Circuit Court for Prince George's County
Case No. CT1413728

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2403

September Term, 2018

DERRICK JEROME CROWDER

v.

STATE OF MARYLAND

Fader, C.J.,
Graeff,
Shaw Geter,

JJ.

Opinion by Graeff, J.

Filed: August 10, 2020

Derrick Crowder, appellant, was convicted by a jury in the Circuit Court for Prince George's County of armed robbery and related offenses. As discussed in more detail, *infra*, the court sentenced appellant to 25 years' imprisonment.

On appeal, appellant presents several questions for this Court's review, which we have consolidated and rephrased slightly, as follows:

1. Did the circuit court err in admitting into evidence two documents bearing appellant's name?

2. Should appellant's sentences for wearing, carrying, or transporting a handgun on his person and for wearing, carrying, or knowingly transporting a handgun in a vehicle merge with his sentence for use of a handgun in the commission of a violent crime?

3. Did the court improperly increase the sentence for possession of a regulated firearm after appellant left the courtroom?

4. Is appellant's sentence of 25 years without parole on the armed robbery conviction cruel and unusual punishment?

For the reasons set forth below, we shall vacate several sentences and otherwise affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On September 6, 2014, at approximately 9:00 a.m., Robert Brown received a call from appellant about "getting high." At that time, Mr. Brown had known appellant, who he knew as "D.J.," for approximately six months. Appellant and Mr. Brown planned for Mr. Brown to buy two "dippers," a cigarette dipped in phencyclidine (PCP), for $15 each. Mr. Brown and appellant had previously smoked together eight or nine times.

At approximately 11:00 a.m., Mr. Brown drove to Forestville, where appellant was living. Appellant had told Mr. Brown that he was alone, but when Mr. Brown met appellant

in the parking lot of his building, another man, who Mr. Brown had never seen before, was with him. Appellant said it was his brother. Mr. Brown later identified this man as Davon Ray. Appellant got in the front passenger seat of Mr. Brown's car, and Mr. Ray got in the back. Mr. Brown testified that neither man looked right, noting that appellant was very red in the face.

After they got in the car, Mr. Brown asked for the money for the dippers, which they gave him. Appellant then took the dippers, pulled out a gun "from his crotch area," and placed the gun on the car console between the two of them. Mr. Brown was very confused, and when he asked what was going on, appellant said that he should rob Mr. Brown. Appellant and Mr. Ray then proceeded to smoke the dippers in the car.[1]

At this point, Mr. Brown was unsure what was happening. He testified that he did not leave the car because it was running, they had a gun, and they told him "they were in the process of robbing" him. Appellant then told Mr. Brown to drive them to find some more dippers. Mr. Brown started to drive while appellant made a phone call. Appellant was unable to reach whoever he was trying to call. Mr. Brown started driving toward the mall, but he decided to turn around and go back to where he met appellant and Mr. Ray. The entire time this was happening, the gun was still on the console. Mr. Brown took them to the back of the parking lot where he had picked them up, and appellant told him to park the car. Once parked, appellant reached over and punched Mr. Brown in the face twice. Appellant also grabbed Mr. Brown's shirt and started calling him names.

[1] Mr. Brown did not think he smoked any dippers that day.

Mr. Ray got out of the car and walked around to the driver's side door, where Mr. Brown had put his wallet. Mr. Ray reached in, grabbed the wallet, and then tried to take the keys from the ignition. Mr. Brown, however, held onto the keys. Appellant then hit him again, and Mr. Brown "got from" appellant's grasp and exited the car. Appellant also got out of the car.

Once they were all out of the car, Mr. Ray realized that there was no money in Mr. Brown's wallet, so appellant grabbed Mr. Brown by the shirt again and asked Mr. Ray to hand him the gun. Appellant said he was going to "take [Mr. Brown] to the bank," and he asked Mr. Brown for the pin number to his bank account so he could take money from it. Mr. Brown was able to take off his shirt to get out of appellant's grasp. As he ran away from them, he called 911 to report the robbery.[2] At some point, the men took back the money they had paid Mr. Brown for the dippers.

Mr. Brown was able to identify both appellant and Mr. Ray as the men he saw that day. The Prince George's County Police Department's investigation resulted in the filing of the following charges against appellant: armed robbery, robbery, first-degree assault, second-degree assault, theft less than $1,000, possession of a firearm as a felon, use of a firearm in the commission of a crime of violence, wearing, carrying, or transporting a handgun on his person, wearing, carrying, or transporting a handgun in a vehicle, and conspiracy to commit armed robbery.

[2] Mr. Brown called appellant "Donald" on the 911 call. He said he did that because he did not know appellant's real first name, he only knew him as "D.J."

At trial, in addition to Mr. Brown's testimony, the State introduced several items found while executing a search warrant at a house in Temple Hills, Maryland. The State introduced a photo of a gun found in the house that Mr. Brown testified looked like the gun that appellant had on the day of the robbery. Neither appellant's fingerprints nor DNA were found on the gun. The State also introduced two items that were found in the house with the gun, a piece of mail with appellant's name on the envelope, and another document that had appellant's name on it.[3]

The jury found appellant guilty of armed robbery, robbery, second-degree assault, theft, possession of a regulated firearm by a felon, use of a firearm in the commission of a crime of violence, wearing, carrying, or transporting a handgun upon his person, and wearing, carrying, or transporting a handgun in a vehicle.

At the sentencing hearing on October 30, 2015, the State advised that it was asking for a sentence of 25 years without parole. It explained that appellant had another case set for sentencing that day, and the State had agreed to let this case run concurrently with that one. Defense counsel stated that they had agreed that appellant would plead guilty in the other case, with the understanding that he would receive "a mandatory 25 in this case." With respect to appellant's conviction for felon in possession of a firearm, the State asked for a sentence of 15 years, all suspended, concurrent with the 25-year sentence.

[3] The address on the letter was not that of the home where it was found. It had another address and appellant's name on the envelope.

The court stated that it would adopt the sentence to which appellant agreed. It then sentenced appellant as follows:

> Count I: Armed robbery – 25 years without parole;
>
> Count II: Robbery – merged;
>
> Count IV: Second-degree assault – merged;
>
> Count V: Theft – merged;
>
> Count VI: Possession of a regulated firearm while a convicted felon – "15 years suspend it all, but merging to Count I";
>
> Count VII: Use of a firearm in the commission of a crime of violence – five years without parole, concurrent to Count I;
>
> Count VIII: Wearing, carrying, or transporting ("wear/carry/transport") a handgun on his person – three years suspended, concurrent to Count I; and
>
> Count IX: Wear/carry/transport a handgun in a vehicle – three years suspended, concurrent to Count I.

The court subsequently changed the sentence for felon in possession of a firearm to 15 years, concurrent.

This appeal followed.

DISCUSSION

I.

Appellant contends that the circuit court erred by admitting a letter and another document with appellant's name on them. He contends that these documents were improperly admitted because they were not relevant. Acknowledging that he did not raise

this argument below, appellant asks this Court to address this issue under the doctrine of plain error review.[4]

The State contends that the relevance claim is not preserved for this Court's review because appellant did not argue below that the documents were irrelevant. It argues that plain error review is not warranted, asserting that there was no error, "much less a 'clear or obvious' one."

"Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). Although this Court has discretion to review unpreserved errors, the Court of Appeals has explained that "appellate courts should rarely exercise" their discretion under Md. Rule 8-131(a). *Chaney v. State*, 397 Md. 460, 468 (2007). This is because considerations of both

> fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Id. *Accord Kelly v. State*, 195 Md. App. 403, 431 (2010), *cert. denied*, 417 Md. 502, *cert. denied*, 563 U.S. 947 (2011).

[4] Appellant's argument below was that the documents were inadmissible because they were hearsay. Although appellant acknowledges in his brief that his reliance below on *Bernadyn v. State*, 390 Md. 1 (2005), was misplaced, he states that he "does not concede the point." Appellant makes no argument on appeal, however, in support of a claim that the documents were inadmissible hearsay. Accordingly, we will not consider that issue. *See Anderson v. Litzenberg*, 115 Md. App. 549, 577–78 (1997) (declining to address claim made with no legal authority).

We reserve our exercise of plain error review for instances when the "unobjected to error [is] 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *State v. Brady*, 393 Md. 502, 507 (2006) (quoting *State v. Hutchinson,* 287 Md. 198, 202 (1980)). *Accord Steward v. State*, 218 Md. App. 550, 566–67, *cert. denied*, 441 Md. 63 (2014). Appellate review based on plain error is "a rare, rare, phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004). We are not persuaded to exercise our discretion to engage in plain error review in this case. [5]

II.

Appellant contends that his sentences for wear/carry/transport a handgun in a vehicle, and wear/carry/transport a handgun on his person, should merge into the sentence for use of a firearm in the commission of a felony. The State agrees that merger is appropriate, and the sentences for the wear/carry/transport counts should be vacated.

This Court can "correct an illegal sentence at any time." *See* Md. Rule 4-345(a). "It is well settled that when convictions for use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun are based upon the same acts, separate sentences for those convictions will not stand." *Holmes v. State*, 209 Md. App. 427, 456 (2013) (citing *Wilkins v. State*, 343 Md. 444, 446–47 (1996)), *cert. denied*, 431 Md. 445 (2013). When determining whether the charges are part of the same act or

[5] The State further argues that the documents in appellant's name, found in the same house as the gun, were circumstantial evidence of appellant's "connection to the house and, in turn, the handgun found therein." Given our determination that the issue does not warrant plain error review, we will not address the merits of the argument.

transaction, we examine whether the "defendant's conduct was 'one single and continuous course of conduct,' without a 'break in conduct' or 'time between acts.'" *Morris v. State*, 192 Md. App. 1, 39 (2010) (quoting *Purnell v. State*, 375 Md. 678, 698 (2003)).

Both parties point to *Clark v. State*, 218 Md. App. 230, 255 (2014), in support of the merger of sentences. In *Clark*, the defendant was found guilty of "wearing or carrying a handgun on his person, transporting a handgun in a vehicle, possession of a firearm by person under the age of 21," and several other counts. *Id.* at 235. This Court held that, under the rule of lenity, the three counts relating to the firearm should merge. *Id.* at 251–53. In merging the two handgun convictions, we explained: "The acts were part of a single transaction . . . in that they were the beginning, middle, and end of the robbery. They were the means by which the appellant transported the gun—whether by vehicle or on his person—to commit the robbery and to escape afterward." *Id*. at 256. *Accord Barrett v. State*, 234 Md. App. 653, 673 (2017) ("[S]entences for his convictions of wearing, carrying, or transporting a handgun on his person and in a vehicle should be merged."), *cert. denied*, 457 Md. 401 (2018).

Here, as in *Clark*, appellant's actions leading to the three firearms convictions were all part of a single transaction, i.e., the means to commit the armed robbery. Accordingly, the two counts for wearing, carrying, and transporting the handgun merge with the use of a firearm in commission of a felony count, and we shall vacate those two sentences.

III.

Appellant next contends that the circuit court improperly increased his sentence on Count VI, felon in possession of a firearm, after he left the courtroom. The State acknowledges that "the transcript reflects a possibility" that appellant was not present when the court changed appellant's sentence on this count, and it argues that we should grant a limited remand for further proceedings.

After the court sentenced appellant, including a sentence of 15 years, all suspended, on Count VI, the State indicated that a suspended sentence required a period of probation. The court stated that, because the entire sentence was suspended, no probation was required. The court then changed its mind, and the following occurred regarding Count VI:

> THE COURT: No, I think I'm going to take out the suspended sentence. Where did they go?
>
> [THE STATE]: I'm here.
>
> THE COURT: I think I'm going to take out — I'm just going to say 15 years concurrent, period.
>
> [THE STATE]: Okay. That's fine.
>
> THE COURT: And the reason is it's all concurrent to Count I, and he's got 25 without. I'm not suspending.
>
> [DEFENSE COUNSEL]: Right.
>
> [THE STATE]: Okay. That—
>
> THE COURT: Please tell him, before I – yeah.
>
> [THE STATE]: Yeah, I -- we have another one, so I'll let him know.

THE COURT: Thanks.

[THE STATE]: Thank you.

THE COURT: I'm not comfortable anymore. Thanks.

The parties agree that the original sentence was not in conformance with *Cathcart v. State*, 397 Md. 320 (2007). The parties also suggest that the initial sentence may have been illegal for failing to include the five-year mandatory minimum provided in Md. Code (2018) § 5-133(c)(2) of the Public Safety Article ("PS"), which provides:

> (2)(i) Subject to paragraph (3) of this subsection, a person who violates this subsection is guilty of a felony and on conviction is subject to imprisonment for not less than 5 years and not exceeding 15 years. (ii) The court may not suspend any part of the mandatory minimum sentence of 5 years[.][6]

We begin our analysis with *Cathcart*, 397 Md. at 327, where the Court of Appeals stated that a court has the power to suspend the execution of a sentence only in conformance with an authorizing statute. It explained that, pursuant to Md. Code (2018 Repl. Vol.), § 6-221 of the Criminal Procedure Article ("CP"), "[t]he court may defer the actual

[6] Paragraph 3 provides:

> (3) At the time of the commission of the offense, if a period of more than 5 years has elapsed since the person completed serving the sentence for the most recent conviction under paragraph (1)(i) or (ii) of this subsection, including all imprisonment, mandatory supervision, probation, and parole:
>
> (i) the imposition of the mandatory minimum sentence is within the discretion of the court; and
>
> (ii) the mandatory minimum sentence may not be imposed unless the State's Attorney notifies the person in writing at least 30 days before trial of the State's intention to seek the mandatory minimum sentence.

imposition of sentence in favor of probation or it may impose a sentence and suspend the execution of all of it in favor of the probation." *Cathcart*, 397 Md. at 326. Thus, a court may impose a split sentence and "(1) impose a sentence for a specified time and provide that a lesser time be served in confinement; (2) suspend the remainder of the sentence; *and* (3) order probation for a time [permitted by that statute]." *Id.* at 326 (emphasis and alteration added in *Cathcart*) (quoting CP § 6-222). To impose a split sentence, a court must include a period of probation. *Id.* at 329. The Court clarified, however, that the failure to impose a period of probation does not automatically make that sentence illegal, but it precludes it from being a split sentence and effectively limits the period of incarceration to the unsuspended part of the sentence. *Id.* at 330.

Here, after the discussion of the need for probation for a split sentence, the court changed the sentence from 15 years, all suspended, to 15 years, concurrent. The parties agree that was an increase in the sentence. The question is whether the change in sentence was proper.

Trial judges are permitted to fix "an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding." *Greco v. State*, 347 Md. 423, 432 n.4 (1997). *Accord* Md. Rule 4-345(c) ("The court may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding."). Here, the record suggests,

but does not conclusively establish, that appellant was not in the courtroom when this change in the sentence was made.

Given these circumstances, we agree that a remand for fact finding on this issue is warranted. On remand, in addition to making a finding whether appellant was in the courtroom when the change was made, the court also should consider whether the initial sentence imposed was illegal due to a failure to impose a mandatory minimum sentence. *See Chaney v. State*, 397 Md. 460, 466 (2007) (An illegal sentence can be corrected "at any time.").

IV.

Appellant's final contention is that his sentence of 25 years without parole for the conviction of armed robbery is cruel and unusual punishment. We are not persuaded.

The record reflects that appellant's armed robbery conviction in this case was appellant's third conviction of a crime of violence, subjecting him to a mandatory sentence of 25 years without parole. *See* Md. Code (2019), § 14-101(c) of the Criminal Law Article ("CR"). "An appellate court will vacate a sentence within statutory limits only if the defendant establishes that his or her sentence was unconstitutional or motivated by ill-will, prejudice or other impermissible considerations." *Carter v. State*, 461 Md. 295, 364 (2018).

As indicated, appellant contends that his 25-year sentence is unconstitutional, under both the Eighth Amendment to the United States Constitution and the Maryland Declaration of Rights. The Eight Amendment prohibits "cruel and unusual punishments."

U.S. Const. amend. VIII. "The Maryland Constitution contains similar proscriptions." *Carter*, 461 Md. at 308. *See Md. Const. Decl. of Rts.* art. 25 ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law."); *Md. Const. Decl. of Rts.* art. 16 ("[N]o Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereafter.").

The prohibition against cruel and unusual punishment is construed as prohibiting "imposition of a sentence that is grossly disproportionate to the severity of the crime." *Rummel v. Estelle*, 445 U.S. 263, 271 (1980). The Court of Appeals has set forth a two-step analysis to address a proportionality challenge:

> In considering a proportionality challenge, a reviewing court must first determine whether the sentence appears to be grossly disproportionate. In so doing, the court should look to the seriousness of the conduct involved, the seriousness of any relevant past conduct as in the recidivist cases, any articulated purpose supporting the sentence, and the importance of deferring to the legislature and to the sentencing court.
>
> If these considerations do not lead to a suggestion of gross disproportionality, the review is at an end. If the sentence does appear to be grossly disproportionate, the court should engage in a more detailed *Solem* [*v. Helm*, 463 U.S. 277 (1983)]-type analysis. . . . In order to be unconstitutional, a punishment must be more than very harsh; it must be *grossly* disproportionate. This standard will not be easily met.

Thomas v. State, 333 Md. 84, 95–96 (1993). *Accord Howard v. State*, 232 Md. App. 125, 175 (2017).

As appellant recognizes, the Court of Appeals has rejected the argument that a 25-year sentence without parole for a third conviction of a crime of violence was cruel and unusual punishment. *Minor v. State*, 313 Md. 573 (1988). In that case, the Court held that

the sentence was not "unconstitutionally disproportionate," *id*. at 586, noting that "the length of legislatively mandated prison terms should rarely be subjected to judicial review." *Id*. at 578. *See also Nelson v. Stat*e, 187 Md. App. 1 (2009) (Twenty-five-year sentence without parole for three-time drug offender was not cruel and unusual.); *Horsman v. State*, 82 Md. App. 99, 107 (Twenty-five-year sentence without parole for attempted daytime house breaking with two prior crimes of violence was not cruel and unusual.), *cert. denied*, 321 Md. 225 (1990).

Appellant attempts to distinguish *Minor* because it was decided before the enactment of Md. Code (2009), § 7-501(b) of the Correctional Service Article ("CS"), which states that "[a]n inmate convicted of a violent crime committed on or after October 1, 2009, is not eligible for a conditional release under this section until after the inmate becomes eligible for parole under" specified circumstances. He asserts that the effect of this statute is that diminution credits and good cause credits cannot be applied to reduce his term of confinement, and the unlikelihood of early release results in a cruel and unusual sentence.

The State disagrees. Quoting *State v. Stewart*, 368 Md. 26, 37 (2002), it points out that "sentences based on recidivist history are generally permissible under the federal and state constitutions," and "the legislature has made it clear that recidivist criminals are to receive harsher punishment than first-time offenders."

Based on the circumstances here, including the seriousness of the crime, armed robbery, as well as appellant's two prior crimes of violence, the 25-year sentence is not grossly disproportionate. Accordingly, appellant's argument that his sentence constitutes cruel and unusual punishment fails.

SENTENCES FOR WEAR, CARRY, TRANSPORT A WEAPON ON HIS PERSON AND WEAR, CARRY, TRANSPORT A WEAPON IN A VEHICLE ARE VACATED. SENTENCE FOR POSSESSION OF A FIREARM BY A PROHIBITED PERSON IS VACATED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY OTHERWISE AFFIRMED. COSTS TO BE SPLIT EVENLY BETWEEN APPELLANT AND THE COUNTY.