

Circuit Court for Baltimore City
Case No.: 000116291011

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1380

September Term, 2017

THOMAS BRADLEY

v.

STATE OF MARYLAND

Woodward, C.J.
Leahy,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: November 7, 2018

*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.

On August 1, 2017, Thomas Bradley, appellant, was convicted after a bench trial, of two counts of second-degree assault and two counts of reckless endangerment, along with other related charges, in the Circuit Court for Baltimore City, and was sentenced to a total term of forty years' imprisonment, with all but fifteen years suspended. Appellant poses two questions for our review. Reworded they are:

1. Should the trial court have merged appellant's sentences for his second-degree assault and reckless endangerment convictions?
2. Was the sentence imposed ambiguous?

For reasons to be discussed, we answer both questions in the affirmative and remand for resentencing.

BACKGROUND

Ms. Lakeesha Ware and her son, Sherrod, who was fifteen years old, entered the home of Mr. Willie Horne where appellant was present in the upstairs bedroom. Ms. Ware and her son sought to confront appellant about comments he had made to his neighbor, Ms. Ware's mother. After a heated exchange between Ms. Ware and appellant, Ms. Ware and Sherrod left the room and headed for the steps, but then Sherrod turned around and went back into the room with appellant. Ms. Ware followed. Thereafter, appellant pulled a gun from his pocket and fired it twice in quick succession, once towards the ceiling and once towards the floor. A bullet hit Sherrod in the face and jaw.¹ He was transported to the hospital and survived. Appellant was arrested and charged for this incident.

¹ It is unclear how the bullet hit Sherrod.

At trial, the court found that appellant did not aim “directly” at either victim, but it found him guilty of second degree assault and reckless endangerment as to both Ms. Ware and Sherrod. Specifically, regarding the second-degree assault, the court found that appellant “did pull the gun out and attempt to frighten” Ms. Ware and Sherrod. Regarding reckless endangerment, the court merely stated that appellant “did engage in conduct that created a substantial risk of death or serious physical injury to others,” such that “a reasonable person would not have engaged in that conduct.”

The court also found appellant guilty of use of a firearm in the commission of a felony or crime of violence, wearing/carrying a handgun in or about his person, unlawful discharge of a firearm within the city limits of Baltimore, and unlawful possession of a firearm after being convicted of a disqualifying crime. The court acquitted appellant of attempted first-degree murder of Sherrod and first-degree assault as to both Ms. Ware and Sherrod.

DISCUSSION

Appellant’s first contention on appeal is that “it is impossible to tell whether the court based its assault and reckless endangerment verdicts on the same act or on separate and distinct acts” and “[t]hat ambiguity must be resolved in [his] favor” by merging the sentences. He relies on principles of fundamental fairness and the rule of lenity.²

² The State argues that appellant made no objection to the sentence below, and therefore we should not engage in a fundamental fairness analysis. *See Pair v. State*, 202 Md. App. 617, 649 (2011) (“We 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)]”). We agree.

The State asserts that the rule of lenity does not require merger in this instance because “the convictions were not based on the ‘same conduct,’ are not for the ‘same offense,’ and there is no ambiguity as to whether the Legislature intended for these two crimes to be punished separately.” The State claims that there were two distinct acts, maintaining that the court based the second-degree assault conviction on appellant “pulling the gun out” and the reckless endangerment conviction on appellant’s firing of the gun.

The rule of lenity 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.” *Abeokuto v. State*, 391 Md. 289, 356 (2006). In *Marlin v. State*, we merged the sentences for reckless endangerment and first-degree assault because the defendant’s “conduct as to reckless endangerment involved the same conduct that formed the first-degree assault by firearm,” that is, shooting the victim, and “no other conduct was involved in proving either offense.” 192 Md. App. 134, 171 (2010).

Here, the conduct involved appellant pulling a gun out of his pocket and immediately firing it twice in more or less rapid succession. When Ms. Ware described the incident at trial she stated, “when the gun came out his pocket, he went straight up in the air and fired” and then, when describing the time between the two shots, she stated, “just seconds, it was right behind each other.” In other words, the evidence was that the

conduct was one fluid act, not separate and distinct acts.³ Although this conduct was sufficient to support convictions for assault and/or reckless endangerment against both Ms. Ware and Sherrod, we hold that, under the rule of lenity, the offenses should have merged for sentencing purposes.

Appellant’s second contention is that the court’s sentence was ambiguous and therefore “his punishment must be construed to favor a milder penalty over a harsher one.” *Robinson v. Lee*, 317 Md. 371, 380 (1989). He claims that the court articulated that he was sentenced to a total term of incarceration of twenty years, but that after the court announced the individual sentences it stated that the total sentence was forty years. Furthermore, appellant claims that the docket entries and the commitment record create more ambiguity.

We agree that the sentence, as pronounced by the court, is ambiguous. The court stated:

[A]s to Count 7 in the indictment ending in 011, assault in the second degree, Sherrod Ware, the sentence of the Court is ten years to the Department of Corrections.

As to count 8, assault in the second degree on Lakeesha Ware, the sentence of the Court is ten years to the Department of Corrections to run consecutive to Count 7.

As to Count 9, reckless endangerment as to Sherrod Ware, the sentence of the Court is five years to run consecutive to Count 7.

To Count 10, reckless endangerment, Lakeesha Ware, five years to run consecutive to Count 7.

³ Ms. Ware also testified that after the shots were fired and Sherrod had fled the room, appellant pointed the gun at her and said, “do you want to die?” The court found, however, that that testimony was not credible.

Count 11, use of a handgun in the commission of a felony or crime of violence, five years without parole to run consecutive to Count 7.

Count 12, carrying a handgun openly or concealed about his person, merges with Count 11.

Count 13, discharging a firearm within the Baltimore City limits, one year to run concurrent to Count 11.

Count 14, possession of a regulated firearm having been convicted of a disqualifying crime, the sentence of the Court is five years consecutive to Count 7.

The total sentence being 40 years. The Court's going to suspend all but 15 years of that sentence and place [appellant] on three years supervised probation upon his release.

That's the sentence of the Court post-trial.

The court, however, never indicated which of the sentences were suspended. Moreover, the commitment record conflicts with the docket entries. The commitment record reflects sentences for Counts 7, 11, 12, and 13, for a total of fifteen years to be served. The docket entries, however, reflect sentences were imposed for all the convictions with some suspended. "When there is a conflict between the transcript and the commitment record, unless it is shown that the transcript is in error, the transcript prevails." *Douglas v. State*, 130 Md. App. 666 (2000). Because the court should have merged second-degree assault and reckless endangerment for sentencing purposes, and because of the ambiguity

between the transcript, the docket entries, and the commitment record, we vacate the sentencing package and remand for resentencing.⁴

**SENTENCES VACATED AND CASE
REMANDED FOR RESENTENCING;
JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY OTHERWISE
AFFIRMED; COSTS TO BE PAID BY
MAYOR AND CITY COUNCIL OF
BALTIMORE.**

⁴ Upon resentencing the court should bear in mind that, subject to certain exceptions, a court “may not impose a sentence more severe than the sentence previously imposed for the offense.” Md. Code, Cts. & Jud. Proc. § 12-702(b).