

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gerald J. Tyree, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 24, 2022

Court of Appeals Case No.
21A-CR-2592

Appeal from the Marion Superior
Court

The Honorable Grant W.
Hawkins, Judge

Trial Court Cause No.
49D31-1612-MR-48029

Tavitas, Judge.

Case Summary

- [1] Gerald Tyree appeals his convictions for murder, robbery, and carrying a handgun without a license. Tyree argues that: (1) the trial court erred by “merging” his felony murder conviction with the murder conviction; and (2) the written sentencing order and the abstract of judgment do not accurately reflect his convictions for robbery and carrying a handgun without a license. The State concedes that Tyree’s arguments are correct. Accordingly, we remand to the trial court for correction of the written sentencing order and the abstract of judgment.

Issue

- [2] Tyree raises one issue, which we restate as whether the trial court’s sentencing order and abstract of judgment require remand for correction.

Facts

- [3] On November 29, 2016, Tyree shot and killed Eric Ballard during a robbery. On December 16, 2016, the State charged Tyree with: (I) murder, a felony; (II) felony murder; (III) robbery resulting in serious bodily injury, a Level 2 felony; and (IV) carrying a handgun without a license, a Class A misdemeanor. The State also alleged in Part II of Count IV that Tyree committed carrying a handgun without a license, a Level 5 felony, due to a previous conviction. The State, however, later moved to dismiss Part II of Count IV, and the trial court granted the motion. In October 2021, the jury found Tyree guilty as charged.

[4] At the sentencing hearing, the parties agreed that the trial court could “sentence up to . . . an equivalent of a Level 5 Robbery for Count 3.” Tr. Vol. III p. 67. The trial court then orally sentenced Tyree to sixty years on Count I; “merged” Count II with Count I; sentenced Tyree to five years consecutive to Count I for the robbery conviction; and imposed a sentence of one year concurrent to the other sentences for the carrying a handgun without a license conviction. *Id.* at 75. Tyree, thus, received an aggregate sentence of sixty-five years in the Department of Correction.

[5] The trial court’s written sentencing order, however, reflects the following sentences and convictions: (1) sixty years for Count I; (2) “[c]onviction [m]erged” in Count II; (3) five years for robbery as a Level 2 felony; and (4) one year for carrying a handgun without a license as a Level 5 felony. Appellant’s App. Vol. II pp. 30. Moreover, the trial court’s written abstract of judgment reflects the following: (1) sixty years for Count I; (2) “[c]onviction [m]erged” in Count II; (3) five years for robbery as a Level 2 felony; (4) one year for carrying a handgun without a license as a Class A misdemeanor; and (5) Part II of Count IV was dismissed. Appellant’s App. Vol. II pp. 30. Tyree now appeals.

Analysis

[6] Tyree argues: (1) the felony murder conviction in Count II must be vacated because merging the conviction into the murder conviction is insufficient; (2) the sentencing order and abstract of judgment should be revised to reflect that Tyree was sentenced on the lesser-included robbery as a Level 5 felony in Count

III rather than as a Level 2 felony; and (3) the sentencing order should be revised to reflect that, in Count IV, Tyree was sentenced on carrying a handgun without a license as a Class A misdemeanor, not as a Level 5 felony. These corrections of the sentencing order and abstract of judgment, however, do not impact Tyree's aggregate sentence.

[7] We first note that our Supreme Court has held that “a merged offense for which a defendant is found guilty, but on which there is neither a judgment nor a sentence, is ‘unproblematic’ as far as double jeopardy is concerned.” *Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006). In *Green*, the Court held:

In this instance, the record does not actually indicate a formal judgment of conviction for any of the offenses. The judge's statement at sentencing, the Abstract of Judgment, and the Order on Plea or Finding of Guilt and Sentence all demonstrate that the conspiracy to commit robbery charge was merged, rather than reduced to judgment, and that Green was never sentenced for that count.

Id. The record here is not clear whether the trial court entered judgment of conviction for the felony murder guilty verdict. The State, however, concedes that remand is necessary to “properly reflect that the felony murder conviction is vacated.” Appellee's Br. p. 5.

[8] Furthermore, where the oral and written sentencing statements conflict, we “examine both the written and oral sentencing statements to discern the findings of the trial court.” *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007). “Rather than presuming the superior accuracy of the oral statement, we

examine it alongside the written sentencing statement to assess the conclusions of the trial court.” *Id.* We have “the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing.” *Id.*

[9] The State also concedes that Tyree is correct regarding the errors in the written sentencing order and the abstract of judgment for the robbery conviction in Count III and the carrying a handgun without a license conviction in Count IV. Accordingly, the robbery conviction should be entered as a Level 5 felony, and the carrying a handgun without a license conviction should be entered as a Class A misdemeanor. We remand to the trial court for the vacation of the felony murder conviction and the correction of the sentencing order and abstract of judgment as detailed above.

Conclusion

[10] The State concedes that Count II, the felony murder conviction, should be vacated. The trial court is ordered to amend the written sentencing order and abstract of judgment accordingly. The State also concedes that the sentencing order and abstract of judgment do not accurately reflect Count III, the robbery conviction, and Count IV, the carrying a handgun without a license conviction. The trial court is ordered to amend the written sentencing order and abstract of judgment to reflect that the robbery conviction in Count III is a Level 5 felony. The trial court is also ordered to amend the written sentencing order to reflect that the carrying a handgun without a license conviction in Count IV is a Class A misdemeanor. Accordingly, we remand to the trial court.

[11] Remanded.

Riley, J., and May, J., concur.