

Circuit Court for Montgomery County
Case No. 27456

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 841

September Term, 2018

BERNARD SMITH

v.

STATE OF MARYLAND

Meredith,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: May 1, 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.

Bernard Smith, appellant, appeals the denial of his motion to correct illegal sentence. Because Mr. Smith’s sentences are legal, we shall affirm.

Mr. Smith attacked a female victim in a Bethesda parking garage, sexually assaulted her, and then drove her to the District of Columbia, where he raped her. Following a 1983 jury trial in the Circuit Court for Montgomery County, Mr. Smith was convicted of kidnapping, first-degree sexual offense, second-degree sexual offense, third-degree sexual offense, assault with intent to rape, and battery. He was sentenced to thirty years’ imprisonment for kidnapping; fifteen years’ imprisonment for assault with intent to rape, to be served concurrently with the sentence for kidnapping; life imprisonment for first-degree sexual assault, to be served concurrently with the sentence for kidnapping; and ten years’ imprisonment for sexual offense in the third-degree, to run concurrent with all other sentences. The remaining convictions were merged. All of Mr. Smith’s sentences were ordered to run consecutive to the sentence for rape imposed in the District of Columbia.

In 2017, Mr. Smith filed a motion to correct illegal sentence, claiming that (1) his life sentence should be vacated because his first-degree sexual offense conviction merged into his second-degree sexual offense conviction, and (2) his kidnapping conviction violated the Double Jeopardy Clause because he had been convicted and sentenced for that offense in the District of Columbia.¹ The trial court denied his motion without a hearing. This appeal followed.

¹ Mr. Smith also raised two additional issues in his motion to correct illegal sentence. However, those issues are not properly before us as he does not raise them on appeal.

Mr. Smith first contends that the circuit court erred in denying his motion to correct illegal sentence because it failed to “consider[] the merging of the lesser included offenses and failed to consider the required evidence test.” As an initial matter, we note that in the argument section of his brief, Mr. Smith does not identify what offenses he believes should have merged or indicate why merger of any of his convictions was required. Because this claim is not presented with particularity, it is not properly before this Court. *See Diallo v. State*, 413 Md. 678, 692-93 (2010) (noting that arguments that are “not presented with particularity will not be considered on appeal” (citation omitted)).

Nevertheless, we briefly address Mr. Smith’s claim, raised in his motion to correct illegal sentence, that his conviction for first-degree sexual offense should have merged into his conviction for second-degree sexual offense. To be sure, the offenses of first-degree sexual assault and second-degree sexual assault merge when they involve the same act. But where merger is required, “the lesser included offense merges into the greater offense, and a sentence is imposed only for the offense having an additional element or elements.” *Nicolas v. State*, 426 Md. 385, 402 (2012). At the time Mr. Smith was convicted, first-degree sexual offense was a greater offense than second-degree sexual offense because it required proof of an additional element. *Compare* Md. Code Ann., Art. 27 § 464 (1957, 1982 Repl. Vol) (setting forth the elements first-degree sexual offense) *with* Md. Code Ann. Art. 27 § 464A (1957, 1982 Repl. Vol) (setting forth the elements of second-degree sexual offense). Therefore, Mr. Smith’s conviction for second-degree sexual offense merged into his conviction for first-degree sexual offense, not the other way around, as Mr. Smith claims. And the circuit court merged Mr. Smith’s convictions in this

manner at sentencing. Because Mr. Smith’s first-degree sexual offense conviction did not merge into his second-degree sexual offense conviction, his life sentence for that offense is not illegal.

Mr. Smith also asserts that, because of his prior conviction for rape in the District of Columbia, his Maryland convictions were barred by the constitutional prohibition against double jeopardy.² However, Mr. Smith raised this claim on direct appeal and it was rejected by this Court. *See Smith v. State*, No. 533, Sept. Term 1983 (filed Jan. 11, 1984) (“It is clear to us that the State of Maryland has not sought to hold Smith criminally liable a second time for a crime committed contrary to the laws of the District of Columbia. Rather, the Maryland indictment charged Smith with separate and distinct crimes that were committed in Maryland.”). Consequently, this claim is barred by the law of the case doctrine. *See Nichols v. State*, 461 Md. 572, 593 (2018) (“The law of the case doctrine bars a trial court from considering an issue as to a sentence’s legality that an appellate court has resolved.”).

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

² Notably, in his motion to correct illegal sentence, Mr. Smith only claimed that his sentence for kidnapping violated the Double Jeopardy clause.