Circuit Court for Montgomery County
Case No. 83767

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 135

September Term, 2017

BENOIT TSHIWALA

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: May 7, 2018

Benoit Tshwila appeals the denial, by the Circuit Court for Montgomery County, of his motion to correct an illegal sentence filed pursuant to Md. Rule 4-345(a). We shall dismiss the appeal because the motion was moot when filed.[1]

Following jury trials in several cases, Tshiwala was convicted of numerous offenses, including conspiracy to commit robbery with a dangerous and deadly weapon and multiple counts of first-degree assault, robbery with a dangerous and deadly weapon, attempted robbery with a dangerous and deadly weapon, and use of a handgun in the commission of a crime of violence and in the commission of a felony. The cases were consolidated for sentencing purposes and on April 28, 2000, Tshiwala was sentenced to a total term of seventy years' imprisonment. This Court affirmed the judgments. *Tshiwala v. State*, No. 763, September Term, 2000 (filed May 4, 2001), *cert. denied,* 367 Md. 88 (2001).

In 2008, a three-judge sentencing review panel reduced Tshiwala's total term of imprisonment from seventy years to thirty-nine years. The overall sentence was compromised of a series of sentences for the various convictions, with some running concurrently and others consecutively. Of relevance here, a five-year sentence for first-degree assault of Alain Assemain (Count 3) and a nine-year sentence for first-degree assault of Akintunde Phillips (Count 17) were both run concurrently with the lead sentence, and hence concurrently with each other. None of the other sentences in the sentencing package were run consecutively to the sentences imposed for Counts 3 and 17. The

[1] Given our disposition, we need not address the State's motion to dismiss the appeal based on other grounds. We note, however, that we disagree with the State's contention that Tshiwala's notice of appeal was untimely.

commitment record reflects that the sentence commenced on November 10, 1998. Thus, the sentences for Counts 3 and 17 were completed in 2003 and 2007, respectively.

In 2016, Tshiwala, a self-represented litigant, filed a motion to correct an illegal sentence in which he challenged the legality of his sentences for Counts 3 and 17 by attacking the underlying convictions. As noted, however, the motion was moot when filed because Tshiwala was no longer serving the sentences imposed for Counts 3 and 17. As such, even if we were to assume there was some error, there was no sentence to correct and the motion should have been dismissed, as a plurality of the Court of Appeals made clear in *Barnes v. State*, 423 Md. 75, 86 (2011).

> As Rule 4-345(a) simply permits a court to revise an illegal sentence, rather than to modify or overturn the underlying conviction, it follows that a court can no longer provide relief under that rule once a defendant has completed his or her sentence. In that instance, there is no longer a sentence to correct, and a court should dismiss the motion as moot unless special circumstances demand its attention.

Id. at 86.

This case presents no "special circumstances" that would justify addressing a moot issue. As noted, the sentences have been served and there were no other sentences consecutive to these which would affect the running of the remaining sentences.

Moreover, even if not moot, we would agree with the State that the issue Tshiwala is now raising is barred under the law of the case doctrine because the basis of his claim – that it is not clear what modality of assault the jury convicted him of for Counts 3 and 17 and, therefore, the assault verdicts *may* not have been unanimous – was addressed in his

direct appeal.[2] *Scott v. State*, 379 Md. 170, 183-184 (2004) (the law of the case doctrine, binding litigants and lower courts to an appellate ruling, applies also to a panel of the same appellate court in a subsequent appeal "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.") (citations omitted). We are not persuaded that this Court's decision on direct appeal was incorrect.

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.

[2] In Tshiwala's direct appeal, this Court, in a lengthy discussion, rejected his contentions that Counts 3 and 17 should have merged into other offenses. In doing so, we concluded that, for Count 17, "the jury convicted appellant of first degree assault for striking Mr. Phillips in the head[.]" *Slip Op.* at 30. As for Count 3, we determined that the conviction for the assault of Mr. Assemain was for "the outside assault," based on Tshiwala's attempt to shoot Mr. Assemain as he fled from his assailant. *Slip Op.* at 35. In short, this Court concluded that the verdicts for Counts 3 and 17 were "not ambiguous." *Id.*