

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2248

September Term, 2013

ALI SINA KARIMI

v.

STATE OF MARYLAND

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: August 18, 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.

This appeal arises from an unsuccessful petition for a writ of coram nobis, filed by Ali Sina Karimi, appellant, in the Circuit Court for Montgomery County in 2010. In 2008, appellant, who is a citizen of Afghanistan, pled guilty to second-degree assault and driving while under the influence of alcohol. After serving a four month sentence, appellant was transferred to the custody of the United States Department of Homeland Security (“DHS”), which initiated deportation proceedings against him. In June 2010, appellant filed a petition for a writ of coram nobis in the circuit court, arguing, based upon *Padilla v. Kentucky*, 559 U.S. 356 (2010), that his attorney failed to adequately inform him of the immigration consequences of pleading guilty. After conducting a hearing on the matter, the circuit court denied the petition, reasoning that, under this Court’s decision in *Miller v. State*, 196 Md. App. 658 (2010), the rule announced *Padilla* did not apply retroactively to convictions that were final before *Padilla* was decided. Appellant subsequently noted an appeal to this Court. While that appeal was pending, the Court of Appeals addressed the retroactive application of *Padilla* in *Denisyuk v. State*, 422 Md. 462 (2011). In March 2011, this Court remanded appellant’s coram nobis case to the circuit court for further consideration in light of *Denisyuk*. In November 2011, the Court of Appeals vacated our 2010 judgment in *Miller*, and remanded that case to us for further consideration. 423 Md. 474 (2011). On remand in *Miller*, we reiterated and expanded upon our opinion that *Padilla* did not afford retroactive relief, 207 Md. App. 453 (2012), and the Court of Appeals affirmed, 435 Md. 174 (2013). Thereafter, in November 2013, the circuit court denied appellant’s coram nobis petition for a second time. This appeal followed.

QUESTION PRESENTED

Appellant submitted five questions for our review, which we have consolidated and rephrased into three questions:¹

1. Did the circuit court err by failing to produce a written opinion explaining its denial of appellant's coram nobis petition?

2. Did the circuit court fail to give appellant adequate notice of the issues to be discussed at the November 2013 coram nobis hearing and an opportunity to respond to the State's contentions?

¹ Appellant submitted five questions for our review:

- 1 Did the Circuit Court of Montgomery County by dismissing my *Writ of Coram Nobis* petition without a written opinion explaining the application of *Miller* case to my case and inapplicability of *Denisyuk* to my case was [sic] an error and violate my Due Process rights guaranteed under the Constitution of the United States?
- 2 Did the Circuit Court has erred [sic] in denying my Writ of Coram Nobis by applying *Miller v. State*, ____ Md. ____, 2013, WL 5354332 (September 25) to my case?
- 3 Was there a violation of my Sixth Amendment rights by my counsel when he failed to inform me of the immigration consequences and advising me to plead guilty to a charge of Second Degree Assault against a Police Officer, under section 3-203(a) of the Maryland Criminal Statute?
- 4 Is *Padilla v. Kentucky*, retroactively applicable to Maryland State convictions?
- 5 Is *Chaidez v. United States*, ____, 133 S. Ct. at 1103 (2013) retroactively applicable?

3. Did the circuit court err by concluding that *Padilla* does not apply retroactively to appellant's 2008 guilty plea?

Because we answer these three questions in the negative, we affirm the judgment of the Circuit Court for Montgomery County.

FACTS & PROCEDURAL HISTORY

Appellant is a citizen of Afghanistan who has resided in this country since 1990. In November 1999, appellant was granted asylee status, which allowed him to remain in the United States indefinitely.

In the early morning hours of October 29, 2007, appellant was arrested after he drove home from work drunk, hit a pole at a gas station, and fled the scene. After his arrest, appellant was transported to the Montgomery County Police Department for processing, where he became belligerent and aggressive. While a police officer was processing his arrest, appellant grabbed the officer's hand and allegedly spat on her arm. As a result, appellant was charged in the District Court with eight counts, including assaulting a police officer, second-degree assault, and driving while under the influence of alcohol. After he was convicted in the District Court of second degree assault of a law enforcement officer, second degree assault, driving under the influence, driving while impaired, failure to stop after an accident, failure to report an accident, and failure to sign a traffic citation, appellant noted an appeal to the circuit court. On March 21, 2008, before trial in the circuit court, appellant pled guilty to two counts: second-degree assault in violation of Maryland Code, Criminal Law Article ("C.L."), § 3-203(b), and driving under the influence. In that

proceeding, appellant was represented by counsel. During the plea hearing, the following colloquy took place between the circuit court and appellant:

[Court:] **Do you understand that if you are not a United States citizen, a plea of guilty in this case could affect your immigration status, including deportation, detention, or ineligibility for citizenship? Do you understand that?**

[Appellant:] Yes, sir.

[Court:] Do you understand that if you are not a United States citizen, and if you need additional information about the potential immigration consequences of your plea, that you should consult with your lawyer? Do you understand that?

[Appellant:] Yes, sir.

[Court:] Do you wish to talk with your lawyer further about the potential immigration consequences of your plea before we proceed any further?

[Appellant:] Yes, sir.

[Court:] Pardon me.

[Appellant:] No.

[Defense Counsel:] Wait a minute. He wants to know—

[Court:] My question is this.

[Appellant:] Oh, no.

[Court:] Listen carefully to me.

[Appellant:] Oh, yes.

[Court:] Do you wish to talk with [Defense Counsel] about the potential immigration consequences of your plea before we go any further?

[Appellant:] No, sir.

[Court:] Okay. You fully understand what's going on here today.

(Emphasis added.)

At the hearing, the prosecutor represented to the court that, if the case proceeded to trial, the State would prove:

The defendant was informed that he would be going to the Central Processing Unit. Officer MacKenzie explained this to him, and she put her hand flat on the table. In the processing room, Mr. Karimi was becoming belligerent and somewhat out of control. He was yelling and causing a disturbance in the station.

Once Officer MacKenzie again told him to quiet down, Mr. Karimi grabbed Officer MacKenzie's hand that was on the table. As he did this, he also spit [sic] on Officer MacKenzie's arm. That would be the basis for the assault, Your Honor.

Appellant objected to this representation and insisted that he did not intend to spit on the officer, although he admitted grabbing her hand while in an agitated state. As a result, the following colloquy took place between defense counsel and the court:

THE COURT: But if he's denying the assault, I'm not going to accept the plea.

[DEFENSE COUNSEL]: No, he admits the assault when his hand made —

THE COURT: Well, he either did the assault by grabbing an officer's arm or spitting on him [sic].

[DEFENSE COUNSEL]: I said, when he grabbed the officer's arm.

THE COURT: Okay. Great.

[DEFENSE COUNSEL]: But I wanted to make clear that, for the record, he didn't intentionally spit on the officer.

THE COURT: If he didn't — I'm not going to get into a debate with you, [Defense Counsel]. If he didn't intentionally spit on the officer, then it very well, if the assault was the spitting, it may well not be a crime. On the other hand, if he grabbed the officer's arm, yes, that's a crime.

[DEFENSE COUNSEL]: Yes.

THE COURT: And he admits that he grabbed the officer's arm, is that correct?

[DEFENSE COUNSEL]: That's correct.

THE COURT: All right. Good.

Appellant was subsequently sentenced to a total of four years' imprisonment, with all but four months suspended in favor of three years' probation. At the sentencing hearing, appellant reiterated that he did not intend to spit at the officer, stating:

It was totally accident. I have a lot of respect with all the police officers, I'm a very responsible person, there was no intention for me for doing that, it was a total accident.

The way this gentlemen is speaking, is nothing on the face, is nothing totally at all like that. It was an accident, it was a survival [sic] from the mouth and the grabbing the hand, just like [counsel] explained to you, it's exactly that's what it was, and I do have a lot of respect for all the police officers, that's why we're in facing the environment today.

Pursuant to the terms of the plea agreement, appellant did not file a direct appeal. He did, however, file a motion for reconsideration, which was denied on September 4, 2008.

In August 2008, relying on appellant's second-degree assault conviction, DHS initiated deportation proceedings against appellant and terminated his asylee status. After serving his four month sentence, appellant was transferred to the custody of the DHS.

While the deportation proceeding was pending, in March 2010, the United States Supreme Court announced its decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that a criminal defense attorney renders ineffective assistance of counsel if the attorney fails to provide the client with accurate advice regarding the immigration consequences of a guilty plea. Relying on *Padilla*, in June 2010, appellant filed a petition for a writ of coram nobis in the Circuit Court for Montgomery County, asserting that his attorney failed to adequately inform him of the immigration consequences of the March 2008 guilty plea. In the petition, appellant argued:

Mr. Karimi is entitled to a review of his previous conviction in the underlying case based upon the fact that his plea was unconstitutional because neither the Court nor her [sic] counsel, [Mr. Defense Counsel,] effectively advised him of the totality of the effects of his guilty plea, specifically with reference to the near certainty of adverse consequences said plea could have upon his immigration status. To suggest that, as was done here that the plea, as agreed to, had the potential to cause immigration consequences is an enormous understatement. The plea, as agreed and as entered, was, as had happened, designed to result in a near certainty of his loss of his asylum status and the near certainty of his removal from the U.S. As a result, Mr. Karimi's plea was not entered in a voluntary or intelligent manner, and he was further denied effective representation of counsel in accordance with his Sixth Amendment rights.

Appellant simultaneously presented the same argument to the circuit court in an Amended Petition for Post Conviction Relief. In March 2011, a federal immigration judge issued a final order of removal, making appellant subject to immediate deportation. That same month, the circuit court conducted a hearing on appellant's coram nobis petition and amended post conviction petition. At the hearing, appellant represented to the court that, at the time of the March 2008 plea hearing, he understood that he could face adverse

immigration consequences as a result of the plea, but that he was unaware that he could be deported.

On March 24, 2011, the circuit court issued a written opinion denying coram nobis and post-conviction relief, reasoning that, under this Court’s decision in *Miller v. State*, 196 Md. App. 658 (2010), *Padilla* did not apply retroactively, and the heightened burden on defense counsel announced in *Padilla* in 2010 was applicable only to convictions that had not become final before the *Padilla* decision was announced. The circuit court also noted in its opinion that, even if *Padilla* was applicable, appellant’s claim of error did not have merit because “it is clear from the transcript of the proceedings that the Court . . . advised [appellant] that a plea of guilty could affect his immigration status, including deportation, detention, or ineligibility for citizenship.”

Appellant subsequently filed an appeal to this Court. While that appeal was pending, the Court of Appeals decided *Denisyuk v. State*, 422 Md. 462 (2011), which held that *Padilla* applied retroactively to all guilty pleas entered after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The Court remarked in dicta: “Thus, even if the Supreme Court ever were to hold that *Padilla* is not retroactive . . . that holding would have no adverse effect on our analysis here.” *Denisyuk*, 422 Md. at 480 n.8. On May 11, 2012, this Court remanded appellant’s case to the circuit court for further consideration in light of *Denisyuk*.

While continuing to seek judicial relief in the State system, appellant also contested his threatened deportation in federal court. In May 2013, a divided panel of the United States

Court of Appeals for the Fourth Circuit held that appellant’s conviction for second-degree assault was not an aggravated felony within the meaning of the Immigration and Nationality Act because the Maryland crime can apply to nonviolent conduct, and therefore, the conviction was insufficient to trigger his deportation. *Karimi v. Holder*, 715 F.3d 561, 570 (4th Cir. 2013).

Meanwhile, the Maryland Court of Appeals had vacated and remanded to this Court the *Miller* case that appellant’s coram nobis court had relied upon when it denied relief in March 2011 — *i.e.*, 196 Md. App. 658 — for further consideration in light of the *Denisyuk* decision. Upon further consideration of Miller’s claim, we relied in part upon *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011), and we reiterated our conclusion that the new rule announced in *Padilla* did not apply to cases that were final prior to the Supreme Court’s opinion in *Padilla*. *Miller v. State*, 207 Md. App. 453, 516-19 (2012). Miller again petitioned for, and was granted, certiorari. While *Miller*’s case was pending in the Court of Appeals, the Supreme Court ruled in *Chaidez*.

On February 20, 2013, the Supreme Court announced its decision in *Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1103, which held that *Padilla* was not retroactively applicable to cases that were final before the decision in *Padilla* was announced. In September 2013, the Court of Appeals issued its opinion in *Miller v. State*, 435 Md. 174 (2013), holding that, notwithstanding its prior decision in *Denisyuk*, *Padilla* did not apply retroactively to cases that were decided before the decision in *Padilla* was announced in 2010.

A hearing was scheduled in the circuit court for November 1, 2013, on appellant’s remanded coram nobis petition. On October 28, 2013, the prosecutor sent a letter to the circuit court and appellant’s counsel, stating in part: “In light of the [Court of Appeals’s] *Miller* opinion, the State once again argues that Mr. Karimi’s request for coram nobis relief should be denied because *Padilla v. Kentucky* does not apply retroactively to his case.”

The circuit court conducted a hearing on the matter on November 1, 2013. At the hearing, appellant’s attorney conceded that the 2013 holding of the Court of Appeals in *Miller* effectively precluded appellant’s claim of ineffective assistance on the part of trial counsel, stating:

Well, we are aware that the [*Miller*] case certainly was not a positive decision, as far as Mr. Karimi is concerned. . . . I think the immigration claims based upon anything prior to the [*Padilla*] case was 2010. There’s no debate this was — this [plea in appellant’s case] occurred in 2008 [— are] not given retroactive effect.

So the argument that we initially put forward before the court, that prior counsel failed his constitutional obligations by not alerting Mr. Karimi to the immigration applications probably cannot be sustained in light of the [*Miller*] case in the State of Maryland with much good faith, viability going any further.

At the end of the hearing, the circuit court denied the petition orally, stating: “All right, then I think that it would be appropriate at this point is to deny — again — the coram nobis, because certainly I think the position that we had taken previously is still the same position. He is precluded at this point from pursuing that. Under *Miller*.” This timely appeal followed.

DISCUSSION

Although appellant presented five questions for our review, he essentially asserts that the circuit court committed three errors — two procedural and one substantive. First, he contends that the court erred by failing to produce a written opinion explaining its rationale for denying his coram nobis petition. Second, he contends that he was not given adequate opportunity at the November 2013 hearing to discuss the applicability of *Miller* and *Denisyuk* to his case. Finally, appellant argues that the circuit court erroneously concluded that *Padilla* was not retroactively applicable to his 2008 guilty plea. These arguments are all without merit. In addition to these three main arguments, appellant also includes argument in his brief addressing a couple of additional challenges to the validity of his guilty plea that were not raised in or addressed by the circuit court. Because neither of those arguments was preserved for appellate review, we decline to address the arguments.

I. Circuit Court’s Failure to Produce Written Opinion Denying Appellant’s Coram Nobis Petition

In the “Questions Presented” section of his brief, appellant asserts that the circuit court erred by denying his coram nobis petition “without a written opinion explaining the application of [the] *Miller* case to my case and [the] inapplicability of *Denisyuk*. . . .” Appellant provides no legal authority to support his contention that the circuit court erred by delivering its ruling orally. Contrary to appellant’s suggestion that a written opinion was mandatory, Maryland Rule 15-1207(a) explicitly provides that, in a coram nobis proceeding, “[t]he judge shall prepare and file or **dictate into the record** a statement setting forth separately each ground on which the petition is based, the federal and state rights involved,

the court's ruling with respect to each ground, and the reasons for the ruling.” (Emphasis added.) The circuit court did not commit reversible error by delivering its opinion orally on the record. Under the circumstances of this case, where the circuit court was reconsidering a previous ruling which had been explained in detail in a written opinion, the court’s oral reference to its previously-filed opinion and to the recent ruling of the Court of Appeals in *Miller* was sufficient to satisfy Rule 15-1207(a).

II. Lack of Notice & Opportunity to Respond at November 2013 Hearing

Appellant argues that the circuit court denied him due process because “[t]he letter [of October 28, 2013] that was addressed to the Judge was never admitted into [the] record,” and therefore, he “did not have the opportunity to discuss the application of *Miller* to my case and [the] inapplicability of *Denisyuk*.” Appellant contends that, “[h]ad the Judge, the State, and my Counsel read the cases it would have been clear” that he was entitled to relief. We are not persuaded there was a denial of due process in this regard.

“An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Here, appellant was provided with both notice and an opportunity to respond to the State’s contentions at the November 2013 hearing. Appellant’s counsel was clearly on notice that the November 2013 hearing would consider the implications of the Court of Appeals’s ruling in *Miller*. In February 2013, the parties had agreed to stay further hearings in the case pending the issuance of the Court of

Appeals’s ruling in *Miller*. Additionally, the record shows that the State sent appellant’s attorney a letter before the hearing indicating that the State intended to rely on the Court of Appeals’s decision in *Miller* in opposing appellant’s coram nobis petition. Finally, appellant’s counsel of record did not request a postponement or raise any objection about insufficient notice. The transcript from the hearing reflects that appellant’s attorney addressed the applicability of *Miller* to appellant’s case. We perceive no error.

III. Retroactive Application of *Padilla v. Kentucky*

Finally, appellant contends that the circuit court erroneously concluded that *Padilla*’s requirement of more detailed advice regarding immigration implications was not retroactively applicable to his March 2008 guilty plea. He asserts that *Denisyuk* controls the outcome in this case and that the 2013 *Miller* decision is not dispositive of his claim. We review *de novo* purely legal claims of error such as this. *State v. Wallace*, 372 Md. 137, 144 (2002).

Appellant’s contention is without merit. As appellant’s attorney readily conceded at the November 2013 coram nobis hearing, the Court of Appeals held in *Miller* in 2013 that the duty imposed upon defense counsel in 2010 by *Padilla* does not apply retroactively to guilty pleas that became final prior to the announcement of the decision in *Padilla*. See *Miller, supra*, 435 Md. at 198-200. See also *Guardado v. State*, 218 Md. App. 640, 653 (2014) (“The circuit court did not err in denying Guardado’s petition for a writ of error coram nobis because the linchpin of his contentions, namely, that *Padilla* applied retroactively to his case, was incorrect.”). This is true regardless of whether the claim of error is styled as

an ineffective assistance of counsel claim or as an involuntary plea claim. *Miller, supra*, 435 Md. at 200 (holding that *Padilla* does not apply retroactively to a claim that a guilty plea was entered involuntarily). *See also Guardado, supra*, 218 Md. App. at 653 (observing that *Padilla* does not apply retroactively to an ineffective assistance claim). Because appellant’s conviction became final when no appeal was filed in 2008, approximately two years before the Supreme Court announced its decision in *Padilla*, the rule announced in *Padilla* is inapplicable to appellant’s case.

Appellant argues, in the alternative, that *Padilla* is applicable to his case because he was still on probation at the time the decision in that case was announced, and therefore, his case was not final, making the retroactivity of *Padilla* immaterial. This argument is devoid of merit. A criminal conviction becomes final “where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed.” *Allen v. State*, 204 Md. App. 701, 717 (2012) (quoting *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965)). That point in time clearly occurred in 2008 for appellant. *Padilla* was announced approximately two years later. The fact that appellant was still on probation at the time the *Padilla* decision was announced is not relevant to the finality of appellant’s conviction.

Moreover, it appears that appellant no longer faces deportation as a consequence of his plea to second degree assault. Under the rule announced in *Padilla*, when “the deportation consequence is truly clear,” the attorney has an obligation to give complete, correct advice. *Padilla, supra*, 559 U.S. at 369. But, “[w]hen the law is not succinct and

straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”

Id. Here, the deportation consequence of appellant’s plea to second-degree assault was not straightforward, as evinced by the fact that the Fourth Circuit ultimately overturned the immigration court and concluded, after years of litigation, that second-degree assault was not a sufficiently violent offense to trigger deportation. *See Karimi, supra*, 715 F.3d at 570. Because the Fourth Circuit ultimately concluded that appellant’s assault conviction did not result in his deportation, counsel’s failure to inform appellant of “the near certainty” that he would be deported if he pled guilty to assault was not ineffective assistance of counsel. And, in any event, it appears that appellant is no longer suffering significant collateral consequences from the conviction.

IV. Additional Attacks on the Validity of Appellant’s Guilty Plea

In his brief, appellant launches two additional attacks on the validity of his guilty plea, which we will address briefly.

First, appellant argues that his plea should be vacated because C.L. § 3-203(b) is inapplicable when the victim of the assault is a police officer. He contends that, because C.L. § 3-203(c) specifically addresses assaults on law enforcement officers, a criminal defendant who assaults a police officer cannot be convicted or plead guilty to generic second-degree assault under C.L. § 3-203(b). Appellant did not raise this argument in his coram nobis petition, and therefore it is not preserved for our review. (Nor did he raise this argument at the time he made the agreement to plead guilty to second degree assault.) *See Maryland Rule*

8-131(a) (“Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . .”).

Second, appellant contends that the guilty plea should be vacated because, at the sentencing hearing, he “clearly and candidly stated to the court that it [any spitting] was totally accidental.” As a result, appellant argues, “the element of intent was absent/denied” and therefore, “the court should have refused to accept [the] guilty plea.” Again, appellant raises this argument for the first time on appeal, and therefore it is not preserved for our review. *See* Maryland Rule 8-131(a).

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