Circuit Court for Dorchester County
Case No. C-09-CR-20-000168

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1655

September Term, 2022

RYSHON MAURICE KELLY

v.

STATE OF MARYLAND

Ripken,
Tang,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: November 13, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Ryshon Maurice Kelly, appellant, was charged with murder and second-degree assault, among other offenses, for the fatal stabbing of Roderick Russ, Jr. The jury acquitted appellant of all counts except second-degree assault. The Circuit Court for Dorchester County sentenced appellant to the maximum potential penalty of 10 years' incarceration for that offense. On appeal, the sole issue presented for our consideration is whether the court imposed a lawful sentence. For the reasons below, we affirm the judgment of the circuit court.

BACKGROUND

A detailed recitation of the evidence presented at trial is not necessary to resolve the issue before us. Suffice it to say that appellant became involved in a physical altercation with Roderick Russ, Jr. when he saw someone hand something to Mr. Russ and tell Mr. Russ to "stick" him. Overcome with fear, appellant pulled out a knife, swung it, and fatally struck Mr. Russ.

At trial, the State proceeded with four charges against appellant: second-degree murder, first-degree assault, second-degree assault, and carrying a dangerous weapon openly with intent to injure.[1] As to murder, the court instructed the jury on voluntary manslaughter and imperfect self-defense. If convicted of manslaughter, the court would have sentenced appellant under Maryland Annotated Code, Criminal Law Article ("CR") § 2-207(a) (2002, 2021 Repl. Vol.), which provides two sentencing options:

[1] The State had initially charged appellant with first-degree murder but later entered a *nolle prosequi* as to that charge.

> (a) A person who commits manslaughter is guilty of a felony and on conviction is subject to:
>
> (1) imprisonment not exceeding 10 years; or
>
> (2) imprisonment in a local correctional facility not exceeding 2 years or a fine not exceeding $500 or both.

Ultimately, the jury acquitted appellant of all counts except second-degree assault, which carries a maximum potential penalty of 10 years of incarceration. CR § 3-203(b). As mentioned, the court sentenced appellant to 10 years of incarceration for that offense.

DISCUSSION

Relying on *Simms v. State*, 288 Md. 712 (1980), appellant contends that, because he was acquitted of manslaughter, the circuit court could not impose a sentence greater than two years under CR § 2-207(a)(2). On this premise, he argues that his sentence of 10 years for the "lesser included" offense of second-degree assault amounts to an illegal sentence under Maryland Rule 4-345(a).[2]

In *Simms*, the question before the Supreme Court of Maryland was "whether, when a defendant is charged with a greater offense and a lesser included offense which carries a higher maximum penalty, and when he is acquitted of the greater and convicted of the lesser, can he properly receive a more severe sentence than could have been imposed had he been convicted of the greater charge." 288 Md. at 719. There, the State had charged the defendants with assault with intent to rob and simple assault. *Id*. at 715. The jury acquitted

[2] Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." We address the legality of the sentence under a *de novo* standard of review. *Blickenstaff v. State*, 393 Md. 680, 683 (2006).

the defendants of assault with intent to rob, which carried a maximum penalty of 10 years' incarceration, and convicted them of simple assault, which, at the time, had no statutory penalty.[3] *Id*. at 714–16. The trial court sentenced the defendants to 12 years of incarceration. *Id*. at 717. The defendants claimed the sentences were illegal because the 10-year cap applied to both offenses. *See id*. at 717–18.

The Court agreed, holding invalid the 12-year sentences imposed on the defendants, who were acquitted of the greater offense of assault with intent to rob, and convicted of the lesser included offense of simple assault. *Id*. at 724. It explained that, because simple assault merges with assault with intent to rob, upholding the 12-year sentences under the circumstances "would permit a defendant to be punished more severely because of an acquittal on a charge. He would have fared better if he were less successful or had pled guilty to the greater charge of assault with intent to rob." *Id*. at 723–24. If the defendants had been convicted of assault with intent to rob, and the included offense of simple assault, the maximum sentence that they lawfully could have received would have been 10 years' imprisonment. *Id*. at 723.

The Court also explained that the defendants "each received something more severe than the maximum for which he was prosecuted." *Id*. at 724. The defendants "were defending against a prosecution seeking a conviction carrying a ten year maximum. If they

[3] The upper limit on the term of imprisonment for a defendant found guilty of simple assault was "limited only by the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and Articles 16 and 25 of the Maryland Declaration of Rights." *Robinson v. State*, 353 Md. 683, 692 n.6 (1999) (citing *Simms*, 288 Md. at 714).

had been defending against a prosecution carrying a risk of a much greater sentence, their tactics might well have been different." *Id*. Based on the circumstances, the Court concluded that it was "unfair to permit the State to exact a more severe and unanticipated penalty than that which could have been imposed if the prosecution had been wholly successful." *Id*.

The Court held:

> [W]hen a defendant is charged with a greater offense and a lesser included offense based on the same conduct, with jeopardy attaching to both charges at trial, and when the defendant is convicted only of the lesser included charge, he may not receive a sentence for that conviction which exceeds the maximum sentence which could have been imposed had he been convicted of the greater charge.

Id.

In the instant appeal, the State responds that appellant's reliance on *Simms* is self-defeating. The maximum sentence for second-degree assault is the same as the maximum sentence for manslaughter—10 years' incarceration. Even if appellant's conviction for second-degree assault is a lesser included offense of manslaughter for which he was acquitted, the sentence he received for second-degree assault does not exceed the maximum sentence which could have been imposed had he been convicted of manslaughter. We agree with the State.

For purposes of this discussion, we assume without deciding that second-degree assault is a lesser included offense of manslaughter. Turning to the manslaughter sentencing statute, appellant acknowledges that the maximum sentence for manslaughter is 10 years. Indeed, "[l]egal authorities have consistently interpreted the manslaughter

statute to carry one penalty for a conviction[.]" *Bowers v. State*, 227 Md. App. 310, 319 (2016) (citing Charles E. Moylan, Jr., *Criminal Homicide Law* § 8.5, at 155–56 (2002) ("If a defendant is convicted of manslaughter in Maryland, the maximum penalty provided by the Legislature is 10 years imprisonment[.]")). Subsections (a)(1) and (2) of the statute "merely provides sentencing *options* that give a sentencing court broad discretion as to whether defendant should serve the sentence in the Department of Corrections or in a local facility and for how long."[4] *Id*.

Appellant focuses on the two-year sentencing option under subsection (a)(2), arguing that the rationale in *Simms* precludes imposition of a sentence for second-degree assault that exceeds the two-year cap under subsection (a)(2). He claims that had he been convicted of manslaughter, instead of second-degree assault, he "would have had a lighter sentencing option[.]" But because he was convicted of, and sentenced on, the lesser offense of second-degree assault, he received a greater sentence than he might otherwise have received under the manslaughter sentencing statute. On this premise, he argues that the manslaughter acquittal was "disadvantageous to him" and thus the "more prudent approach, consistent with *Simms*, is capping [his] sentence at two years."

We are not persuaded. *Simms* requires that the sentence for a lesser-included offense cannot exceed the maximum sentence which could have been imposed had a defendant been convicted of a greater charge. Here, because both offenses carry a maximum 10-year

[4] Due to fiscal concerns stemming from placing individuals with shorter sentences in the State penitentiary, the legislature changed the manslaughter sentencing statute to provide that shorter sentences, not exceeding two years, would be served in local jails rather than the State penitentiary. *See Bowers*, 227 Md. App. at 324–25.

penalty, appellant's sentence of 10 years for second-degree assault is not illegal. The court could have sentenced appellant anywhere within the range of 10 years of incarceration for second-degree assault; the manslaughter acquittal did not limit the court from imposing a sentence of less than two years. The sentence imposed for second-degree assault does not contravene the holding in *Simms*.

JUDGMENT OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.