UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1574 & 1575

September Term, 2016

DAVID SERRANO

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Berger,

JJ.

Opinion by Berger, J.

Filed: August 2, 2017

On November 19, 2010, Appellant, David Serrano, appeared before the Circuit Court for Wicomico County and pleaded guilty to second-degree rape and the commission of a sexual offense in the first degree. Pursuant to a binding plea agreement, the court sentenced Serrano to a term of twenty-five years' imprisonment for the sex offense and to a consecutive term of twenty years' imprisonment for the rape offense. In addition, pursuant to Md. Code (2001, 2008 Repl. Vol.), §§ 11-701 *et seq*. of the Criminal Procedure Article ("CP"), the court ordered Serrano to register as a sexual offender for life and to submit to lifetime sexual offender supervision.

This consolidated appeal arises from (1) the denial of Serrano's third motion to correct an illegal sentence and (2) the denial of Serrano's motion to withdraw his guilty plea that he filed before being re-sentenced as a result of prevailing on his second motion to correct an illegal sentence. Because of the relevance of prior litigation to the current litigation, we set forth that history in some detail.

Application for Leave to Appeal from Guilty Plea

Serrano did not immediately seek leave to appeal from his guilty plea in this Court, but was later granted post-conviction relief in the form of the right to belatedly seek leave to appeal, which he did. We denied the relief he requested in *David Serrano v. State*, No. 2478, Sept. Term, 2012 (filed November 5, 2013). Among other things, Serrano contended that the circuit court breached the terms of the binding plea agreement when it imposed lifetime sexual offender registration and supervision.

Serrano I

In 2012, Serrano filed a motion to correct an illegal sentence contending that the circuit court's imposition of lifetime sexual offender registration and supervision breached the terms of the binding plea agreement, and, therefore, resulted in the imposition of an illegal sentence. The circuit court denied Serrano's motion to correct an illegal sentence and Serrano noted an appeal to this Court.

Upon review, we observed that the terms of the binding plea agreement, as placed on the record at the plea hearing, provided that Serrano would plead guilty to one count of first-degree sex offense and to second degree rape. In exchange, the State would enter a nolle prosequi to the remaining charges and would withdraw its notice of intent to seek a sentence of life imprisonment without the possibility of parole, and the court would impose a mandatory twenty-five year term of imprisonment for the first-degree sex offense and a term of twenty years' imprisonment for second-degree rape to run consecutive to the sex offense sentence**.**

In affirming the circuit court's denial of Serrano's motion to correct an illegal sentence, we noted that "the circuit court did not breach the terms of Serrano's plea agreement, and thereby render his sentences illegal for [Md.] Rule 4-345(a) purposes, by ordering sex offender registration and sex offender supervision." *David Serrano v. State*, No. 2125, Sept. Term 2012 (filed August 15, 2014) Slip Op. at 8, (*Serrano I*).

Serrano II

Meanwhile, in May 2013, while *Serrano I* was pending in this Court, Serrano filed another motion to correct an illegal sentence, this time contending that the mandatory

imposition of sexual offender supervision for the duration of his life amounted to an illegal sentence because the statute in effect at the time Serrano committed his offenses placed the duration of sexual offender supervision within the discretion of the court with a minimum term of three years and a maximum term of life, whereas the statute in effect at the time Serrano was sentenced required lifetime supervision.

The circuit court denied the motion, and once again, Serrano noted an appeal to this Court. On appeal, we agreed with Serrano and reversed the circuit court's judgment. *David Serrano v. State*, No. 203, Sept. Term 2015 (filed May 6, 2016), (*Serrano II*).

In *Serrano II*, we found that the version of CP § 11-723 in effect prior to October 1, 2010 (when Serrano committed his offenses) did not require *automatic* lifetime sexual offender supervision, as it did when Serrano pleaded guilty and was sentenced. Although CP § 11-723 required sexual offender supervision both before, and after, October 1, 2010, prior to that date, the statute authorized the court to impose supervision for a minimum period of three years and a maximum period of life. We vacated the portion of Serrano's sentence that required lifetime supervision and remanded the case to the circuit court with instructions for the circuit court to impose sexual offender supervision according to the version of CP § 11-723 in effect prior to October 1, 2010, i.e. for a minimum of three years and a maximum of life.

Motion to Withdraw Guilty Plea

Shortly after we remanded the case to the circuit court for the re-sentencing directed in *Serrano II*, Serrano, acting *pro se*, filed a pleading titled "Motion for Appropriate Relief and/or Strike the Plea Agreement as Unenforceable." In that pleading, and in its

accompanying *pro se* memorandum of law, Serrano contended that he was not advised that his sentence would include sexual offender supervision, that the imposition of sexual offender supervision violated the plea agreement, that the imposition of sexual offender supervision rendered his sentence illegal, and that the appropriate remedy was to permit him to withdraw his guilty plea.

On August 12, 2016, the circuit court held a hearing during which the court denied Serrano's motion to withdraw his plea. Initially, the court was reluctant to hear Serrano's motion, stating "[w]e're not here for that, we're here for sentencing." The court believed that, because it was "simply a re-sentencing," Serrano was not entitled to withdraw his plea. Ultimately, the court decided that "[e]ven if you construed the rule[1] to read that he could make that request, it would not serve the interest of justice, in my opinion; therefore, I deny [Serrano's] motion to withdraw his guilty plea."

[1] The rule to which the court referred is Md. Rule 4-242(h), which provides:

> (h) *Withdrawal of Plea*. At any time before sentencing, the court may permit a defendant to withdraw a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere when the withdrawal serves the interest of justice. After the imposition of sentence, on motion of a defendant filed within ten days, the court may set aside the judgment and permit the defendant to withdraw a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere if the defendant establishes that the provisions of section (c), (d), or (e) of this Rule were not complied with or there was a violation of a plea agreement entered into pursuant to Rule 4-243. The court shall hold a hearing on any timely motion to withdraw a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere.

Re-sentencing pursuant to Serrano II

After denying Serrano's motion to withdraw his plea, the court then endeavored to re-sentence Serrano in accordance with our mandate in *Serrano II* by stating as follows: "[t]he court will order [Serrano] to register as a sexual offender, it will be for a period of 25 years with such supervision as deemed appropriate." Serrano sought clarification from the court by stating "[s]o you're imposing the same sexual parole supervision or registration, because it's two different things." To which the court responded "Court stands adjourned" before confirming that the other sentences remained the same.

Motion to Correct an Illegal Sentence #3

Shortly after being re-sentenced, on August 23, 2016, Serrano filed a motion to correct an illegal sentence. In that motion, Serrano again contended that the circuit court breached the plea agreement by ordering sexual offender supervision, and that his sentence was therefore illegal. Through counsel, Serrano averred, *inter alia*:

> The Defendant maintains that the sentence imposed on [August 12, 2016] is still an illegal sentence because it was not part of the plea agreement. He asserts that various conditions[2] imposed upon him at sentencing were not part of the plea agreement, to include being subject to so [sic] CP 11-723 sexual offender supervision, as such, the agreement and sentencing violate Maryland 4-243.
>
> ****
>
> The Defendant further argues that the State cannot add additional terms to the plea agreement and cites *Cuffley v. State*, 416 Md. 568 [(2010)], for the proposition that the

[2] Serrano never reveals the "various conditions" imposed on him that he claims were not part of the plea agreement, other than sexual offender supervision.

> purpose of [Md. Rule] 4-243 is to eliminate the possibility that the Defendant may not fully comprehend the nature of the agreement before pleading guilty. To violate this provision would violate due process.

All Together Now

Unsatisfied with the circuit court's denial of his motion to withdraw his guilty plea, Serrano filed an application for leave to appeal in this Court. Serrano also noted a direct appeal from the denial of the motion to correct an illegal sentence. We thereafter consolidated those appeals without granting, or denying, Serrano's application for leave to appeal. Having now read and considered the application for leave to appeal, it is denied.

Serrano presents the following questions which we have re-phrased[3] in light of our denial of the application for leave to appeal:

> I. Did the circuit court err in denying Serrano's motion to correct an illegal sentence where the court imposed a sentence in excess of that which Serrano reasonably understood to be part of the plea agreement?

[3] Serrano posed his questions as follows:

> 1. Did the circuit court err in denying [Serrano's] motion to strike the plea agreement and motion to correct an illegal sentence where the court imposed a sentence in excess of that which [Serrano] reasonably understood to be part of the plea agreement?
>
> 2. Did the circuit court err in summarily denying [Serrano's] motion withdraw his guilty plea?
>
> 3. Did the circuit court err by failing to impose a definite period of sexual offender supervision?

II. Did the circuit court err by failing to impose a definite period of sexual offender supervision?

In addition, the State raises the following question:

III. Did the circuit court impose an illegal sentence by reducing the period of sexual offender registration from life to 25 years?[4]

We answer question I in the negative, and questions II & III in the affirmative. We vacate the circuit court's imposition of a 25-year term for sexual offender registration, and remand the case with instructions to impose lifetime sexual offender registration. We also remand the case for the circuit court to impose sexual offender supervision for a period of not less than three years, and not more than life.

DISCUSSION

I.

Serrano contends that, because the imposition of sexual offender supervision was not a term of the plea agreement, and because the court imposed sexual offender supervision, that his sentence is illegal pursuant to the holdings of *Cuffley v. State*, 416 Md. 568 (2010), and *Baines v. State*, 416 Md. 604 (2010). Serrano's argument is foreclosed by the law of the case doctrine because, as noted *supra*, in *Serrano I*, we already found that the imposition of sexual offender supervision (and registration) did not breach the plea agreement and did not amount to an illegal sentence. Accordingly, we decline to reconsider the matter.

> The law of the case doctrine is one of appellate procedure . . . . Under the doctrine, once an appellate court rules upon a

[4] The State raised this question, not in so many words, via footnote.

> question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case . . . . Not only are lower courts bound by the law of the case, but decisions 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.

Haskins v. State, 171 Md. App. 182, 189–90 (2006) (quotations and alterations omitted) (ellipses in original) (quoting *Scott v. State*, 379 Md. 170, 183–84 (2004)). Moreover, under the law of the case doctrine, "[n]either the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal." *Haskins v. State*, 171 Md. App. 182, 190 (2006), quoting *Martello v. Blue Cross & Blue Shield of Maryland, Inc.*, 143 Md. App. 462, 474 (2002). The law of the case doctrine is a "rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950). The Court of Appeals has explained that:

> It is the well-established law of this state that litigants cannot try their cases piecemeal. They cannot prosecute successive appeals in a case that raises the same questions that have been previously decided by this Court in a former appeal of that same case; and, furthermore, they cannot, on the subsequent appeal of the same case raise any question that could have been presented in the previous appeal on the then state of the record, as it existed in the court of original jurisdiction. If this were not so, any party to a suit could institute as many successive appeals as the fiction of his imagination could produce new reasons to assign as to why his side of the case should prevail, and the litigation would never terminate. Once this Court has ruled upon a question properly presented on an appeal, or, if the ruling be contrary to a question that could have been raised and argued in that appeal on the then state of the record, as

> aforesaid, such a ruling becomes the "law of the case" and is binding on the litigants and the court alike, unless changed or modified after reargument, and neither the questions decided not the ones that could have been raised and decided are available to be raised in a subsequent appeal.

Fidelity-Baltimore Nat. Bank & Trust Co. v. John Hancock Mut. Life Ins. Co., 217 Md. 367, 371-72 (1958).

Serrano contends that the law of the case doctrine should not apply for two reasons. First, in an endeavor to split a fine hair, Serrano contends that the issue raised in this appeal is different than the issue raised in *Serrano I.* He argues that in *Serrano I*, he argued that the sentence was illegal because imposition of sexual offender supervision was not a term of the plea agreement. In contrast, according to Serrano, he is now arguing that the length of the sexual offender supervision was not a term of the agreement. Serrano raises a distinction without a difference. We believe that the contentions disposed of in *Serrano I* are analytically indistinct for purposes of the law of the case doctrine.

Serrano also contends that *Serrano I* was wrongly decided, and therefore, the law of the case doctrine does not bar re-litigation of his claim. Serrano contends that *Serrano I* wrongly treated sexual offender supervision and registration the same and "failed to recognize that the two consequences are very different from each other." He points out that the lifetime registration requirement is imposed automatically by CP 11-723, whereas the court retained discretion to determine the duration of sexual offender supervision. We disagree with Serrano's characterization of our opinion in *Serrano I*. In that opinion, we separately set forth the supervision and registration requirements and the statutes that require them. *See Serrano I*, Slip Op. at 6-7. Nevertheless, Serrano fails to illuminate how,

or why, this distinction matters to the overall holding of *Serrano I* that the imposition of sexual offender supervision and registration did not breach the plea agreement and did not render his sentence illegal.

We believe *Serrano I* was correctly decided. Accordingly, we decline to revisit the matter.

II.

Serrano contends that the circuit court erred when it re-sentenced him in light of *Serrano II* because, according to Serrano, the circuit court failed to carry out this Court's mandate when it failed to impose a definite term of sexual offender supervision. As noted above, when re-sentencing Serrano, the court said "[t]he court will order [Serrano] to register as a sexual offender, it will be for a period of 25 years with such supervision as deemed appropriate."

In *Serrano II*, we said:

> Since 2006, CP section 11-723 has required the imposition of a term of "extended sexual offender parole supervision" for "extended parole supervision offenders," a status that includes those convicted of second-degree rape or first-degree sexual offense. CP § 11-701(f). Before October 1, 2010, the term of "extended parole supervision" was "a minimum of 3 years to a maximum term of life [.]" CP § 11-723(b)(1). Effective October 1, 2010, CP section 11-723 was amended, as relevant, to require lifetime sexual offender supervision for a person convicted of second-degree rape or first-degree sexual offense. The statute, as amended, specifies that it applies to any person convicted of a crime "on or after October 1, 2010." CP § ll-723(c)(2).
>
> In the case at bar, the court imposed lifetime sexual offender supervision pursuant to the amended version of CP section 1 1-723, stating that it was required to do so. By the express

> terms of the amended statute, however, the provisions requiring lifetime supervision as a sexual offender did not apply to the appellant because the crimes he pleaded guilty to were committed before October of 2010. Because the circuit court sentenced the appellant under the wrong law, the portion of the appellant's sentence imposing lifetime sexual offender supervision must be vacated. Upon remand, the circuit court shall revise the supervision portion of the appellant's sentence in accordance with law.

Serrano II, Slip Op. at 2-3.

We believe that when the court re-sentenced Serrano, the term of sexual offender supervision it imposed was, at best, ambiguous. The court ordered registration for a period of 25-years, and then said "with such supervision as deemed appropriate." To the extent that the circuit court did not implement the mandate of *Serrano II*, we vacate the portion of Serrano's sentence imposing sexual offender supervision, and remand the case to the circuit court with instructions to impose sexual offender supervision pursuant to CP 11-723 for not less than three years and not more than life.

IV.

The State contends that the circuit court erred when it re-sentenced Serrano in light of *Serrano II* because, according to the State, the circuit court reduced the term of sexual offender registration from lifetime to 25 years in contravention of the statutory requirement that such registration be for life pursuant to CP §§ 11-701(q), 11-704(a)(3), & 11-707(a)(4)(iii).[5] Moreover, as the State correctly points out, *Serrano II* did not vacate

[5] Serrano was convicted of one count of second-degree rape, in violation of Crim. Law §3-304, and one count of first-degree sex offense, in violation of Crim. Law § 3-305. Pursuant to CP § 11-701(q), those convictions qualified Serrano as a "Tier III sex

the portion of Serrano's sentence dealing with sexual offender registration. Rather, *Serrano II* only vacated the portion of Serrano's sentence dealing with sexual offender supervision. As a result, the circuit court not only lacked statutory authority to impose less than lifetime registration, it lacked any authority under our mandate in *Serrano II* to adjust the term of sexual offender registration.

Maryland Rule 4–345(a) provides that "[t]he court may correct an illegal sentence at any time." In *State v. Griffiths*, 338 Md. 485 (1995) the Court of Appeals recognized that Md. Rule 4-345(a) "does not preclude action by the trial court on its own initiative," and noted that the appellate courts "have in the past *ex mero motu* directed the trial court to correct an illegal sentence upon remand." *Id*. at 496, *See Boyd v. State*, 321 Md. 69, 73–74 n. 2 (1990). Accordingly, the circuit court's order reducing the term of sexual offender registration from lifetime registration to 25 years, is vacated. The case is remanded with instructions for the circuit court to impose lifetime sexual offender registration.

APPLICATION FOR LEAVE TO APPEAL DENIAL OF MOTION TO WITHDRAW GUILTY PLEA DENIED; ORDER OF THE CIRCUIT COURT FOR WICOMICO COUNTY DENYING APPELLANT'S MOTION TO CORRECT AN ILLEGAL SENTENCE AFFIRMED; PORTION OF THE SENTENCE OF THE CIRCUIT COURT ADDRESSING THE DURATION OF SEXUAL OFFENDER SUPERVISION VACATED; PORTION OF THE SENTENCE OF THE CIRCUIT COURT SUBJECTING APPELLANT TO TWENTY-FIVE YEARS OF SEXUAL OFFENDER REGISTRATION VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR

offender," who, pursuant to CP § 11-704(a)(3), was required to register as a sex offender, and pursuant to CP § 11-707(a)(4)(iii), was required to register for life.

RESENTENCING CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE APPELLANT AND WICOMICO COUNTY.