

Circuit Court for Worcester County
Case No. 23-K-16-000038

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1115

September Term, 2016

PATRICK JOSEPH THOMAS A/K/A/
PATRICK JOSEPH PATRICK

v.

STATE OF MARYLAND

Leahy,
Friedman,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: November 25, 2019

*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.

Patrick Joseph Thomas was convicted of distribution of heroin, reckless endangerment, and involuntary manslaughter under two theories: unlawful act manslaughter and gross negligence manslaughter. In this Court, Thomas challenged the sufficiency of the evidence to sustain his involuntary manslaughter conviction. We reversed. *Thomas v. State*, 237 Md. App. 527 (2018). The State appealed only as to the gross negligence variant of involuntary manslaughter. The Court of Appeals reversed us and reinstated Thomas' involuntary manslaughter conviction. *State v. Thomas*, 464 Md. 133 (2019). The Court of Appeals then remanded the matter to this Court to determine whether the trial court erred in failing to merge Thomas' sentences for involuntary manslaughter and distribution of heroin. *Id.* at 180 n.23.

Shortly thereafter, this Court decided *Tolen v. State*, 242 Md. App. 288 (2019). In *Tolen*, we held that under the required evidence test, a sentence for heroin distribution must merge into the sentence for the unlawful act variant of involuntary manslaughter where the unlawful act is the selling of heroin. 242 Md. App. at 310. Our analysis was carefully limited to the unlawful act variant of involuntary manslaughter and reserved for future consideration whether the gross negligence variant also necessitates merger. That question is presented here.¹ We also address Thomas' request to correct the docket entries and commitment record.

¹ This Court asked for and received supplemental briefing both before and after *Tolen*. We thank both parties for their diligent work assisting this Court.

I. MERGER

Maryland recognizes three avenues for merger of sentences. *Carroll v. State*, 428 Md. 679, 694 (2012). *First*, as a requirement of the federal Constitution’s prohibition on double jeopardy, we prohibit multiple sentences for the same conduct. *Latray v. State*, 221 Md. App. 544, 553 (2015). Under this test, we determine whether each statutory provision requires proof of a fact that the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). This is known as the *required evidence test*. *Second*, as a rule of statutory construction, when it is unclear whether the General Assembly intended to punish a crime with multiple punishments, we resolve ambiguities to the benefit of the defendant. *Latray*, 223 Md. App. at 555. This is known as the *rule of lenity*. And, *finally*, there is a vanishingly small category of cases in which imposing separate sentences for the same “wrongdoing” violates our understanding of fundamental fairness. *Carroll*, 428 Md. at 697. This is known as the *principle of fundamental fairness*. Because Thomas does not argue that the rule of lenity compels merger of his sentences, we only consider merger under the required evidence test and under the principle of fundamental fairness.

A. The Required Evidence Test

As noted above, in applying the required evidence test we compare the elements of the two crimes. Merger is required only if all the elements of one of the crimes is included in the other. *Blockburger*, 284 U.S. at 304. The type of involuntary manslaughter of which Thomas was convicted, gross negligence, requires proof of an unintentional killing caused by the defendant’s grossly negligent conduct. *State v. Albrecht*, 336 Md. 475, 499 (1994). Distribution of heroin requires proof of actual or constructive delivery of heroin from the

defendant to another person. *Anderson v. State*, 385 Md. 123, 132 (2005). As the State aptly put it: “Involuntary manslaughter does not require the transfer of heroin, and heroin distribution does not require unintentional killing. The elements of the crime are not the same and double jeopardy does not require merger.” We agree and hold that the elements of the gross negligence variant of involuntary manslaughter are different from the elements of distribution of heroin. And, as a result, the trial court did not err in sentencing Thomas separately for each crime.

B. The Principle of Fundamental Fairness

Thomas’ argument that the principle of fundamental fairness requires his sentences to merge was not preserved for our review. Under the principle of fundamental fairness, merger is a “fluid test dependent upon a subjective evaluation of the particular evidence in the particular case.” *Potts v. State*, 231 Md. App. 398, 414 (2016). As such, a contemporaneous objection is required to preserve the issue for this Court’s review. *Id.*; see *Pair v. State*, 202 Md. App. 617, 649 (2011) (comparing fundamental fairness merger to a motion to correct an illegal sentence under Maryland Rule 4-345 and determining that the fundamental fairness test does not “enjoy ... the same procedural dispensation” of a motion to correct an illegal sentence, which can be raised, and the illegal sentence corrected, “at any time”). Thomas failed to make a contemporaneous objection as to the lack of fundamental fairness of his sentences at the trial court and, as a result, failed to preserve the issue for our review.

II. DOCKET ENTRIES AND COMMITMENT RECORD

As noted above, Thomas was convicted of the gross negligence variant of *involuntary* manslaughter. Despite this, the docket entries and commitment record in this case indicate that Thomas was convicted of *voluntary* manslaughter.² Thomas asks that we correct both the docket entries and commitment record to accurately reflect the crime of which he was convicted.

We begin by noting that manslaughter is a common law crime, which has only been partially codified in Maryland. *See* MD. CODE, CRIMINAL LAW (“CR”) § 2-207. Our law recognizes the common law distinctions between voluntary and involuntary manslaughter. Voluntary manslaughter is an “intentional homicide, done in a sudden heat of passion, caused by adequate provocation, before there has been a reasonable opportunity for the passion to cool.” *Selby v. State*, 361 Md. 319, 332 (2000). Involuntary manslaughter, on the other hand, is an “unintentional killing done without malice.” *Id.* Manslaughter cannot be both voluntary and involuntary “at the same time.” *Id.* at 335. Despite this, however, both voluntary and involuntary manslaughter are punishable by up to 10 years’ imprisonment in a State correctional facility or 2 years’ imprisonment in a local correctional facility. CR § 2-207(a)(1), (2); *Bowers v. State*, 227 Md. App. 310, 326 (2016) (noting that there was “no legislative intent to differentiate sentencing between voluntary

² We also note that the docket and commitment record report that Thomas was convicted of CJIS Code 10910 (voluntary manslaughter), not CJIS Code 10911 (involuntary manslaughter).

and involuntary manslaughter”). Nevertheless, the differences between the two variations of the crime are significant and important.

In response to Thomas’ request to correct the relevant documents, the State essentially concedes that the docket entries and commitment record in Thomas’ case are wrong. Despite this, the State argues that because Thomas is not currently suffering from the erroneous docket entries and commitment record, we should do nothing now and he can move for a correction when he is harmed by the error.

We disagree. Prisoners who have been convicted of voluntary manslaughter are deemed “violent offenders.” CR § 14-101(a)(4) (characterizing “manslaughter, except involuntary manslaughter” as a crime of violence). As a result, those prisoners have different opportunities for participation in programs while incarcerated and their parole eligibility may be affected. MD. CODE, CORRECTIONAL SERVICES (“CS”) § 7-301(c)(1).

When this Court is presented with an error, it is our job to try to remedy it. We, therefore, employ the assistance of the circuit court and remand for the limited purpose of correcting the docket entries and commitment record to reflect the charge for which Thomas was convicted—involuntary manslaughter.

**JUDGMENT OF THE CIRCUIT COURT
FOR WORCESTER COUNTY AFFIRMED;
CASE REMANDED TO THE CIRCUIT
COURT FOR WORCESTER COUNTY TO
CORRECT APPELLANT’S
COMMITMENT RECORD AND
PERTINENT DOCKET ENTRIES IN
ACCORDANCE WITH THIS OPINION;
COSTS TO BE PAID ½ BY WORCESTER
COUNTY AND ½ BY APPELLANT.**