Circuit Court for Prince George's County
Case No. CT18-0208X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 137, September Term, 2020

No. 771, September Term, 2021

JONATHAN GREGORY LINDLER

v.

STATE OF MARYLAND

Arthur,
Tang,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: August 2, 2022

Jonathan Gregory Lindler appealed the denial, by the Circuit Court for Prince George's County, of his motion for leave to file a belated appeal and his petition for a writ of habeas corpus. Lindler has abandoned his appeal from the denial of the motion for leave, and the State has moved to dismiss his appeal from the denial of the petition for habeas corpus.

We shall affirm the denial of the motion for leave to file a belated appeal and dismiss the appeal from the denial of the petition for habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

On January 17, 2019, a Prince George's County jury found Lindler guilty of a fourth-degree sexual offense and of assault in the second degree. On April 12, 2019, the Circuit Court for Prince George's County sentenced Lindler to incarceration for one year for the fourth-degree sexual offense. For second-degree assault, the court sentenced Lindler to a concurrent term of 10 years, but suspended all but five years and gave him credit for one year and 69 days of time served. The court also imposed five years of probation.

Lindler's trial counsel did not file a notice of appeal to this Court within 30 days of the entry of the final judgment, as required by Md. Rule 8-202(a).

On January 15, 2020, Lindler moved for leave to file a belated appeal. On February 26, 2020, the court denied the motion. Lindler noted a timely appeal from the denial of that motion. That appeal is designated as No. 137 of the September 2020 Term.

On July 16, 2020, Lindler filed a motion to correct an illegal sentence. Relying on *State v. Frazier*, 469 Md. 627 (2020), Lindler argued that the sentence for second-degree assault should have merged with the sentence for the fourth-degree sexual offense because both convictions were based on the same acts. The circuit court granted the motion, leaving Lindler with a conviction only for the fourth-degree sexual offense and a sentence of one year, which he had already served by that time. Accordingly, the court ordered that Lindler be immediately released from incarceration. Because the five-year period of probation was attached to the assault conviction, it went away when the court merged the assault conviction into the conviction for the fourth-degree sexual offense.

Before Lindler was released from incarceration, however, the State required him to register as a Tier 1 sex offender. Although Tier 1 is the least restrictive of the three tiers, Lindler is still subject to a number of restrictions on his liberty as a consequence of his required registration.

On September 30, 2020, Lindler filed a petition for writ of habeas corpus. In his petition, Lindler sought "the opportunity to file a belated notice of appeal of [his] judgment of conviction[.]" He argued that his required registration on the sex offender registry constituted an illegal restraint on his liberty that resulted from the constitutionally defective performance of his trial counsel in failing to note a timely appeal of his conviction.

The State opposed the petition. The State appears to have argued, principally, that Lindler did not meet the statutory preconditions for a writ of habeas corpus in § 3-702(a) of the Courts and Judicial Proceedings Article of the Maryland Code (1974, 2020 Repl.

Vol.), because he was no longer "committed, detained, [or] confined" and was not "restrained from his lawful liberty within the State."

On July 17, 2021, the court issued an order denying Lindler's petition. In reaching its decision, the court reasoned that Lindler's "required registration as a Tier 1 sexual offender does not render him sufficiently restrained so as to qualify for habeas relief." Citing *Sabisch v. Moyer*, 466 Md. 327 (2019), the court tacitly recognized that persons may be "restrained from [their] lawful liberty," within the meaning of § 3-702(a), even if they are no longer "committed, detained, or confined."[1] The court also recognized that, as a Tier 1 offender, Lindler is subject to a number of restrictions on his liberty. The court reasoned, however, that, unlike the petitioner in *Sabisch v. Moyer*, Lindler was "neither on probation nor under supervision by the State." The court added that "the conditions of [Lindler's] registration are less onerous than if he had been on probation." Consequently, the court concluded that Linder's "required registration on the sex offender registry does not render him sufficiently restrained so as to qualify for habeas relief."

[1] In *Sabisch v. Moyer*, 466 Md. at 332, the Court of Appeals held that "a petition for a writ of habeas corpus is not foreclosed where a person is placed on probation with conditions that significantly restrict or restrain the person's liberty within the State." The Court also held that "people who are committed, detained, or confined within the State or persons on probation with conditions that significantly restrain the person's lawful liberty within the State are entitled to seek habeas corpus relief. *Id.* The Court affirmed the denial of a writ of habeas corpus in that case because the petitioner, a convicted Tier 1 sex offender on unsupervised probation, was "living in Michigan" and hence "was not committed, detained, confined, or restrained in Maryland." *Id.* at 332-33.

Lindler noted a timely appeal, which is designated as No. 771 of the September 2021 Term. On Lindler's motion, this Court consolidated his two appeals.[2]

In his brief, Lindler states that "he is no longer pursuing" the first appeal (No. 137 of the September 2020 Term), from the denial of his motion for a belated appeal. He has not, however, filed a notice of dismissal in accordance with Md. Rule 8-601(a).

The State has moved to dismiss the appeal (or, more precisely, the appeal from the denial of the petition for habeas corpus, in No. 771 of the September 2021 Term). In support of the motion, the State argues that the appeal is not permitted by law.

For the reasons discussed below, we shall affirm the judgment in No. 137 of the September 2020 Term and shall dismiss the appeal in No. 771 of the September 2021 Term.

DISCUSSION

I. No. 137 of the September 2020 Term

Because Lindler has not dismissed his appeal in No. 137 of the September 2020 Term, it is still technically before us. Nonetheless, because Lindler no longer wishes to pursue that appeal, his brief contains no argument in support of it. We decline to address the merits of appeal, because Lindler has not briefed the merits. *See, e.g.*, *HNS Dev., LLC v. People's Counsel*, 425 Md. 436, 458-60 (2012); Md. Rule 8-504(a)(6) (requiring a brief to contain "[a]rgument in support of the party's position on each issue").

[2] At Lindler's request, this Court had stayed his earlier appeal when he filed his habeas corpus petition.

Even if we were to address the merits, we would reject any contention that the circuit court erred or abused its discretion in declining to extend the deadline, *nunc pro tunc*, for Lindler's direct appeal from his criminal convictions. In postconviction proceedings under the Uniform Post Conviction Procedure Act ("UPPA"), a court may permit a belated appeal as a remedy when petitioners demonstrate that they were deprived of the Sixth Amendment right to effective assistance of counsel because their lawyers failed to note a timely appeal. *See, e.g.*, *Garrison v. State*, 350 Md. 128, 142-43 (1998). But although Lindler could have pursued a postconviction proceeding under that statute, he did not do so. Instead, he asked the court to extend the deadline for noting an appeal. Rule 1-204(a) prohibits a court from doing so.[3]

II. No. 771 of the September 2021 Term

"The writ of *habeas corpus* is a common law writ, having for its great object the liberation of persons imprisoned without sufficient cause." *Deckard v. State*, 38 Md. 186, 203 (1873). In other words, the petition for a writ of habeas corpus is a method by which a person may "challenge the lawfulness of an underlying conviction and detention." *Maryland Correctional Inst. v. Lee*, 362 Md. 502, 517 (2001). It is frequently used as a civil remedy through which prisoners may compel the person with custody of them to bring them to court to ensure that their imprisonment is not illegal. *See, e.g.*, *Simms v. Shearin*, 221 Md. App. 460, 468 (2015).

[3] Rule 1-204(a) states, in pertinent part, that a "court may not shorten or extend the time for filing . . . a notice of appeal . . . ."

The right to habeas corpus is currently codified in § 3-702 of the Courts and Judicial Proceedings Article. Section 3-702 provides that "[a] person committed, detained, confined, or restrained from his lawful liberty within the State for any alleged offense or under any color or pretense or any person in his behalf, may petition for the writ of habeas corpus to the end that the cause of the commitment, detainer, confinement, or restraint may be inquired into."

"Although the right to seek a writ of habeas corpus is constitutionally protected,[4] the right to an *appeal* from the disposition of the habeas corpus petition is not." *Simms v. Shearin*, 221 Md. App. at 469 (emphasis in original). Statutory provisions like § 12-301 of the Courts and Judicial Proceedings Article, which generally authorizes an "appeal from a final judgment entered in a civil or criminal case by a circuit court," "do not apply to habeas corpus cases." *Gluckstern v. Sutton*, 319 Md. 634, 652 (1990); *accord Sabisch v. Moyer*, 466 Md. 327, 351 (2019); *Simms v. Shearin*, 221 Md. App. at 469. Instead, "[a]n appeal may be taken from a final order in a habeas corpus case only where specifically authorized by statute." *Gluckstern v. Sutton*, 319 Md. at 652; *accord Sabisch v. Moyer*, 466 Md. at 351; *Simms v. Shearin*, 221 Md. App. at 469.

The Court of Appeals has "identified four statutes that permit appeals or applications for leave to appeal in habeas corpus cases." *Sabisch v. Moyer*, 466 Md. at 351. They are:

[4] Md. Const. art. III, § 55 (stating the "the General Assembly shall pass no Law suspending the privilege of the Writ of *Habeas Corpus*").

(1) § 9-110 of the Criminal Procedure Article of the Maryland Code (2001, 2018 Repl. Vol.), which "authorizes an appeal under certain conditions from the denial of a habeas corpus application in an extradition case";

(2) § 3-707 of the Courts and Judicial Proceedings Article, which "provides for applications for leave to appeal from the denial of relief in habeas corpus cases regarding the right to bail or allegedly excessive bail";

(3) § 3-706 of the Courts and Judicial Proceedings Article, which applies where a writ of habeas corpus is issued "on the ground that the law under which the person was convicted is unconstitutional"; and

(4) § 7-107 of the Criminal Procedure Article.

Sabisch v. Moyer, 466 Md. at 351.

Lindler's petition does not concern extradition or bail. Furthermore, the circuit court did not issue a writ of habeas corpus, much less issue the writ on the ground that law under which he was convicted is unconstitutional. Therefore, Lindler has the right to appeal only if his appeal is authorized by § 7-107 of the Criminal Procedure Article.

Section 7-107 is part of the UPPA. The purpose of the UPPA "was to create a simple statutory procedure, in place of the common law habeas corpus and coram nobis remedies, for collateral attacks upon criminal convictions and sentences." *Gluckstern v. Sutton*, 319 Md. at 658.

Section 7-107(b)(1) currently states that, "[i]n a case in which a person challenges the validity of confinement under a sentence of imprisonment by seeking the writ of habeas corpus or the writ of coram nobis or by invoking a common law or statutory remedy other than this title, a person may not appeal to the Court of Appeals or the Court of Special Appeals." Thus, as a general rule, § 7-107(b)(1) prohibits an appeal when a

person seeks a writ of habeas corpus to challenge the validity of confinement under a sentence.[5]

Section 7-107(b)(2)(ii), however, sets forth a different rule for cases in which a petitioner does not challenge the validity of confinement under a sentence. It states that the statute "does not bar an appeal to the Court of Special Appeals . . . in any other proceeding in which a writ of habeas corpus is sought for a purpose other than to challenge the legality of a conviction of a crime or sentence of imprisonment for the conviction of the crime . . . ."

In short, under § 7-107(b), Lindler may appeal if, but only if, he sought a writ of habeas corpus "for a purpose other than to challenge the legality of a conviction of a crime or sentence of imprisonment for the conviction of the crime." Therefore, to determine whether Lindler may appeal from the denial of his petition, we must determine whether Lindler sought a writ of habeas corpus to challenge the legality of his conviction or sentence or for some other purpose.

The Court of Appeals has given a number of examples of cases in which persons had the right to appeal from the denial of a writ of habeas corpus because they sought the writ for a purpose other than to challenge the legality of a conviction or sentence.

Most notably, in *Gluckstern v. Sutton*, 319 Md. at 638, the petitioner had been sentenced to life imprisonment, but was later found to be a "defective delinquent." As a

[5] Under § 7-109(a) of the Criminal Procedure Article, a person aggrieved by an order in an action under the UPPA may apply to this Court for leave to appeal within 30 days of the order.

consequence of that finding, the court committed him to the Patuxent Institution for an indeterminate sentence and suspended his sentence of imprisonment for his convictions. *Id.* at 638-39. Under the law at the time of his conviction, the petitioner could be released on parole whenever the Institutional Board of Review determined that his release would benefit both him and society. *Id.* at 639-40.

While he was at Patuxent, however, the legislature changed the law to place additional obstacles in the path of his release, including a requirement that the Governor approve the decision to release him on parole. *Id.* at 642. When the Governor refused to approve his release despite the Institutional Board of Review's decision to parole him, he filed a petition for a writ of habeas corpus, naming the director of Patuxent Institution as the defendant. *Id.* at 644. He contended that the requirement of gubernatorial approval, as applied retroactively to him, violated the ex post facto clauses of the Maryland Declaration of Rights and the United States Constitution. *Id.* at 644-45.

The circuit court granted the petitioner's writ, the director appealed, and the petitioner moved to dismiss the appeal. *Id.* at 645-47. The Court of Appeals denied the motion, holding that the appeal was authorized by the statutory predecessor of § 7-107. *Id.* at 653.

The Court based its decision on the statutory language stating that the UPPA does not bar an appeal in a proceeding in which a person sought a writ of habeas corpus for a purpose other than to challenge the legality of a conviction or a sentence. *Id.* at 661. That language, the Court said, "obviously applie[d]" to the petition in that case. *Id.* The petitioner did not challenge his conviction or sentence. To the contrary, he wanted the

benefit of his sentence. His challenge went only to the retroactive imposition of additional conditions that interfered with his rights under his sentence.

The *Gluckstern* Court went on to observe that its conclusion was "consistent with the purpose" of the UPPA. *Id.* at 662. The UPPA "was designed to create a statutory remedy for collateral challenges to criminal judgments . . . and to substitute this remedy for habeas corpus and coram nobis actions challenging criminal judgments . . . ." *Id.* So, "[i]n situations," such as the one in that case, "where the [UPPA] did not provide a remedy, and thus was not a substitute for habeas corpus, the enactment of the new statute provided no reason for restricting appeals in habeas corpus cases." *Id.* The court's reasoning implies that, if the UPPA provides a remedy, the petitioner has no right to appeal.

The Court reached a similar conclusion in *Maryland Corr. Inst. – Women v. Lee*, 362 Md. 502 (2001). In that case, an inmate contended that the Division of Correction had failed to follow its guidelines in administering an ambiguous sentence. She did not, in substance, contend that her conviction or sentence was unlawful. *Id.* at 515. Rather, she contended that her continued confinement was unlawful under the sentence, as she interpreted it. *Id.* at 515-16. In those circumstances, the Court of Appeals held that, under the statutory predecessor of § 7-107, the prison had the right to appeal the grant of a writ of habeas corpus. *Id.* at 517.[6]

[6] For additional cases in which the Maryland appellate courts have held that a petition for habeas corpus did not challenge the petitioner's conviction or sentence, and thus that the aggrieved party could appeal from the disposition of the petition, see *Simms v. Shearin*, 221 Md. App. at 473 (citing *Lomax v. Warden, Md. Corr. Training Ctr.*, 120

By contrast, in *Green v. Hutchinson*, 158 Md. App. 168, 175 (2004), this Court dismissed an inmate's appeal from the dismissal of a petition for habeas corpus. We reasoned that the inmate's arguments "went directly to the legality of [his] convictions," as they concerned "ineffective assistance of counsel" and other errors and improprieties in the conduct of the trial. *Id.* at 174. We added that "[t]he issues were of the type that could have been raised in a petition for postconviction relief." *Id.* at 173.

Similarly, in *Simms v. Shearin*, 221 Md. App. at 474, this Court held that an inmate could not appeal from the denial of a petition for habeas corpus in which he alleged that he had been denied due process and equal protection because the State had destroyed DNA evidence that had been admitted at trial (and thus had prevented him from taking advantage of new technologies that might exonerate him). We reasoned that, unlike the petitioners in *Gluckstern* and *Lee*, the inmate did "not contend that his confinement or its duration [was] illegal for some collateral reason." *Id.* "Rather," he contended that the destruction of the evidence "rendered him unable to challenge the legality of his *conviction* through post-trial collateral attack." *Id.* (emphasis in original). In this Court's view, "the essence" of the inmate's assertion spoke to his "desire – and his corresponding inability – to challenge the legality of his convictions, not, for example,

Md. App. 314, 323 (1998); and *Frost v. State*, 336 Md. 125, 132 n.5 (1994)). In *Lomax v. Warden, Md. Corr. Training Ctr.*, 120 Md. App. at 323, an inmate challenged the constitutionality of the Governor's pronouncement that he would not grant parole to persons who had been sentenced to life imprisonment; the inmate did not challenge his conviction or life sentence. In *Frost v. State*, 336 Md. at 132 n.5, a number of inmates challenged the Parole Commissioner's authority to rescind their diminution credits; they too did not challenge their convictions or sentences.

the terms of his confinement." *Id.* Because the inmate, therefore, had not sought the writ of habeas corpus for a purpose other than to challenge the legality of a conviction of a crime or sentence, he had no right to appeal. *See id.*

Unlike the petitioners in *Gluckstern* and *Lee*, Lindler's petition, by his own admission, "challenged the legality of the procedures resulting in the judgment of his conviction." In his petition, Lindler, like the inmate in *Green v. Hutchinson*, claimed that he was denied his Sixth Amendment right to the effective assistance of counsel. His requested remedy was a belated appeal that, he contended, would result in the invalidation of his conviction. Thus, by claiming that the procedures resulting in his conviction were illegal, Lindler ultimately sought to set aside his conviction. It follows that Lindler's appeal is prohibited by § 7-107(b) of the Criminal Procedure Article, because he did not file his petition for "a purpose other than to challenge the legality of a conviction of a crime or sentence of imprisonment for the conviction of the crime." Accordingly, we must dismiss the appeal. Md. Rule 8-602(b)(1) (requiring this Court to dismiss an appeal if it is not allowed by law).

Lindler could have raised his claim of ineffective assistance of counsel in a proceeding under the UPPA while he was still incarcerated. "[W]hen an accused can show that appellate review of his conviction has been frustrated by his trial or appellate attorney's inaction in failing to file timely an appeal that an accused has promptly and diligently requested be filed, or when, through no fault of his own, an accused's desired appeal is not timely filed on his behalf, a belated appeal may be a proper remedy under post conviction procedures." *Garrison v. State*, 350 Md. at 142-43 (footnote omitted).

Thus, because the UPPA provided Lindler with a remedy to challenge his attorney's alleged failings, and thus was a substitute for habeas corpus, § 7-107(b) restricts his right to appeal in this case. *See Gluckstern v. Sutton*, 319 Md. at 662. For this additional reason, we must dismiss the appeal. Md. Rule 8-602(b)(1).[7]

Nonetheless, Lindler does not lack a remedy for the constitutional violation that he asserts. In its brief, the State agrees that Lindler "may file a petition for a writ of error coram nobis," the "remedy for a convicted person who is not incarcerated and not on parole or probation, who is suddenly faced with a significant collateral consequence of his or her conviction, and who can legitimately challenge the conviction on constitutional or fundamental grounds." *Skok v. State*, 361 Md. 52, 78 (2000). Through that petition, he may assert a claim of ineffective assistance counsel (*see, e.g., State v. Sanmartin Prado*, 448 Md. 664 (2016)) and, if he is successful, have his remaining conviction set aside.

IN NO. 137, SEPTEMBER TERM, 2020, JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; APPELLANT TO PAY COSTS.

IN NO. 771, SEPTEMBER TERM, 2021, APPEAL DISMISSED; APPELLANT TO PAY COSTS.

[7] As the State observes, had Lindler begun a UPPA proceeding while he was still incarcerated, the courts would retain the power to decide the case after the completion of his sentence and his subsequent release from confinement. *Kranz v. State*, 459 Md. 456, 479 (2018).