

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1355

September Term, 2014

CHARLES WITHERSPOON

v.

STATE OF MARYLAND

Wright,
Reed,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: December 2, 2015

*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 1979, appellant, Charles Witherspoon, was convicted by a jury in the Circuit Court for Baltimore City of robbery with a deadly weapon and a deadly weapon offense. He served consecutive prison sentences for those convictions and then was released. Thereafter, in 2009, he was convicted of a crime in federal court, and, as a result, he is currently serving time in federal prison. Now, in the hopes of obtaining a reduced federal sentence,¹ he seeks to have his 1979 convictions vacated. He argues that the judge at his 1979 trial gave unconstitutional jury instructions. However, the transcript of the trial no longer exists.

Witherspoon presents three questions on appeal, which we reduce to two and rephrase:²

1. Should the State's Motion to Dismiss be granted?

¹ He argues that his state convictions "enhanced" his federal sentence because they resulted in him being assigned 6 federal sentencing guideline "points." If his state convictions were to be vacated, he might be able to have his federal sentence reduced to reflect his new guideline "point" total.

² Witherspoon's questions presented *verbatim* are:

1. Does the Appellant have a valid claim of a constitutional violation of his Due Process rights under the Fourteenth Amendment of the United States Constitution, pertaining to his claim of erroneous jury instructions in his 1979 trial proceedings?
2. Was the Circuit Court's denial of the Appellant's Motion to Vacate because of lack of records base [sic] on a [sic] error of law?
3. If the answers to questions No. 1, and No. 2, are yes then what is the Appellant's recourse of action in order to be able to obtain the records needed and adjudicate his claim for relief?

2. Did the circuit court err in denying Witherspoon’s Motion to Vacate Sentence for the stated reason that Witherspoon is no longer incarcerated for the 1979 convictions?

For the following reasons, we answer the first question in the affirmative and do not reach the second question.

FACTUAL AND PROCEDURAL BACKGROUND

In 1979, Witherspoon was convicted by a jury in the Circuit Court for Baltimore City of robbery with a deadly weapon and a deadly weapon offense. He was sentenced to a term of 20 years’ imprisonment for robbery with a deadly weapon, and a consecutive term of 3 years’ imprisonment for the deadly weapon offense. In December of 2009, after his release from state prison, Witherspoon was convicted of an unrelated crime in federal court and began serving a 180 month sentence in federal prison. On May 13, 2014, Witherspoon filed a “Motion to Vacate Sentence” in the Circuit Court for Baltimore City, in which he asserted that the instructions given to the jury at his 1979 trial were “fundamentally flawed.” He contended that although his state convictions have “expired,” they “enhanced” the federal sentence he is currently serving. The Motion to Vacate was denied by the Honorable Jeffrey M. Geller by Order dated May 20, 2014. Witherspoon resubmitted the Motion on June 30, 2014, but Judge Geller denied it a second time by Order dated July 9, 2014. This *pro se* appeal followed.

DISCUSSION

I. Parties' Contentions

Witherspoon argues that advisory jury instructions similar to those found erroneous by the Court of Appeals in *Unger v. State*, 427 Md. 383 (2012),³ were given to the jury at his 1979 trial. However, Witherspoon did not submit a transcript of the instructions because the transcript is unavailable. Nevertheless, he asserts that the federal sentence he is currently serving was “enhanced” by his 1979 convictions, and therefore prays those convictions be vacated.

The State first argues that Witherspoon’s case should be dismissed because, by failing to procure the transcript from his 1979 trial, Witherspoon failed to produce a record adequate for appeal. The State asserts that the burden is on Witherspoon to rebut the “general presumption of regularity in the proceedings below,” *State v. Chaney*, 375 Md. 168, 184 (2003) (internal citations and quotations omitted), and contends that the presumption cannot be rebutted without the transcript. Therefore, the State requests that we exercise the discretion afforded us by Md. Rule 8-602(a)(6), which allows us to dismiss an appeal if the contents of the record are inadequate.

³ At Unger’s trial on charges of felony murder and related offenses, the court instructed the jury: “[A]nything which I may say about the law, including any instructions which I may give you, is merely advisory and you are not in any way bound by it. You may feel free to reject my advice on the law[.]” 427 Md. at 391-92 (emphasis omitted). “Unger’s attorney did not object to . . . the instructions[.]” *Id.* at 393. The Court of Appeals concluded that “defense counsel’s failure to object . . . did not amount to deficient representation,” and “the lack of objection . . . did not constitute a waiver[.]” *Id.* at 411.

Second, the State argues that, lack of transcript aside, dismissal is also warranted by Witherspoon’s failure to meet the timing requirements of Md. Rules 2-534 and 8-202(c)(2). Specifically, the State asserts that because Witherspoon resubmitted his Motion to Vacate more than 10 days after the court issued its original denial,⁴ the 30-day window for appeal was not tolled. Therefore, the State contends that this appeal could be dismissed simply because Witherspoon waited until August 8, 2014, to file his appeal, which was more than thirty days after the Motion to Vacate was originally denied.⁵

Finally, and notwithstanding the dismissal argument, the State asserts that we should uphold Witherspoon’s 1979 convictions because Witherspoon does not qualify for *coram nobis* relief. Specifically, the State contends that Witherspoon has not satisfied the “significant collateral consequences” requirement for *coram nobis* relief because the sentencing sheet he provided from his federal conviction “refers to a ‘defendant’ but does not give a name or other identifying information, and does not indicate the purpose of that document.” The State argues that even if the document had referred to Witherspoon by name, it would still be insufficient to show that Witherspoon is facing “significant collateral consequences.” This is because the federal sentencing guidelines are merely advisory, and, as such, there is no way to prove that the 1979 convictions actually increased the federal sentence.

⁴ Judge Geller denied the original Motion to Vacate on May 20, 2014, and Witherspoon resubmitted the Motion on June 30, 2014.

⁵ Judge Geller denied the original Motion to Vacate by Order dated May 20, 2014.

II. Analysis

A. MOTION TO DISMISS

Witherspoon’s Motion to Vacate is “a collateral challenge to a criminal conviction . . . [for which he is no longer] incarcerated . . . [or] on parole or probation.” *Graves v. State*, 215 Md. App. 339, 348 (2013) (internal citations and quotations omitted), *cert. granted*, 437 Md. 637, *dismissed*, 441 Md. 61 (2014). Therefore, he seeks *coram nobis* relief.⁶ *Id.* It is with this particular relief in mind that we consider the State’s Motion to Dismiss.

i. Missing Trial Transcript

We first address the State’s argument that we should “dismiss [Witherspoon’s] appeal because the contents of the record do not comply with Maryland Rule 8-413, which refers to ‘the transcript required by Rule 8-411.’” Maryland Rule 8-413(a)(2) states that “[t]he record on appeal shall include . . . the transcript required by Rule 8-411,” which in turn states:

(a) Ordering of Transcript. Unless a copy of the transcript is already on file, the appellant shall order in writing from the court reporter a transcript containing:

(1) a transcription of (A) all the testimony or (B) that part of the testimony that the parties agree, by written stipulation filed with the clerk of the lower court, is necessary for the

⁶ “To be eligible for *coram nobis* relief, several requirements must be met: (1) the grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character; (2) the *coram nobis* petitioner must be suffering or facing significant collateral consequences from the conviction; (3) the claim for which *coram nobis* relief is sought cannot be waived or finally litigated; and (4) the petitioner must show prejudice.” *Graves*, 215 Md. App. at 438.

appeal or (C) that part of the testimony ordered by the Court pursuant to Rule 8-206 (d) or directed by the lower court in an order;

(2) a transcription of any proceeding relevant to the appeal that was recorded pursuant to Rule 16-404 (e); and

(3) if relevant to the appeal and in the absence of a written stipulation by all parties to the contents of the recording, a transcription of any audio or audiovisual recording or portion thereof offered or used at a hearing or trial.

For the following reasons, we find that the missing transcript is not, independently, an adequate ground to dismiss Witherspoon’s appeal.

The State cites *Callahan v. Dean*, 17 Md. App. 67 (1973), as a case in which we dismissed a claim due to a missing transcript. However, *Callahan* is not entirely analogous because that case did not involve a criminally convicted individual who attempted to order the transcript of his trial but was told it no longer exists. Rather, *Callahan* was a civil case in which we determined that the parties’ joint stipulation of facts was invalid because it was based on a jurisdictionally defective hearing. *Id.* at 71. We dismissed the appeal not because the transcript no longer existed, but because Callahan relied solely on the stipulation and didn’t order the transcript. *Id.* at 72-73.

Regardless of the factual differences between *Callahan* and the case at bar, dismissal under Rule 8-602(a) is discretionary.⁷ This is consistent with the fact that Rule

⁷ “On motion or on its own initiative, the Court *may* dismiss an appeal for any of the following reasons . . .” Md. Rule 8-602(a) (emphasis added); *See Town of Cheverly Police Dep’t v. Day*, 135 Md. App. 384, 391 (2000) (noting that this court’s power to dismiss an appeal due to a missing transcript is discretionary).

15-1202, which sets forth the requirements for *coram nobis* petitions,⁸ does not invalidate petitions that aren't accompanied by the relevant portions of the transcript, but instead states that “[t]he petitioner shall attach to the petition all relevant portions of the transcript *or explain why the petitioner is unable to do so.*” Md. Rule 15-1202(c) (emphasis added). Witherspoon explained in detail why he was unable to procure his trial transcript. He also provided us with a copy of a letter he received from the Maryland State Archives stating that “[n]o transcripts were found for [your] two cases, nor is there any indication that a transcript was ever created.” Under these circumstances, we decline to exercise our discretion under Rule 8-602(a) to dismiss Witherspoon’s appeal solely because he was unable to procure the transcript.

ii. Timing of the Appeal

The State argues that even if the contents of the record are adequate, Witherspoon failed to file his appeal within the window of time required by the Maryland Rules. We agree. For the reasons set forth in the following paragraphs, we hereby grant the State’s Motion to Dismiss.

We begin by recognizing that “a writ of error *coram nobis* remains a civil action in Maryland, independent of the underlying action from which it arose.” *Skok v. State*, 361 Md. 52, 65 (2000) (quoting *Ruby v. State*, 353 Md. 100, 107 (1999)). As such, “[a]n appeal

⁸ Although Witherspoon titled his motion “Motion to Vacate Sentence” and never used the words “*coram nobis* relief,” for the reasons set forth *supra*, we are treating his motion as a Petition for Writ of Error *Coram Nobis*.

from a circuit court [*coram nobis*] judgment . . . proceeds in accordance with the Rules in Title 8,” Md. Rule 15-1207 comm. n. (West 2015), which, in relevant part, state:

(c) Civil Action--Post-Judgment Motions. In a civil action, when a timely motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the notice of appeal shall be filed within 30 days after entry of (1) a notice withdrawing the motion or (2) an order denying a motion[.]

Md. Rule 8-202. However, “[w]hen parties file timely motions under Rules 2–533 or 2–534, the time the parties have to note an appeal is suspended until after the motion is decided.” *Pickett v. Noba, Inc.*, 122 Md. App. 566, 570 (1998).

In the present case, Witherspoon’s resubmitted Motion to Vacate was actually a Rule 2-534 Motion to Alter or Amend Judgment, as he was imploring the circuit court to enter a new judgment on the original Motion to Vacate. *See* Md. Rule 2-534. Motions to Alter or Amend Judgment may be “filed within ten days after entry of judgment,” *id.*, and failure to make a timely filing carries serious consequences:

When parties file timely motions under Rule[] . . . 2-534, the time the parties have to note an appeal is suspended until after the motion is decided. If parties file a . . . motion to alter or amend more than ten days after judgment, the time for filing an appeal will not be stayed.

Pickett, 122 Md. App. at 570 (internal citations omitted). Therefore, if Witherspoon resubmitted his Motion to Vacate within ten days after Judge Geller issued his denial on May 20, 2014, then the time he had to note his appeal would have been stayed until after

the Motion was decided;⁹ however, if he waited more than ten days after the original denial to resubmit, then the time period within which to appeal would not have been tolled.

To repeat, the record indicates that Judge Geller denied Witherspoon’s Motion to Vacate by Order dated May 20, 2014. The record further indicates that Witherspoon waited until June 30, 2014, to resubmit the Motion to Vacate. Therefore, the time within which to file an appeal with this court was not suspended from May 20, 2014, the date of the original denial, which means his appeal filed on August 8, 2014, was untimely, and his “motion to revise . . . [was], as a practical matter, a substitute for appeal.” *Id.* at 571 (quoting Paul V. Niemeyer & Linda M. Schuett, *Maryland Rules Commentary*, 418 (2d ed.1992)).

As we have stated in the past, “[w]hile we recognize and sympathize with [*pro se* litigants like Witherspoon], we also need to adhere to procedural rules in order to maintain consistency in the judicial system.” *Pickett*, 122 Md. App. at 568. Here, Witherspoon filed his notice of appeal over one month late. Had it not been so untimely, we might have been able to forgive his failure to strictly adhere to the timing requirement given his situation.¹⁰

⁹ The time he had to note his appeal would have been suspended until July 9, 2014, because that is the day on which Judge Geller issued his Order denying the resubmitted Motion to Vacate.

¹⁰ Witherspoon is currently housed in “FCI Beckley” (a federal correctional institution in Beaver, West Virginia), which is where he wrote his *pro se* Motion to Vacate and his Notice of Appeal. Furthermore, even though he requested an attorney to assist him, Witherspoon had to file his original Motion, resubmit his Motion, and appeal to this court *pro se* because there is no right to counsel in *coram nobis* cases. See *Coram Nobis Information Sheet*, MARYLAND OFFICER OF THE PUBLIC DEFENDER, <http://www.opd.state.md.us/Divisions/PCD/WritsofErrorCoramNobis.aspx> (last visited September 16, 2015).

However, Witherspoon missed the 30-day window for appeal by a considerable margin. Therefore, we are granting the State’s Motion to Dismiss.

However, for the following reasons, we are dismissing the appeal without prejudice to the appellant. First, Witherspoon is a *pro se* litigant currently serving time in a federal prison in West Virginia. As such, he faces an uphill climb and must navigate around a number of procedural pitfalls as he endeavors to obtain the relief he desires. Second, we do not believe Witherspoon made a deliberate attempt to violate the rules of appellate procedure. And finally, Witherspoon’s Motion to Vacate was not drafted as a formal Rule 15 *coram nobis* petition. As we stated *supra*, nowhere in his Motion to Vacate nor his appellate Brief did he mention the words “*coram nobis* relief.” However, as he is seeking relief relating to a crime for which he is no longer incarcerated or on probation, *coram nobis* relief is the only form of relief available to him. And, because he did not draft his Motion to Vacate as a petition for writ of error *coram nobis*, the trial judge did not treat it as such.¹¹ This is evidenced by the fact that the trial judge, in his Order dated May 20, 2014, stated that “the Petitioner’s Motion be, and hereby is, **DENIED**, *as the Petitioner is no longer incarcerated on any of the offenses in the above-captioned cases,*” (emphasis added), and, in his Order dated July 9, 2014, denied Witherspoon’s resubmitted Motion “[f]or the same reason set forth in this Court’s May 20, 2014 Order.” However, the fact that Witherspoon is no longer incarcerated for his 1979 convictions is not relevant to

¹¹ Because we are dismissing the appeal, we need not determine whether the Motion to Vacate met all the requirements of Md. Rule 15-1202 for a writ of error *coram nobis*.

whether he is entitled to the relief he seeks;¹² rather, what is relevant is whether he has satisfied the requirements for *coram nobis* relief. For these reasons, while the State’s Motion to Dismiss must be granted, it will be without prejudice to allow Witherspoon to apply for relief under Title 15 of the Maryland Rules.

**STATE’S MOTION TO DISMISS
GRANTED. APPELLANT’S APPEAL
DISMISSED WITHOUT PREJUDICE.
COSTS TO BE PAID BY APPELLANT.**

¹² *Coram nobis* relief is “a ‘remedy for a convicted person who is not incarcerated and not on parole or probation.’” *Graves*, 215 Md. App. at 348 (quoting *Skok*, 361 Md. at 78)).