

Circuit Court for Anne Arundel County
Case No. K-97-1684 and
Case No. K-97-1848

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

Nos. 2438 and 2439

September Term, 2017

LYE ONG

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: December 31, 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.

Lye Ong, appellant, filed an appeal from an order of the Circuit Court for Anne Arundel County denying his motion to correct an illegal sentence. He presents two questions for our review:¹

1. Did the resentencing court err in ordering that the sentences run consecutive to a sentence previously imposed by the Circuit Court for Howard County?
2. Was it error to apply retroactively to Appellant the principle that, on resentencing, the sentence on an individual count may be increased, provided that the total package of sentences is not increased?

For the reasons that follow, we affirm.

In April 1998, Ong pleaded guilty in the Circuit Court for Howard County to two counts of child abuse, and one count of second degree sexual offense. In December 1998, Ong was sentenced for those convictions to a total term of 20 years' imprisonment, with five years suspended.

In August 2000, Ong was convicted by a jury in the Circuit Court for Anne Arundel County of second degree sexual offense, child abuse, perverted sexual practice, and third degree sexual offense, all involving the same victim as in the Howard County case. In November 2000, Ong was sentenced by the Circuit Court for Anne Arundel County (hereinafter "the court") to 20 years' imprisonment for the conviction for second degree sexual offense; 10 years for the child abuse conviction, to be served consecutive to the

¹ Appellant originally presented a third question for review: "Was Appellant entitled to credit against each of the sentences for 60 days of pretrial incarceration?" On July 31, 2018, appellant filed a letter withdrawing that issue.

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sentence for second degree sexual offense; and 10 years for the conviction for third degree sexual offense, to be served concurrent with the sentence for child abuse, for a total of 30 years’ imprisonment.² The court ordered that the sentences were to be served consecutive to any sentences that had been imposed and that were being served or were yet to be served. The judgments were affirmed in an unreported opinion. *Ong v. State*, No. 2544, September Term 2000 (filed December 12, 2001) (“*Ong I*”).

In 2014, Ong filed a motion to correct an illegal sentence which the circuit court denied. On appeal from that order, Ong claimed, *inter alia*, that (1) the court erred in failing to merge the convictions for second degree sexual offense and third degree sexual offense with the conviction for child abuse, and (2) the sentencing court erred in ordering that the sentences imposed run consecutive to the sentence previously imposed by the Circuit Court for Howard County. In an unreported opinion, we held that the conviction for second degree sexual offense should have merged with the conviction for child abuse, vacated all the sentences, and remanded the case for resentencing. *Ong v. State*, No. 253, September Term 2015 (filed March 9, 2017), slip op. at 11 (“*Ong II*”). To provide guidance to the sentencing court on remand, we held that “[t]he offenses committed in Howard County are separate from the offenses committed in Anne Arundel County, and therefore, the sentencing court did not err in ordering that the sentences run consecutive to the Howard County sentence.” *Id.* at 13.

² The conviction for perverted sexual practice was merged for sentencing purposes.

Thereafter, on January 25, 2018, pursuant to our opinion and order of remand, the court resentenced Ong to 15 years’ imprisonment for the child abuse conviction, and a consecutive ten-year term for the conviction for third degree sexual offense, for a total of 25 years, to be served consecutive to any sentence Ong was serving as of November 1, 2000 (the original sentencing date). This appeal followed.

I.

Ong first reasserts the argument he made in his 2014 appeal from the denial of his motion to correct an illegal sentence, specifically, that ordering the sentences to run consecutive to the Howard County sentence resulted in an illegal sentence because the convictions in Anne Arundel County and Howard County were for “offenses against the same person and during, in part, the same time period” and therefore, “the offenses in Howard County should not be considered a separate crime.” The State contends that Ong is precluded from raising that issue in the present appeal by the law of the case doctrine. We agree with the State.

“Once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case.” *Kaye v. Wilson-Gaskins*, 227 Md. App. 660, 676, *cert. denied*, 449 Md. 420 (2016) (citations and quotation marks omitted.) Although Md. Rule 4-345(a) provides that a court may correct an illegal sentence at any time, the rule “does not render the law of the case doctrine inapplicable to an issue as to a sentence’s legality.” *Nichols v. State*, ___ Md. ___, 2018 WL 5816989, No. 8, Sept. Term 2017, at 8 (Nov. 7, 2018). As the Court of Appeals explained, the law of the case doctrine “bars a trial court from considering under Maryland

Rule 4-345(a) an issue as to the legality of a sentence where an appellate court has previously resolved the same issue.” *Id.*³

In his 2014 appeal, Ong raised the issue of the illegality of his consecutive sentences, asserting the same argument he presents in this appeal. We resolved the issue, holding that the offenses committed in Howard County were separate from the offenses committed in Anne Arundel County, and therefore, the sentencing court did not err in ordering that the sentences run consecutive to the Howard County sentence. Accordingly, as that holding is the law of the case, it is binding on the parties, and may not be relitigated.⁴

³ “The law of the case doctrine does not, however, bar a trial court from considering under Maryland Rule 4-345(a) an issue as to the legality of a sentence that an appellate court has not resolved[,]” nor does it “prohibit consideration of an issue as to the legality of a sentence under Maryland Rule 4-345(a) where a defendant could have raised, but failed to raise, the issue in a prior appeal.” *Nichols*, 2018 WL 5816989 at 8.

⁴ Our prior holding on the issue of the legality of consecutive sentences is the law of the case even though we vacated the sentences and remanded for resentencing after concluding that the second degree sexual offense conviction should have been merged with child abuse. *See Kaye*, 227 Md. App. at 677:

When a question of law is raised properly by the issues in a case and the Court supplies a deliberate expression of its opinion upon that question, such opinion is not to be regarded as *obiter dictum*, although the final judgment in the case may be rooted in another point also raised by the record.

(quoting *Schmidt v. Prince George’s Hosp.*, 366 Md. 535, 551 (2001)).

II.

Ong next contends that the resentencing court was without authority to impose a sentence on the conviction for child abuse above the 10-year sentence originally imposed. We disagree.

“[T]he category of illegal sentence covered by Rule 4-345(a) [is] limited to where ‘there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful.’” *Rainey v. State*, 236 Md. App 368, 374, *cert. denied*, 460 Md. 23 (2018) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). “An appellate court reviews without deference the issue of whether a sentence is illegal.” *Nichols*, 2018 WL 5816989 at 11.

Pursuant to Md. Code (1974, 2013 Repl. Vol.), Courts and Judicial Proceedings Article (“CJP”), § 12-702(b), “[i]f an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper . . . sentence, . . . the lower court may impose any sentence authorized by law to be imposed as punishment for the offense[,]” however, the resentencing court “may not impose a sentence more severe than the sentence previously imposed for the offense,” except in certain circumstances that are not relevant in the present case.⁵ “[A]s used in [CJP] § 12-702(b), the word ‘offense’ does

⁵ Pursuant to CJP §12-702(b), a trial court may increase a sentence on remand if:

- (1) The reasons for the increased sentence affirmatively appear;

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not mean an individual crime for which a trial court sentences a defendant, [but] instead refers to ‘the entirety of the sentencing package that takes into account each of the individual crimes of which the defendant was found guilty.’” *Nichols*, 2018 WL 5816989 at 15 (quoting *Twigg v. State*, 447 Md. 1, 26-27 (2016)). Accordingly, “[a] defendant’s sentence will be considered to have increased under § 12-702(b) only if the total sentence imposed after retrial or on remand is greater than the originally imposed sentence.” *Twigg*, 447 Md. at 30 (2016).

The total sentence originally imposed in 2000 for Ong’s convictions was 30 years. The total sentence imposed by the resentencing court in 2014 was 25 years. Accordingly, under *Twigg*, the sentence is not illegal under § 12-702(b).⁶

Ong claims that, because *Twigg* was decided after his resentencing in 2014, and during the pendency of his appeal from the court’s ruling on his motion to correct that sentence, “the *Twigg* total package rule of resentencing cannot be applied retroactively to his case, under the *ex post facto* principles that apply to judicial decision making through the operation of the Fifth and Fourteenth Amendments’ due process guarantees.” We disagree.

(2) The reasons are based upon additional objective information concerning identifiable conduct on the part of the defendant; and

(3) The factual data upon which the increased sentence is based appears as part of the record.

⁶ Ong does not claim that the 15-year sentence imposed for the child abuse conviction exceeded the maximum sentence permitted for that crime.

“[T]he question of whether a new constitutional or statutory decision in the criminal law area should be applied prospectively or retroactively arises only when the decision declares a new principle of law, as distinguished from applying settled principles to new facts.” *Taylor v. State*, 236 Md. App. 397, 427 (2018) (citation omitted). If the judicial decision “does not declare a new principle, it is fully retroactive and applies to all cases.” *Id.* (citation omitted). We agree with the State that the holding in *Twigg*, based on its interpretation of CJP § 12-702(b), did not create or declare new law, and therefore it was applicable at appellant’s resentencing in January 2018.

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