

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2191

September Term, 2012

BARRY THOMAS A/K/A RICKY THOMAS
A/K/A BALLY THOMAS

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: February 23, 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.

Barry Thomas filed a petition for a Writ of Error *Coram Nobis* in the Circuit Court for Baltimore City, alleging that his guilty pleas in two prior cases were invalid and that the invalid convictions created a significant risk of a collateral consequence. The trial court denied the petition on the ground that appellant failed to meet his burden of proving that he faced significant collateral consequences as a result of his guilty pleas in these two prior convictions. On appeal, he presents one issue: whether the trial court’s denial of his petition for *coram nobis* was error. We conclude that appellant has proved that he faces collateral consequences as a result of his guilty pleas, and thus remand the case to the circuit court.

Analysis

In 2010, appellant entered into a plea bargain in the Federal District Court of Maryland in order to reduce a sentence for a federal criminal conviction pursuant to 18 U.S.C. § 924(c)—possession of a firearm in the furtherance of drug trafficking. Concerned that he would receive an enhanced sentence as a result of two prior criminal convictions arising in the Circuit Court of Baltimore City, appellant filed a petition for *coram nobis* challenging the validity of these two convictions.

The circuit court examined appellant’s claim under *Skok v. State*, 361 Md. 52 (2000), which details the elements a petitioner must establish for a viable *coram nobis* claim; a petitioner must: (1) establish that there are constitutional, jurisdictional, or fundamental grounds for challenging the criminal conviction; (2) overcome the “presumption of regularity” attached to criminal cases; (3) prove they are currently

suffering or facing significant collateral consequences; and (4) show that no other statutory or common law remedy is available. *Id.* at 78–80.

The circuit court’s analysis focused on one of these elements: whether appellant proved that he was facing significant collateral consequences. It concluded that appellant had failed to prove this element, and accordingly denied the petition for *coram nobis*.

On appeal, appellant argues that he presented sufficient evidence to prove that he faced significant collateral consequences due to his two prior convictions. Specifically, he cites paragraph 6 of his plea agreement, which states:

The Defendant understands that the Court will determine a sentencing guidelines range for this case (henceforth the ‘advisory guideline range’) pursuant to the Sentencing Reform Act of 1984 at 18 U.S.C. 3551-3742 (excepting 18 U.S.C. 3553(b)(1) and 3742 (e)) and 28 U.S.C. 991 through 998. The Defendant further understands that the Court will impose a sentence pursuant to the Sentencing Reform Act, as excised, and must take into account the advisory guidelines range in establishing a reasonable sentence.

Appellant argues that the language that the judge “must take into account the advisory guidelines range in establishing a reasonable sentence,” proved that his two prior convictions would be considered in calculating this sentence. After oral argument before this Court, appellant submitted a motion to amend the record with court papers from his sentencing proceedings in the federal court. These documents show that appellant received a final sentence of 235 months from the District Court; he alleges this is further evidence that he is suffering a collateral consequence due to his two prior convictions.

The State did not oppose appellant’s motion to amend the record, and given that the actual sentence served by appellant is relevant to the issue on appeal, we grant the motion.

We conclude that appellant’s plea agreement as well as the evidence that he is serving a 235-month sentence proves that appellant is suffering a significant collateral consequence due to his two prior convictions. We believe it is appropriate to remand this case to the trial court for a new hearing on appellant’s petition.

At the time of his petition, appellant had entered into a plea agreement with the Assistant United States Attorney’s Office (the “Office”), but he had not yet been sentenced by the federal court. On its face, his plea agreement established that appellant was being sentenced with an offender score of 37, but with a 2-level reduction, bringing his offender score to 35. Under the federal sentencing guidelines, a sentencing range is established in light of (a) the defendant’s offense score, and (b) the defendant’s criminal history category. U.S.S.G. Ch. 5, Pt. A. Appellant’s criminal history category is calculated using the guidelines in U.S.S.G. § 4A1.1; which are as follows:

- (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.
- (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of 3 points for this subsection.

Appellant’s petition for *coram nobis* challenges the validity of two prior convictions, one in 2001 and one in 2004. Appellant was sentenced to four years for his 2001 conviction, and sentenced to three years in his 2004 conviction. Pursuant to U.S.S.G. § 4A1.1, these two convictions would give appellant a criminal history category of six points.

However, the federal sentencing guidelines contain separate guidelines for those defendants convicted as “career offenders” or “armed career criminals.” U.S.S.G. §§ 4B1.1, 4B1.4. Appellant asserted in his petition for *coram nobis*, that due to his two prior convictions, he would be sentenced as a career offender,¹ but if those convictions were vacated, the range would “fall dramatically.”

A comparison of the sentence ranges appellant would face with and without his two prior convictions suggests that this is correct. If the two prior convictions are

¹U.S.S.G. §§ 4B1.1 (emphasis added) states that a defendant is a “career offender” if:

- 1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) ***the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.***

vacated, leaving appellant with a criminal history category of 0, appellant’s sentencing range would be 168-210 months.² U.S.S.G. Ch. 5, Pt. A. If the two convictions are not vacated, but if appellant was also not sentenced as a “career offender,” then appellant’s sentencing range would be 210-262 months.³ *Id.* If the two convictions are not vacated, and appellant was sentenced as a “career criminal,” the sentencing range would be 292-365 months. U.S.S.G. § 4B1.1(c)(3).⁴

The federal plea agreement establishes that appellant faced significant collateral consequences due to his two prior convictions. As appellant notes, paragraph 6 of the plea agreement states that the sentencing judge is required to “take into account the advisory guidelines range in establishing a reasonable sentence.” As we noted *supra*, these guidelines establish that the sentencing range for appellant’s federal conviction differ significantly depending on whether his two prior convictions are vacated. We believe this establishes that appellant was facing a higher sentencing range, and thus facing a significant collateral consequence, due to his two prior convictions.

²This is the sentence range for a level 35 offender score with a criminal history category of I, which is for those defendants with a criminal history category score of 0-1. U.S.S.G. Ch. 5, Pt. A.

³This is the sentence range for a level 35 offender score with a criminal history category of III, which is for those defendants with a criminal history category score of 4-6. U.S.S.G. Ch. 5, Pt. A.

⁴This is the sentence range for a career criminal who has received a 2-level reduction. U.S.S.G. § 4B1.1(c)(3).

The State argues that the plea agreement does not prove that appellant faced significant collateral consequences because (a) appellant was required to explicitly inform the circuit court of the differences between his potential sentencing range with and without his two prior convictions, and (b) the federal court judge had the discretion to depart from the federal guidelines where appropriate.

With regard to the State’s first argument, we acknowledge that appellant’s counsel could have done a better job of explaining to the circuit court how the federal sentencing guidelines applied to him. However, counsel did enough to bring the issue to the court’s attention. Thus, we do not believe appellant made a fatal error in failing to explicitly state that the difference between the federal guidelines for sentencing was 168-210 and 210-262 months, depending on whether appellant’s two prior convictions were vacated.

As to the State’s second argument, we do not believe the fact that the federal judge had discretion to deviate from the federal guidelines—if appropriate—establishes that appellant failed to prove that he faced significant collateral consequences. The fact remains that the plea agreement required the judge to take the federal sentencing guidelines into account, and, under those guidelines, appellant faced a higher sentencing range if his prior convictions were not vacated. In *Skok*, the Court of Appeals stated that a petitioner must prove that he is either “suffering *or facing* significant collateral consequences[.]” 361 Md. at 79 (emphasis added). Once a petitioner has been sentenced, he is suffering the collateral consequence of an earlier conviction; thus, we do not

believe that the only way a petitioner can prove he *faces* a significant collateral consequence is to already suffer from the collateral consequence. We believe that if a petitioner provides evidence sufficient to establish that he faces a strong likelihood of suffering a significant collateral consequence, this is sufficient.

Our conclusion is bolstered by the evidence submitted by appellant after oral argument showing that he received a final sentence of 235 months from the federal court. In light of this information, we conclude that appellant has established that he faces significant collateral consequences due to his two prior convictions.

We conclude that appellant demonstrated that he faced significant collateral consequences due to his prior two convictions. The sentence actually imposed by the District Court shows that appellant's concerns were well-founded. We will vacate the circuit court's judgment and remand this action so that the court can decide whether appellant can satisfy the other three *Skok* factors. We believe that the interest of justice would be best served if the parties were afforded an opportunity to present additional evidence and argument on these issues.

**THE JUDGMENT OF THE CIRCUIT COURT FOR
BALTIMORE CITY IS REVERSED. THIS CASE IS
REMANDED TO IT FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION. COSTS TO BE PAID
BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.**