the court below denied his motion to correct an illegal sentence improperly by failing to find that two of his convictions merged for sentencing purposes. Maryland Rule 4-345(a) provides that “[t]he court may correct an illegal sentence at any time.” An illegal sentence is “limited to situations in which the illegality inheres in the sentence itself; *i.e.*, there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful.” *Chaney v. State*, 397 Md. 460, 466 (2007). A circuit court’s failure to merge a sentence when so required is considered to be an “illegal sentence” within the contemplation of the rule. *Randall Book Corp. v. State*, 316 Md. 315, 319-22 (1989); *Britton v. State*, 201 Md. App. 589, 598-99 (2011); *Ingram v. State*, 179 Md. App. 485, 508-09 (2008); *Campbell v. State*, 65 Md. App. 498, 510-11 (1985). We review the legal

issue of the sentencing under the *de novo* standard of review. *Bishop v. State*, 218 Md. App. 472, 504 (2014).

Merger is a mechanism within the trial court’s toolkit used to guard against the illegality of imposing multiple sentences for the same offense in violation of either the “Double Jeopardy” clause of the Fifth Amendment to the Federal Constitution or state law. *See* U.S. Const. amend. V (providing that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb”); *State v. Long*, 405 Md. 527, 536 (2008) (explaining that the Double Jeopardy clause “bars multiple punishments and trials for the same offense”); *Pair v. State*, 202 Md. App. 617, 624-25 (2011) (noting that a sentence may be illegal in Maryland because it either violates the Fifth Amendment or because it is prohibited by statute). The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Odum v. State*, 412 Md. 593, 603 (2010); *Benton v. Maryland*, 395 U.S. 784, 794 (1969). When merger is employed, the sentence of one conviction swallows the sentence of another conviction, such that the latter becomes subsumed within the former, and only one sentence is imposed. *State v. Lancaster*, 332 Md. 385, 392 (1993).

Three standards are available to determine whether an offense should merge with another offense for sentencing purposes: (1) the required evidence test, (2) the rule of lenity, or (3) principles of fundamental fairness. We note at the outset that although the required evidence test is the preferred test, almost all merger cases are decided by either the required

evidence test or rule of lenity. *Pair*, 202 Md. App. at 643. Furthermore, “[i]t is only when there is no merger under the required evidence test that other criteria are considered to determine whether the offenses should merge.” *Lancaster*, 332 Md. at 394.

Before resolving whether appellant’s sentences merge under any of the three merger tests, we address the State’s argument that appellant has not preserved his rule of lenity and fundamental fairness arguments for this appeal. As we discussed, failure to merge a sentence *when so required* is considered an illegal sentence as a matter of law, and may be corrected “at any time.” Md. Rule 4-345(a). An appellant may raise the circuit court’s failure to merge a sentence on appeal notwithstanding normal preservation requirements so long as failing to do so rendered the sentence illegal within the contemplation of Rule 4-345(a). *Pair*, 202 Md. App. at 624. The State argues that appellant’s rule of lenity and fundamental fairness arguments are not properly before this Court, relying on *Pair*.

The State’s reliance on *Pair* is only partially warranted. In *Pair*, we declined to address the appellant’s fundamental fairness argument and held that “[w]e do not believe that a non-merged sentence pursuant to such a fluid test dependant upon a subjective evaluation of the particular evidence in a particular case is an inherently ‘illegal sentence’ within the tightly limited contemplation of [Rule 4-345(a)].” *Pair*, 202 Md. App. at 649. *Pair* stands for the proposition that a *fundamentally unfair* sentence is not inherently “illegal” within the meaning of Rule 4-345(a), and is thus subject to normal preservation requirements. *Pair*

does not stand for the proposition that failure to merge a sentence under the *rule of lenity* is not inherently illegal and not cognizable under Rule 4-345(a)'s exception to the normal preservation requirements. A circuit court's failure to merge a sentence under principles of fundamental fairness does not create an inherently illegal sentence and is thus subject to normal rules of preservation.

Turning to whether appellant has preserved his fundamental fairness argument, we conclude that this argument is not before this Court properly. Appellant raised his fundamental fairness argument for the first time after *Jones I* in a collateral proceeding. We conclude that appellant waived this argument by failing to raise it in his direct appeal. The notion of fundamental fairness is not one that falls within the ambit of a motion to correct an illegal sentence. Judge Charles E. Moylan, Jr., writing for this Court in *Pair*, carefully explained in great detail why fundamental fairness is a “very different doctrinal phenomenon” than the required evidence test and rule of lenity. *Pair*, 202 Md. App. at 645. While merger pursuant to the required evidence test and rule of lenity “can both be decided as a matter of law, virtually on the basis of examination confined within the ‘four corners’ of the charges,” a fundamental fairness analysis “is heavily and intensely fact-driven” and is not so easily decided. *Id.* Our research has only uncovered two cases—*Monokerv. State*, 321 Md. 214 (1990) and *Marquardt v. State*, 164 Md. App. 95 (2005)—in which fundamental fairness was an independent basis for merger. Unlike the case at bar, both *Monoker* and

Marquardt were direct appeals involving a *de novo* evaluation of the particular evidence in each case. *Pair*, 202 Md. App. at 645, 649.

On the merits of the case *sub judice*, appellant maintains that his sentences for first-degree assault and use of a handgun in the commission of a crime of violence should have merged under the required evidence test. The required evidence test originates from the Supreme Court’s decision in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), and provides 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.” Under the required evidence test, one offense merges into another “if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements.” *State v. Jenkins*, 307 Md. 501, 517 (1986). Conversely, “if . . . each offense contains an element which the other does not, there is no merger . . . even though both offenses are based upon the same act or acts.” *Lancaster*, 332 Md. at 391. Nevertheless, even if the required evidence test is satisfied—*i.e.* at least one of the offenses at issue contains all of the same elements as the other—merger will not apply if “the General Assembly has specifically or expressly authorized multiple punishments.” *Id.* at 394; *see also Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983); *Albernaz v. United States*, 450 U.S. 333, 344 (1981).

Appellant was charged in Count 2 of the criminal information with “unlawfully assault[ing] Delvonna Smoot in the first degree” in violation of Md. Code Ann. Crim. Law § 3-202(a)(1)-(2).⁵ Section 3-202 provides that a person “may not intentionally cause or attempt to cause serious physical injury to another” or “commit an assault with a firearm.”⁶ Appellant was charged in Count 4 with use of a handgun in the commission of a crime of violence in violation of § 4-204. The criminal information stated that appellant “unlawfully did use a handgun . . . in the commission of a crime of violence.” Section 4-204(b) provides that “[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” A firearm is defined as including a “handgun” for purposes of section 4-204. *See* § 4-204(a)(2). First-degree assault is a “crime of violence” under the Public Safety Article. *See* Md. Code Ann. Pub. Safety § 5-101 (Repl. 2011).

In most cases our task in applying the required evidence test would be twofold: (1) to determine whether appellant’s convictions meet the required evidence test; and if so, (2) to determine whether they nonetheless do not merge because the Legislature clearly intended to impose separate punishments for the defendant’s criminal act. Section 4-204(c)(1)(i)

⁵ Unless otherwise indicated herein, all subsequent statutory references to Maryland Code (2002, Repl. Vol. 2012) shall be to the Criminal Law Article.

⁶ We are unable to discern from the record if appellant was convicted of first-degree assault under § 3-202(a)(1) or (a)(2).

provides that “[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.” In the case *sub judice*, we bypass the first prong because even if appellant’s convictions meet the required evidence test, the Legislature “has specifically . . . authorized multiple punishments” for using a handgun in the commission of a crime of violence. *Lancaster*, 332 Md. at 394.

In *Garner v. State*, 442 Md. 226, 242 (2015), the Court of Appeals held that § 4-204(b)’s “plain language demonstrates the General Assembly’s intent to permit multiple convictions and sentences for each violation of CR § 4-204; in other words, CR § 4-204(b)’s plain language leads to the inescapable conclusion that CR § 4-204 authorizes a separate conviction and sentence for each felony or crime of violence.” Appellant’s conviction of using a handgun in the commission of first-degree assault (which is a crime of violence) triggered the circuit court’s obligation to sentence appellant to a period of incarceration of not less than five years in addition to whatever sentence the court imposed for first-degree assault. Thus, appellant’s reliance on the required evidence test must fail because even if he were to meet the first prong of the required evidence test, he fails under the second prong.

Appellant’s reliance on the rule of lenity fails for reasons similar to his required evidence argument. The rule of lenity is a method of statutory construction that gives the defendant the “benefit of the doubt” when a statute is ambiguous with respect to whether the

legislature intended to impose separate punishments for a single criminal act. *Walker v. State*, 53 Md. App. 171, 201 (1982). The rule of lenity is applicable only when “at least one of the two crimes subject to merger analysis is a statutory offense.” *Pair*, 202 Md. App. at 638. The rule provides that “where there is no indication that the Legislature intended multiple punishments for the same act, a court will not impose multiple punishments but will, for sentencing purposes, merge one offense into the other.” *McGrath v. State*, 356 Md. 20, 25 (1999). When it is clear that the Legislature intended to impose separate punishments for the same criminal act, the rule of lenity does not apply. As discussed above, § 4-204 is clear in its mandate to impose separate punishment upon any person who uses a firearm in the commission of a felony or crime of violence; therefore, the rule of lenity is not applicable in this case. There is no ambiguity here.

We hold that the circuit court did not err or abuse its discretion in sentencing appellant to two consecutive terms of incarceration: one term for first-degree assault and another term for use of a handgun in the commission of a crime of violence.

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