Circuit Court for Charles County
Case No. 08-K-09-000811

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1759

September Term, 2017

SHAWN ALBERT FRANKLIN

v.

STATE OF MARYLAND

Meredith,
Friedman,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 30, 2019

Appellate courts defer to the factfinding of trial courts. Here, we defer to the trial court's determination from an arguably ambiguous record that Shawn Franklin's defense counsel in fact requested a hearing on a motion for reconsideration. As a result, we affirm the trial court's denial of Franklin's petition for a writ of error coram nobis because he failed to establish that his conviction suffered from a constitutional defect.

BACKGROUND

Franklin pled guilty to one count of reckless endangerment and one count of illegally transporting a handgun. Franklin was sentenced to two concurrent, three-year terms of incarceration, with all but 14 days suspended. Franklin was also ordered to serve three years of unsupervised probation, pay a $500 fine, perform 24 hours of community service, forfeit his handguns, and pay court costs. In passing sentence, the circuit court told Franklin, "[i]f you successfully complete the terms of probation[,] I am not ruling out probation before judgment."

Ten days later, Franklin's counsel filed a motion for reconsideration with a proposed order. We set out the text of both in full:

> MOTION FOR RECONSIDERATION OF SENTENCE
>
> Now comes the Defendant, SHAWN ALBERT FRANKLIN, … pursuant to Maryland Rule of Procedure 4-345, and moves this Honorable court to reconsider the sentence imposed in the above captioned matter[] and states in support thereof:
>
> 1. That on March 22, 2010, the Defendant, SHAWN ALBERT FRANKLIN came before this court for disposition on the above referenced case;
> 2. The Defendant was charged with [Reckless Endangerment pursuant to CR § 3-204(a)(1)].

3. The Defendant pled guilty and was sentenced to:

   a. A Three (3) year jail term, all but Two (2) years, Eleven (11) months and Sixteen (16) days suspended;

   b. Three (3) years unsupervised probation upon release;

4. The Defendant was also charged with [Illegally Transporting a Handgun pursuant to CR § 4-203].

5. The Defendant pled guilty and was sentenced (concurrent with sentence in paragraph 3) to:

   a. A Three (3) year jail term, all but Two (2) years, Eleven (11) months and Sixteen (16) days suspended;

   b. Three (3) years unsupervised probation upon release;

   c. To pay Five Hundred Dollar ($500.00) fine.

6. That Judge Harrington stated that she would consider Probation Before Judgment in the future.

7. That Defendant requests that this Motion for Reconsideration not be denied outright, but asks for reconsideration for a possible Probation Before Judgment at the conclusion of his probationary period.

* * *

ORDER

Upon consideration of the foregoing Motion for Reconsideration[,] it is on this _____ day of _____, 2010, in the Circuit Court for Charles County, Maryland,

ORDERED, that this motion be set in for hearing on the _____ day of _____, 2010; or in the alternative that,_____
_____.

ORDERED, that the motion in the above captioned matter be kept under advisement.

Around three weeks later, Judge Harrington handwrote the words, "no action" at the bottom of Franklin's proposed order. No hearing was ever scheduled on Franklin's motion, and five years later, pursuant to the terms of Maryland Rule 4-345(e)(1), the motion (and Franklin's chance for probation before judgment) expired.

Frustrated that he had missed his chance at a probation before judgment, Franklin filed a petition for a writ of error coram nobis. In Franklin's petition, he alleged that his defense counsel had failed to request a hearing on his motion for reconsideration, and that this failure constituted ineffective assistance of counsel. The trial court denied relief, finding as a matter of fact, that counsel had requested the hearing. Franklin now appeals from that ruling.

DISCUSSION

Franklin's case boils down to whether his counsel requested a hearing on the motion for reconsideration. Answering that question requires us to examine three legal steps.

First, a coram nobis petitioner must satisfy three substantive elements: (1) the grounds for challenging the conviction must be of "constitutional, jurisdictional, or fundamental character," (2) the petitioner must be suffering or facing "significant collateral consequences" from the conviction, and (3) the petitioner must not have other remedies available to challenge the conviction such as a direct appeal or petition for post-conviction relief. *Skok v. State*, 361 Md. 52, 78-80 (2000) (cleaned up); *see also* MD. RULE 15-1202(b) (identifying the contents of a petition for coram nobis).[1] *Second*, to satisfy the first element

[1] Although sometimes counted as elements, there are two other procedural rules by which a coram nobis petitioner must abide: (1) "a presumption of regularity attaches to the

of the coram nobis test—that there was a constitutional defect in his conviction—Franklin asserts that he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *See Perry v. State*, 357 Md. 37, 78 (1999). *Third*, the Court of Appeals has held that defendants have a right to the effective assistance of counsel in connection with motions for modification of a sentence under Maryland Rule 4-345(e), which, as here, are sometimes captioned as motions for reconsideration. *State v. Flansburg*, 345 Md. 694, 703 (1997) ("Flansburg had under Maryland law a right to the effective assistance of counsel in connection with his request to file a motion for modification of the reimposed sentence."); *Tolson v. State*, 201 Md. App. 512, 517-518 (2011) (recognizing "sole authority for modifying a sentence imposed is Maryland Rule 4-345(e)" and that motions are sometimes called motions for reconsideration). Recently, this Court held that a failure to request a hearing on such a motion within the time constraints set forth by Maryland Rule 4-345(e)(1)[2] constitutes ineffective assistance of counsel. *Moultrie v. State*, 240 Md.

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criminal case, and the burden of proof is on the coram nobis petitioner;" and (2) "basic principles of waiver are applicable to issues raised in coram nobis proceedings." *State v. Rich*, 454 Md. 448, 462 (2017) (cleaned up).

[2] Maryland Rule 4-345(e)(1) provides that "[u]pon a motion filed within 90 days after imposition of a sentence … in a circuit court, whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence." As a result, such motions are frequently filed immediately after sentencing and held in abeyance. *See, e.g.*, *Hoile v. State*, 404 Md. 591, 597-598 (2008) (hearing not held until 2004 on timely motion for reconsideration of sentence filed in 2001); *State v. Karmand*, 183 Md. App. 480, 483 (2008) (timely motion for reconsideration held *sub curia* for more than one year until hearing date).

App. 408, 420-424 (2019); *see also* MD. RULE 4-345(f) (court can only modify a sentence "on the record in open court, after [a] hearing").

Thus, this case turns on the factual question of whether in the motion and proposed order reproduced above, Franklin's lawyer made a timely request for a hearing on the motion for modification of sentence. The State argues that the language quoted above is a sufficient request for a hearing. Franklin, by contrast, argues, that his lawyer should have done more to renew the request. The trial court held that the language in the motion and proposed order served to request a hearing. We review that factual determination only to see if it was clearly erroneous. *State v. Rich*, 454 Md. 448, 471 (2017). We think that the trial court is in a far better position than we are to understand how such requests are ordinarily made, renewed, and denied. In any event, there was more than sufficient support in this record for the trial court's determination that the motion and proposed order were a request for a hearing and that the notation "no action" constituted a denial of the hearing request. As a result, Franklin did not receive ineffective assistance of counsel,[3] and as a further result, he failed to satisfy the first condition for issuance of a writ of coram nobis. We, therefore, affirm.

[3] Our recent decision in *Moultrie v. State* does not compel a different result here because, in that case, it was undisputed that defense counsel failed to request a hearing on the motion for modification. 240 Md. App. 408, 415, 422-424 (2019). In particular, in the motion to modify, defense counsel asked the court to hold the motion *sub curia* and "'[g]rant a hearing upon petition of counsel[.]'" *Id.* at 415. Defense counsel then failed to petition the court for a hearing. *Id.*

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