

Circuit Court for Baltimore City Case Nos.
112333013, 112333014, and 112333015

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1277

September Term, 2016

DARRYL NICHOLS

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: December 19, 2017

*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.

In 2014, Daryl Nichols was convicted by a jury in the Circuit Court for Baltimore City for a variety of crimes arising out of a kidnap-for-ransom scheme that resulted in the murder of the victim. Nichols appealed to this Court. In *Nichols v. State*, No. 169, Sept. Term, 2014, slip op. at 2 (filed Feb. 4, 2016) (“*Nichols I*”), a panel of this Court affirmed some of the convictions, vacated others and, what is relevant to his appeal, vacated his sentence for false imprisonment and remanded the case to the circuit court for resentencing on that charge.

BACKGROUND

We quote the unreported opinion in Nichols’s previous appeal for the factual background:

Darryl Nichols, Donta Vaughn, Eric Price,² and Sherelle Ferguson decided to try kidnapping and ransom as a way to make money. Together, they planned and executed a kidnapping scheme, and collected two separate ransom payments totaling \$40,000. Nichols was apprehended during the police manhunt for the kidnapping victim. Police found the body of the victim, Eric Pendergrass, beaten and asphyxiated, and arrested Vaughn and Ferguson soon thereafter.

² Price testified that he quit the conspiracy upon learning that the others planned to kill their victim after collecting the ransom money.

Nichols I, slip op. at 2.

Nichols was charged with first-degree premeditated murder, first-degree felony murder, kidnapping, false imprisonment, extortion, conspiracy to commit first-degree murder, conspiracy to commit kidnapping, conspiracy to commit false imprisonment, and

conspiracy to commit extortion. *Id.*, slip op. at 1. At the close of evidence, the circuit court erroneously, but without objection, instructed the jury that extortion was a valid predicate felony for first-degree felony murder.¹ *Id.* The jury acquitted Nichols of first-degree premeditated murder, conspiracy to commit first-degree murder, kidnapping, and conspiracy to commit kidnapping. The jury returned guilty verdicts for first-degree felony murder (with extortion as the predicate felony), false imprisonment, conspiracy to commit false imprisonment, extortion, and conspiracy to commit extortion. *Id.*, slip op. at 2.

The circuit court sentenced Nichols as follows:

Conviction	Sentence	Concurrent/Consecutive
First-Degree Felony Murder	Life, all but 50 years suspended	----
False Imprisonment	Life, all but 50 years suspended	Concurrent
Conspiracy to Commit False Imprisonment	50 years	Concurrent
Extortion	Five years	Concurrent
Conspiracy to Commit Extortion	Five years, followed by five years of supervised probation	Concurrent

Thus, in total, Nichols was sentenced to life imprisonment, with all but 50 years suspended, to be followed by five years' probation. We will now consider his first appeal.

¹ Criminal Law Article (“CL”) § 2-201(a)(4) specifies the universe of predicate felonies that may support a conviction of first-degree felony murder. That list does not include extortion.

First, the *Nichols I* panel exercised plain error review with regard to the first-degree felony murder jury instruction and vacated both the conviction and sentence for that offense. *Id.*, slip op. at 5-8. The panel also held that the State was precluded from retrying Nichols on a charge of second-degree felony murder, with extortion as the predicate felony. *Id.*, slip op. at 8 & n.4.

Second, the panel held that Nichols’s sentence of life imprisonment, with all but 50 years suspended, for false imprisonment was illegal. False imprisonment is a lesser included offense of the crime of kidnapping. Kidnapping has a statutory maximum sentence of 30 years, while false imprisonment, a common law offense, has no statutory maximum. Because Nichols was tried on both charges, his sentence for false imprisonment could not exceed the 30 year maximum sentence for kidnapping. The panel vacated that sentence and remanded that conviction with instructions for the circuit court to impose a sentence not to exceed 30 years’ imprisonment for that offense. *Id.*, slip op. at 10-11.

Third, the panel concluded that the evidence adduced at trial supported only a single conspiracy conviction. Therefore, the panel vacated the conviction and sentence for conspiracy to commit extortion. *Id.*, slip op. at 13-14.

Finally, the *Nichols I* panel rejected his challenges to the legality of his sentence for conspiracy to commit false imprisonment. *Id.*, slip op. at 11-12 & n.5.

In accordance with these holdings, the mandate in *Nichols I* stated:

**JUDGMENT FOR FIRST-DEGREE FELONY MURDER
VACATED. JUDGMENT FOR CONSPIRACY TO COMMIT**

EXTORTION VACATED. SENTENCE FOR FALSE IMPRISONMENT VACATED AND REMANDED FOR FURTHER PROCEEDINGS. JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

Nichols I, slip op. at 15.

Thus, as of the time the mandate was issued, Nichols stood convicted of false imprisonment, conspiracy to commit false imprisonment, and extortion. Because the mandate provided that the remaining convictions were “otherwise affirmed,” he remained sentenced to concurrent terms of 50 years’ imprisonment for conspiracy to commit false imprisonment and five years’ imprisonment for extortion.² On remand, the circuit court’s task was to resentence him for the false imprisonment conviction, and that sentence was not to exceed 30 years’ imprisonment.

At the resentencing hearing, and relevant to the issues raised in this appeal, defense counsel argued that the sentence for conspiracy to commit false imprisonment—50 years—should be capped at 30 years because the sentence for false imprisonment was capped at 30 years as per the *Nichols I* mandate. The court refused to revisit the sentence for conspiracy to commit false imprisonment because it read the *Nichols I* mandate as affirming that conviction and sentence. Counsel also sought to present mitigating evidence as to the conspiracy to commit false imprisonment conviction. The court

² The fate of the five-year term of probation was still unresolved, because none of the then-extant sentences included any suspended time, which is required if any term of probation is to be imposed. *Cathcart v. State*, 397 Md. 320, 326-27 (2007).

refused to accept mitigation evidence “unless you want to argue mitigation with regard to false imprisonment,” because that was the only conviction before the court.

The court sentenced Nichols to a term of 30 years’ imprisonment for false imprisonment, to run consecutively to the other two sentences. The net effect was that Nichols is now subject to a term of 80 years’ active incarceration with no probation.

DISCUSSION

I. The Sentence for Conspiracy to Commit False Imprisonment

A.

Nichols argues that the sentence of 50 years’ imprisonment for conspiracy to commit false imprisonment is illegal. He contends that:

- (1) false imprisonment is a lesser included offense of kidnapping;
- (2) he was tried on charges of kidnapping and false imprisonment and acquitted of the former charge;
- (3) the court was limited to a sentence that did not exceed the maximum sentence for kidnapping, citing *Simms v. State*, 288 Md. 712, 724 (1980); so
- (4) the sentence imposed for conspiracy to commit false imprisonment may not exceed 30 years’ imprisonment, and the sentence of 50 years is illegal because it violates CL § 1-202. That statute provides:

The punishment of a person who is convicted of conspiracy may not exceed the maximum punishment for the crime that the person conspired to commit.

The State raises two arguments in response. The first is that consideration of this claim is barred by the law of the case doctrine. The second contention by the State is that there is no maximum penalty for conspiracy to commit false imprisonment because false imprisonment itself is a common law crime, and therefore has no fixed maximum penalty.³ Applying the same reasoning to the lesser included offense of conspiracy to commit false imprisonment, the State concludes that Nichols’s sentence for that crime was legal. The State’s first contention is dispositive – the law of the case doctrine applies here and prevents us from considering Nichols’s argument.

Under the “law of the case” doctrine, “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.” *Scott v. State*, 379 Md. 170, 183 (2004). Moreover, “[d]ecisions rendered by a prior appellate panel will generally govern the second appeal’ at the same appellate level as well, unless the previous decision is incorrect because it is out of keeping with controlling principles announced by a higher court and following the decision would result in manifest injustice.” *Id.* (quoting *Hawes v. Liberty Homes*, 100 Md. App. 222, 231 (1994)). And, more recently, in *Holloway v. State*, 232 Md. App. 272 (2017), we observed that the law of the case doctrine applies not only to a claim that was actually decided in a prior appeal, but also to any claim “that

³ The exception would be any limitation imposed by the Eighth Amendment, which is not at issue here.

could have been raised and decided” in the prior appeal. *Id.* at 284 (quoting *Kline v. Kline*, 93 Md. App. 696, 700 (1992)).

In his first appeal, Nichols challenged the 50 year sentence imposed for conspiracy to commit false imprisonment. He asserted that the statutory maximum penalty is 30 years because that crime is a lesser included crime of false imprisonment, for which the maximum penalty is 30 years. CL §§ 1-202 & 3-502(b); *Nichols I*, slip op. at 11-12 & n.5. The *Nichols I* panel rejected that claim, this Court issued its mandate, and the time period during which a petition for writ of certiorari could have been filed lapsed. The panel’s holding therefore became the law of the case.

In the present appeal, Nichols asserts that the 50 year sentence for conspiracy to commit false imprisonment is illegal because it violates CL § 1-202.⁴ This argument was not addressed by the *Nichols I* panel. However, because it “could have been raised and decided” in the previous appeal, further consideration of it is barred by the law of the case doctrine. *Holloway*, 232 Md. App. at 284.

The law of the case doctrine does not apply if “the previous decision is incorrect because it is out of keeping with controlling principles announced by a higher court and following the decision would result in manifest injustice.” *Scott*, 379 Md. at 183. There

⁴ C.L. § 1-202 states:

The punishment of a person who is convicted of conspiracy may not exceed the maximum punishment for the crime that the person conspired to commit.

is no decision of the Court of Appeals that is directly on point and contrary to the panel’s holding, and we certainly do not perceive a “manifest injustice,” given Nichols’s role in the kidnap-for-ransom scheme and the ensuing death of the victim, Mr. Pendergrass.⁵

In sum, Nichols had a full and fair opportunity to litigate his illegal sentence claims in *Nichols I*. Those claims were resolved on the merits by the *Nichols I* panel, and he did not prevail. There is no reason why his current contention could not have been raised in *Nichols I*. Therefore, the law of the case doctrine prevents him from challenging the legality of that sentence, even if his current attack is based upon a different legal theory.

⁵ Nichols relies on *State v. Garnett*, 172 Md. App. 558 (2007) (“*Garnett II*”) for his contention that the law of the case doctrine does not bar his current challenge to the legality of his sentence. However, our reasoning here is consistent with *State v. Garnett*.

Garnett was tried for trespass and malicious destruction of property after she damaged vehicles at a police station. *State v. Garnett*, 384 Md. 466, 469-70 (2004) (“*Garnett I*”). She pleaded guilty but was found not criminally responsible for her actions because of a mental disorder. *Id.* at 507. Her initial challenge to the outcome of her case reached the Court of Appeals. The Court explicitly noted that it was not making a determination regarding the legality of imposing an order of restitution on a defendant found not criminally responsible, as that issue was not raised. *Id.* at 475 n.10. Rather, it considered whether the order to pay restitution was a civil or criminal penalty, and whether such an obligation is dischargeable in bankruptcy.

In the second round of litigation, Garnett challenged the order as illegal, only to have the circuit court find that the law of the case doctrine barred her claim. We concluded that was an incorrect application of the doctrine, as while Garnett had already challenged the order on other grounds, she had not previously raised the issue of whether the order was illegal under Md. Rule 4-345(a). *Garnett II*, 172 Md. App. at 562-63.

Nichols, in contrast, has already challenged the legality of his sentence and failed to prevail in *Nichols I*.

B.

Nichols next contends that the circuit court exceeded the scope of this Court’s remand by altering his sentence for conspiracy to commit false imprisonment. This contention is not supported by the record. Our review of the resentencing transcript indicates that the circuit court left intact the sentences for conspiracy to commit false imprisonment and extortion and that the only action it took was to resentence Nichols on his false imprisonment conviction. Resentencing Nichols only on the false imprisonment conviction was entirely consistent with the *Nichols I* mandate.⁶

III. The Sentence for False Imprisonment

Nichols contends that the circuit court illegally increased his sentence on remand because, whereas his previous sentences resulted in a net sentence of life imprisonment,

⁶ Indeed, when Nichols’s counsel sought permission to present mitigation evidence relevant to the other counts, the circuit court replied:

At this juncture, given why we’re here, I don’t have any power to do that. Because it -- this is not a motion for modification that we’re hearing.

The only thing that we are hearing is as set forth in the unreported opinion of the Court of Special Appeals 1-6, 0-1-6-9 September Term 2014 Darryl Nichols versus State of Maryland, which was judgment for first degree felony murder, vacated sentence for conspiracy to commit extortion, vacated sentence for false imprisonment, vacated and remanded for further proceedings.

And that’s why we’re here, is the further proceedings with regard to the false imprisonment, as I understand it.

with all but 50 years suspended, his sentence is now for a term of 80 years’ active incarceration. The State counters that, because Nichols’s original sentence was for a term of life imprisonment, and his amended sentence is for a term of years, there was no illegal increase in sentence. We do not agree with the State.

We are aware of no authority that is expressly on point. However, in *Matthews v. State*, 424 Md. 503 (2012), the Court of Appeals dealt with a very similar issue and we believe that the approach taken there is instructive.

In that case, Matthews had entered into a plea agreement, whereby he was to be sentenced to a term “to the top of the guidelines range,” which called for incarceration for a term of between 23 to 43 years. *Id.* at 507. After the State averred that it would “be asking for incarceration of forty-three years,” which was “a cap as to actual and immediate incarceration at the time of initial disposition,” the circuit court “agreed to cap any sentence,” while, at the same time, advising Matthews that it could, “theoretically,” impose a sentence ranging from “the mandatory minimum on the one count, which is five years without parole, up to the maximum of life imprisonment.” *Id.* The court then accepted Matthews’s guilty plea and scheduled a sentencing hearing.

At the ensuing sentencing hearing, the State argued for a sentence of life imprisonment, with all but 43 years suspended. The circuit court sentenced Matthews to “a total sentence of life imprisonment, with thirty years of it as executed time.”⁷ *Id.*

⁷ Matthews pleaded guilty to attempted first-degree murder, two counts of first-degree assault, and unlawful use of a handgun in the commission of a felony or crime of

Matthews then filed a postconviction petition alleging, among other things, that his trial counsel had been ineffective by failing to object to the State’s violation of the plea agreement, which, according to Matthews, provided for “a total sentence of forty-three years, inclusive of any suspended portion.” *Id.* The postconviction court agreed that the State had breached the plea agreement and granted Matthews a new sentencing hearing; it further held that the plea agreement had *not* been a *binding* agreement and that the circuit court, on remand, would be “free to impose whatever sentence it feels appropriate.” *Id.* at 508-09. On remand, the circuit court re-imposed the same sentence it had previously imposed. *Id.* at 509-10.

Matthews filed a motion to correct an illegal sentence, which the circuit court denied without a hearing. *Id.* at 510. This Court affirmed in a reported opinion. *Matthews v. State*, 197 Md. App. 365 (2011), *rev’d*, 424 Md. 503 (2012). The Court of Appeals reversed. Among other things, the Court construed the plea agreement as a *binding* plea agreement in light of the circuit court’s statement during the plea hearing that it “agreed to cap any sentence.” *Matthews*, 424 Md. at 520, 523-25. And, because the precise terms of that binding plea agreement were ambiguous, the Court resolved that ambiguity in favor of Matthews, holding that he was “entitled to have the plea agreement enforced,

violence. The court sentenced him to life imprisonment, with all but 30 years suspended, for attempted first-degree murder, as well as concurrent sentences of 25 years’ imprisonment for each of the two assault charges and 20 years’ imprisonment (with a mandatory five-year minimum) for the unlawful use of a handgun. *Matthews v. State*, 424 Md. 503, 506-07 (2012).

based on the terms as he reasonably understood them to be: a maximum sentence, including any suspended portion, of forty-three years.” *Id.* at 525. Because the sentence imposed had exceeded that allowable maximum, the Court held that it was illegal within the meaning of Maryland Rule 4-345(a).⁸ *Id.*

Moreover, and what is particularly pertinent here, the Court vacated Matthews’s sentence and remanded for resentencing, ordering that, “at the resentencing proceeding, the court is bound not to exceed a total sentence of 43 years, with all but 30 years suspended.” *Id.* at 525-26 (citing Courts and Judicial Proceedings Article (“CJ”) § 12-702(b)) (footnote omitted). We think it especially noteworthy that the cap of 30 years of executed time was not derived from the terms of the plea agreement in that case, as construed by the Court of Appeals. Our reading of *Matthews* suggests that the thirty-year cap was determined from the previous sentence the court had imposed in that case: life imprisonment, with all but 30 years suspended. *See id.* at 507.

Returning to the present case, we first set forth the statute that governs resentencing following an appeal, CJ § 12-702(b):

If an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper judgment or sentence, or conduct a new trial, and if there is a conviction following this new trial, the lower court may impose any sentence authorized by law to be imposed as punishment for the offense. However, it may not impose a sentence more severe than the sentence previously imposed for the offense unless:

⁸ Maryland Rule 4-345(a) provides: “The court may correct an illegal sentence at any time.”

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

The circuit court originally sentenced Nichols to life imprisonment, with all but 50 years suspended, for the false imprisonment conviction. This sentence was to run concurrently to the sentences imposed for Nichols's other convictions. Upon remand, the court imposed a sentence of incarceration of 30 years on the false imprisonment conviction but made it consecutive to the other sentences. The net effect was to increase the time of active incarceration from 50 to 80 years.

The circuit court based its resentencing decision on the fact that Nichols's sentence for a federal conviction for an unrelated crime was reduced after the sentence in the instant case was imposed. But a change in sentence, by a different court in a different case, is not grounds for an increase in sentence upon remand under CJ § 12-702(b) because it does not constitute "identifiable conduct on the part of the defendant." CJ §12-702(b)(2).

In the absence of "additional objective information concerning identifiable conduct on the part of the defendant" that would justify the increase in the executed portion of Nichols's sentence, a point which was raised neither at the resentencing hearing nor by the State on appeal, we conclude that the circuit court unlawfully increased Nichols's

sentence. We therefore vacate the sentence for false imprisonment and remand, with instructions that the sentence imposed may not result in a total term of active incarceration greater than 50 years.

IV. Mitigation Evidence

Finally, Nichols contends that the circuit court erred in refusing to hear mitigation evidence as to his conviction for conspiracy to commit false imprisonment. But the court did not resentence Nichols for that conviction and, indeed, could not have done so without flouting the mandate in *Nichols I*. The court made it clear to counsel that it would permit the defense to present mitigating evidence as to the conviction for which it would be imposing sentence. We fail to see any error whatsoever by the circuit court.

**THE SENTENCE FOR FALSE IMPRISONMENT IS VACATED.
THE JUDGMENTS ARE OTHERWISE AFFIRMED. THE CASE IS
REMANDED FOR RESENTENCING FOR THE FALSE
IMPRISONMENT CONVICTION IN ACCORDANCE WITH THIS
OPINION.**

**COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF
BALTIMORE.**