

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0804

September Term, 2014

WINDSOR W. KESSLER, III

v.

STATE OF MARYLAND

Woodward,
Friedman,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: January 8, 2016

*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.

After the Circuit Court for Baltimore County denied the petition for writ of error *coram nobis* filed by appellant, Windsor W. Kessler, III, he appealed. Appellant presents two questions for our review:

1. Was the trial court[']s denial of the Appellant's Petition for Error Coram Nobis without granting the Appellant a hearing legally correct?
2. Did the trial court err when it denied the Appellant's Petition for Error Coram Nobis?

We answer the first question in the affirmative and the second in the negative, and, therefore, we affirm the judgment of the circuit court.

FACTS AND PROCEDURAL HISTORY

In August 2007, appellant was charged with two counts of third-degree sexual offense after it was revealed that on several occasions, appellant, then twenty-one years old, had engaged in sexual intercourse with a fourteen year old girl.¹ On January 10, 2008, appellant appeared in the circuit court for a plea hearing. The prosecutor informed the court that, pursuant to a plea agreement, appellant would plead guilty to one count of third-degree sexual offense and, upon a conviction for that offense, the State would enter a *nolle pross* as to the remaining count. The State further related that it would recommend a sentence of three years' imprisonment, all suspended, and a period of probation, with the defense "free

¹ Third degree sexual offense is a crime under Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("C. L."), § 3-307(a)(5), which prohibits "engag[ing] in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old."

to argue” for a lesser sentence. Defense counsel noted that the prosecutor had given “a correct reflection of the plea [agreement],” but added a request that the court “defer sentencing for a short period of time” because counsel wished to review some “psychiatric records” that he had requested but not yet received.

Defense counsel then examined appellant, on the record, before the guilty plea was entered. It was elicited that appellant was then twenty-one years old and was in college.

The examination continued:

[DEFENSE COUNSEL]: Are you under the influence today of any drugs or alcohol or any medication, prescribed medication, which would affect your ability to understand what’s going on today?

[APPELLANT]: No, sir.

[DEFENSE COUNSEL]: Now, it’s my understanding that you have previously been admitted to Sheppard Pratt and have been under the psychiatric care of a psychiatrist since 1994, is that correct?

[APPELLANT]: Yes, sir.

[DEFENSE COUNSEL]: Now, does that in any way, you’ve been diagnosed with bipolar disease, correct?

[APPELLANT]: Yes, sir.

[DEFENSE COUNSEL]: So does that in any way have any influence on your ability to understand these proceedings today?

[APPELLANT]: No, sir.

Defense counsel then reviewed with appellant the rights that he was waiving by pleading guilty. After the prosecutor proffered facts in support of the plea, the trial court found that appellant had “knowingly, voluntarily and intelligently” entered the plea and that the facts proffered supported a verdict of guilty of a third-degree sexual offense.

Three months later, appellant returned to court for sentencing.² In advocating for the sentence recommended by the State (three years, all suspended), defense counsel informed the court that appellant had been diagnosed at a young age with “ADHD” (attention deficit hyperactivity disorder) and with bipolar disorder. Defense counsel further advised the court that, since the plea proceeding, he had obtained records documenting appellant’s “psychiatric history.” Appellant declined to speak for himself.

The court imposed a three-year term of imprisonment, all suspended, and placed appellant on unsupervised probation for a three-year period. Appellant did not seek leave to appeal the judgment on the conviction nor file a petition for post-conviction relief.

In June 2013, appellant filed a *pro se* petition for a writ of error *coram nobis* in which he sought to vacate the conviction. He alleged that the trial court erred in failing to *sua sponte* order a competency hearing, because at the time of his plea, he was taking

² The State points out that at sentencing, the prosecutor described the prior plea hearing as a “not guilty agreed statement of facts.” The State, therefore, notes that it is unclear whether appellant pleaded guilty or proceeded by way of a not guilty agreed statement of facts. Although we conclude that appellant pleaded guilty, and appellant even stated in his petition and brief that he pleaded guilty, the precise nature of the proceeding is of no moment. *See Prado v. State*, 225 Md. App. 201, 208 n.5 (2015) (noting that guilty pleas and convictions following not guilty agreed statement of facts were functionally equivalent for purposes of proceeding with a writ of *coram nobis*).

several psychotropic medications that altered his thought processes, and, on the day of the plea, he claimed that he had neglected to take his prescribed Adderall medication. Appellant implied that because of his ADHD and bipolar diagnoses, he was “prone to poor impulse control.” Appellant attached an affidavit to his petition indicating, that, because he had forgotten to take his Adderall that day, he was “unfocused.” In short, appellant claimed that it was incumbent on the court, aware of his psychiatric state, to order a competency hearing.

In the same vein, appellant alleged that he received ineffective assistance of counsel because his trial counsel, who also was aware of his psychiatric condition and learning disorder, never requested a competency hearing. Appellant also argued that defense counsel failed to advise him of the various rights that he would give up by proceeding as he did.

The State moved to dismiss appellant’s petition, because appellant had not alleged that he was suffering any significant collateral consequences as a result of his conviction, which meant that his *coram nobis* petition was fatally flawed. The State surmised that appellant had filed his petition in an attempt to attack a federal sentence by removing his state conviction. But appellant denied this claim: “The State contends that [P]etitioner instituted this action merely with prospects to undermine a federal sentence he is currently serving. There is no record support for this contention. Petitioner instituted this action in good faith and to seek redress of his conviction since his right to counsel was violated.”

The circuit court denied the petition, without a hearing. In its statement of reasons, the court noted that on January 18, 2012, appellant “was convicted in federal court of child pornography charges and was sentenced to ten years of incarceration.” The court found, however, that appellant had “failed to allege in his Petition that significant collateral consequences exist that would warrant *coram nobis* relief.” Although the court recognized that an enhanced federal sentence due to a prior state conviction would be considered a significant collateral consequence for *coram nobis* purposes, appellant had not alleged that he had received an enhanced federal sentence. In fact, the court noted that appellant had “expressly rebutted” the State’s suggestion that he had filed for *coram nobis* relief as a means of attacking the federal sentence. Accordingly, because appellant had “failed to allege any significant collateral consequences and failed to meet his burden on this threshold issue[,]” the court denied his request for *coram nobis* relief.

The circuit court went on to note that, even if appellant had alleged a significant collateral consequence, appellant “still would not be afforded relief.” First, the court rejected appellant’s contention that the trial court should have *sua sponte* ordered a competency hearing before accepting his plea. The court explained:

Section 3-104(a) of the Criminal Procedure [A]rticle of the Maryland Code provides that if the defendant “appears to the court to be incompetent or the defendant alleges incompetence to stand trial” then the court shall determine competency. The trial court may *sua sponte* trigger the requirements of the statute if it has “a bona fide doubt as to the defendant’s competency.”

The Court perceives no error with the trial court’s actions in the instant case. The trial court observed [appellant] in court and listened to [appellant]’s responses. [Appellant] was asked whether his

diagnosis of bipolar disease and psychiatric treatment influenced his ability to understand the proceedings, to which [appellant] responded, “No, sir.” Further, there is no indication that [appellant] did not appear competent, nor is there any evidence that [appellant] lacked the present ability to consult with his lawyer or failed to understand the proceedings. That [appellant] had bipolar disorder alone does not render [appellant] incompetent or raise competency as an issue. Moreover, at the time of his hearing, [appellant]’s mental illness was being managed with mental health treatment and medication, and the trial judge ordered that [appellant] continue with these measures. This allegation of error does not merit relief.

(Internal citations omitted).

Next, the trial court rejected appellant’s claim that he was denied the effective assistance of counsel because defense counsel failed to request a competency hearing. The court explained:

To succeed on a claim of ineffective assistance of counsel, [appellant] must show that (1) counsel’s representation fell “below an objective standard of reasonableness,” determined by whether counsel’s performance fell below the prevailing professional norms, and that (2) counsel’s error caused prejudice, demonstrated by a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 688-94 (1984).

[Appellant] fails to make these necessary showings. As discussed previously, there is no indication that [appellant] was not competent to stand trial. Furthermore, [appellant] failed to demonstrate that counsel’s decision to not request a competency hearing was error as opposed to trial strategy. Counsel was aware of [appellant]’s mental health issues, negotiated a plea deal that would culminate in supervised probation, and reserved discussing [appellant]’s mental health history for sentencing mitigation. The ineffective assistance of counsel inquiry does not concern whether counsel’s representation was prudent or appropriate, but only what is constitutionally compelled. *Burger v. Kemp*, 483 U.S. 776, 794-95 (1987); *Strickland*, 466 U.S. at 690-91. Counsel’s representation was not so deficient that it would rise to the level of ineffective assistance,

and [appellant] failed to show that it was not the product of sound trial strategy.

Finally, the trial court rejected appellant’s claim that his counsel was deficient for failing to inform him that the right to testify at trial and the right to note an appeal would be waived upon the entry of a guilty plea. The court explained:

This allegation lacks merit as the transcript reflects that [appellant] was informed of the various rights that are waived by pleading guilty on the record. [Appellant] indicated, on the record, that he understood the difference between a court trial and a jury trial, and that he would not be able to call or confront witnesses. The trial court also informed [appellant] of his appellate rights. The Court perceives no error with [appellant]’s advisement.

(Internal citations omitted).

This timely appeal followed.

DISCUSSION

“Coram nobis is extraordinary relief designed to relieve a petitioner of substantial collateral consequences outside of a sentence of incarceration or probation.” *State v. Smith*, 443 Md. 572, 654 (2015). It is an equitable remedy for petitioners who face “circumstances that did not exist at the guilty plea hearing, such as removal or sentencing under the Armed Career Criminal Act, or the Federal Sentencing Guidelines.” *Id.* (internal citations omitted). A “presumption of regularity” attaches to criminal cases, and the *coram nobis* petitioner bears the burden of proof. *See Prado*, 225 Md. App. at 206 (citing *Skok v. State*, 361 Md. 52, 78 (2000)). Accordingly, we “will not ‘disturb the factual findings of the post-conviction court unless they are clearly erroneous[,]’ [and] we will make an ‘independent determination of relevant law and its application to the facts.’” *Id.* (quoting *Arrington v.*

State, 411 Md. 524, 551 (2009)). *Coram nobis* is “not a belated direct appeal,” and “relief that may have been granted upon direct appeal will not necessarily be obtained through a writ of error *coram nobis*.” *Coleman v. State*, 219 Md. App. 339, 354 (2014), *cert. denied*, 441 Md. 667 (2015).

A petitioner for a writ of error *coram nobis* must allege:

(1) grounds that are of a “constitutional, jurisdictional or fundamental character,” (2) **that he is “suffering or facing significant collateral consequences from the conviction,”** (3) that the grounds for challenging the criminal conviction were not waived or finally litigated in a prior proceeding, and (4) that he is not, as a result of the underlying conviction, incarcerated or subject to parole or probation such that he would possess another statutory or common law remedy.

Smith v. State, 219 Md. App. 289, 292 (2014) (emphasis added) (internal citations omitted).

See also Rule 15-1202(b)(1)(F) (“The petition shall include the significant collateral consequences that resulted from the challenged conviction.”).

I. Denial Without a Hearing

Appellant first contends that the trial court erred when it denied his petition without a hearing because Rule 2-311(f) required that a hearing be held. We find this contention to be without merit.

Rule 2-311(f) provides, in part: “Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.” Appellant believes that the circuit court was compelled to hold a hearing prior to denying his petition, because such denial was

dispositive of his claim. Appellant, however, overlooks the fact that Rules 15-1201 through 15-1207 govern *coram nobis* proceedings. Rule 15-1206(a) states, in pertinent part: “The court, in its discretion, may hold a hearing on the petition. *The court may deny the petition without a hearing* but may grant the petition only if a hearing is held.” (Emphasis added). *See also Smith*, 219 Md. App. at 293 (finding that the *coram nobis* court committed no error in denying the petition without a hearing). Accordingly, the circuit court did not err in denying appellant’s petition without a hearing.

II. The *Coram Nobis* Petition

Appellant contends that the court erred in denying his petition, because he did allege significant collateral consequences, and he received ineffective assistance of counsel. He argues that his rights to counsel and due process were “obliterated” in the circuit court. Appellant also notes that as a result of his conviction, he must register as a sex offender.

As a preliminary matter, the State points out that appellant did not raise the issue of registering as a sex offender in the circuit court. Indeed, appellant mentions this issue for the first time in his brief to this Court. Consequently, this issue is not properly before us. *See Robinson v. State*, 404 Md. 208, 211 (2008) (refusing to consider issue raised for first time in appellate court).

The State contends that the circuit court properly denied appellant’s petition because, on its face, the petition failed to allege that there were significant collateral consequences of appellant’s conviction. Thus according to the State, appellant’s petition failed to meet the pleading requirements of a *coram nobis* petition under the Maryland

Rules. Finally, the State argues that this case is similar to *Smith*, 219 Md. App. at 292-93. We agree.

In *Smith*, Smith had failed to allege in his petition for *coram nobis* relief that he was facing significant collateral consequences as a result of his conviction. *Id.* at 292. Although he briefly mentioned that he may face adverse immigration consequences as a result of his conviction, we held that such allegation was insufficient. *Id.* at 292-93. Here, appellant failed to allege *any* significant collateral consequences in his petition. When the State suggested below that an enhanced federal sentence may have been appellant’s motivation for seeking *coram nobis* relief, appellant expressly denied that he was attempting to undermine his federal sentence. Therefore, appellant failed to meet the pleading requirements of Rule 15-1202, and the circuit court properly denied his petition on that ground.

Given our holding, we need not address the merits of appellant’s petition. If we were to do so, however, we would agree with the circuit court’s findings and conclusions set forth above.

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