

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1605
September Term, 2015

KENYATTA M. SMITH

v.

STATE OF MARYLAND

Graeff,
Friedman,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.
Concurring Opinion by Friedman, J.

Filed: August 1, 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.

Appellant, Kenyatta Smith, appeals from the denial of her petition for a writ of error coram nobis by the Circuit Court for Baltimore County. In the petition she contended that her 2002 guilty pleas to forgery and identity fraud were not entered knowingly and voluntarily and should therefore be vacated. For reasons we herein explain, we believe that the circuit court was wrong to deny her petition without a hearing, and we therefore vacate the judgment of the circuit court and remand the case for the circuit court to hold a hearing on her petition for writ of error coram nobis.

BACKGROUND

The circuit court summarized the facts of Smith's forgery and identity fraud offenses as follows:

The basis for the convictions arose from the Petitioner's unauthorized use of her former employer's personal identifying information, including name, tax identification number, and social security number to obtain a commercial loan in the amount forty thousand dollars (\$40,000). The Petitioner then used checks bearing the victim's forged signature to deposit the fraudulently obtained loan into the Petitioner's personal bank account. Petitioner then used the ill-gotten money to purchase a Lexus from Len Stoler Lexus in Reisterstown.

In June of 2002, Smith was tried and found guilty by the District Court of Maryland for Baltimore County of forgery and identity fraud and sentenced to six months imprisonment. Apparently unsatisfied with that result, she took a *de novo* appeal to the circuit court where she pleaded guilty to forgery and identity fraud as part of a binding three-party plea agreement reached between the court, the State, and Smith. Pursuant to

that agreement, the court sentenced Smith to three years imprisonment, all suspended, with two years of supervised probation. Thereafter she sought neither appellate nor post-conviction review of her convictions.

In May of 2015, Smith filed a petition for a writ of error coram nobis challenging the validity of her 2002 guilty plea. She now appeals the circuit court’s decision to deny her petition without a hearing.

Additional background will be addressed as it becomes relevant to our discussion.

DISCUSSION

I. Coram Nobis Generally.

To be eligible for coram nobis relief, a petitioner must be: (1) “a convicted person who is not incarcerated and not on parole or probation” as a “result of the challenged conviction”; (2) “who is suddenly faced with a significant collateral consequence of his or her conviction”; and (3) “who can legitimately challenge the conviction on constitutional or fundamental grounds”. *Skok v. State*, 361 Md. 52, 78-80 (2000).

Moreover, the burden of proof in a coram nobis proceeding is on the petitioner. *Id.* at 78. And, not only are “[b]asic principles of waiver . . . applicable to issues raised in coram nobis proceedings,” but “where an issue has been finally litigated in a prior proceeding, and there are no intervening changes in the applicable law or controlling case law, the issue may not be relitigated in a coram nobis action.” *Skok*, 361 Md. at 79. Indeed, “the same body of law concerning waiver and final litigation of an issue, which is

applicable under” the Maryland Uniform Post-conviction Procedure Act, is “applicable to a coram nobis proceeding challenging a criminal conviction.” *Id.*

II. Smith’s Coram Nobis

In Smith’s petition for a writ of error coram nobis, she contended that her plea was invalid because the record did not reflect that she was apprised (1) of the nature or elements of the offenses to which she pleaded guilty, (2) of the presumption of innocence, (3) that, by pleading guilty, she would forfeit the right to file preliminary motions to “contest the charging document, arrest, any confession or statement, results of searches and seizures, pretrial or in-court identifications, or other technical defenses, and (4) of the immigration and other collateral consequences of pleading guilty.¹ Additionally, Smith claimed that, as a result of her convictions, she faced “significant collateral consequences” because she could not obtain employment as a mortgage originator.

The circuit court agreed with Smith that her plea was involuntary because the record did not reflect that she had been advised of the nature and elements of the offenses to which she pleaded guilty in violation of *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). The circuit court noted that, in light of *Bradshaw*:

No longer can a trial judge rely on the presumption that defense counsel has sufficiently explained to the defendant the nature of the offense to which he or she is entering a guilty plea. Instead, the trial judge must either (1) explain to the

¹ In her petition, Smith mentioned, in passing, that her “counsel was ineffective for failing to assure that her plea was knowing and voluntary” but offered no analysis or authority in furtherance of that contention. In addition, she does not mention it on appeal. As a result, we find that she has abandoned the issue and decline to address it.

defendant on the record the nature of the charge and the elements of the crime, or (2) obtain on the record a representation by defense counsel that the defendant has been “properly informed of the nature and elements of the charge to which he [or she] is pleading guilty.” *Abrams v. State*, 176 Md. App. 600, 622-23, 933 A.2d 887, 900 (2007).

The circuit court also found that Smith had no other available remedy because the time to appeal her convictions had lapsed long ago, and, because she was not incarcerated, on parole, or probation, she was not eligible to file a petition for post-conviction relief or a petition for a writ of habeas corpus to challenge her convictions.

Nevertheless, as indicated earlier, the circuit court denied Smith’s petition on the alternative grounds that (1) she waived her claims by not seeking leave to appeal from the guilty plea, and (2) that her inability to obtain the specific employment she sought (a mortgage originator) did not qualify as a “significant collateral consequence” of the conviction, and she was therefore ineligible for coram nobis relief.

III. Waiver.

As indicated above, the circuit court denied Smith’s petition, in part, because the court found that Smith waived her claims when she did not seek appellate review of her convictions. On appeal both Smith and the State claim that the circuit court’s finding of waiver was erroneous. In light of the Court of Appeals decision in *State v. Smith*, 443 Md. 572 (2015), we will accept the State’s concession, that “contrary to the coram nobis court’s finding, [Smith] did not waive her right to seek coram nobis relief.”

IV. Significant Collateral Consequences.

In her petition for a writ of error coram nobis, Smith alleged that sometime after 2002, she began working for a “mortgage company.” She further alleged that “[s]he worked in the industry, and was successful, until the beginning of [the] housing crash in 2006. At that time, changes in regulations required that persons working in her capacity be licensed by DLLR.² Ms. Smith applied for her Mortgage Originator’s License, which was denied by letter on January 26, 2007.” Smith attached a copy of that letter as an exhibit to her coram nobis petition. Moreover, Smith alleged she is trained for work in the financial field, but has been denied numerous jobs in that industry because of her convictions.

Based on her inability to obtain certain employment and her inability to obtain a mortgage originator’s license, Smith contended that she had satisfied the coram nobis prerequisite of suffering “significant collateral consequences” as the result of her forgery and identity fraud convictions.

The circuit court found that the collateral consequences of Smith’s convictions outlined above were not “significant” because Smith did not allege that she was completely unemployable, rather she simply could not work in a particular field. The circuit court said:

The Court, while sympathetic to the Petitioner’s plight, does not find that her inability to obtain employment within a specific field constitutes a “significant collateral consequence” under *State v. Hicks* [139 Md. App. 1 (2001)]. Coram

² DLLR is an acronym for the Maryland Department of Labor, Licensing, and Regulation.

nobis exists as a remedy to address extraordinary or extreme cases. [*S*]ee *United States v. Denedo*, 129 S. Ct. 2213 at 2223 (2009). Petitioner has not alleged that she is destitute or unable to be employed in any capacity. She is simply unable to work in the industry of her choosing. The financial industry has vested and obvious reasons for refusing to hire individuals with convictions for fraud and forgery. It is therefore, not unjust that she cannot work in that industry because of the convictions. Despite conviction, the Petitioner is still free to pursue other lines of work.

In *Parker v. State*, 160 Md. App. 672 (2005) we addressed an analytically similar situation to the instant case. Parker sought coram nobis relief on the basis that his guilty pleas were not knowing and voluntary. He claimed he would suffer significant collateral consequences resulting from his convictions in the form of enhanced sentencing in a subsequent federal criminal case. *Id.* at 676. After the circuit court denied his petitions without holding a hearing³, but before the appellate briefs were filed in the case, Parker was found guilty in federal court and sentenced. Although Parker alleged that he was facing 28 months additional federal incarceration as a result of his state convictions, it was not clear on appeal whether he had actually received additional incarceration as a result of his state convictions.

After, determining that Parker’s “guilty pleas . . . were not entered into knowingly and voluntarily, that [Parker] did not waive the claims on which he sought coram nobis relief, and that the petitions *alleged* significant collateral consequences”, *id.* at 688 (emphasis added), we determined that Parker had stated a cause of action and that his coram nobis petition should not have been denied without a hearing. We found that the appropriate remedy was to remand the case to the circuit court to determine whether

³ Parker waived a hearing on his petition. *Parker*, 160 Md. App at 676.

Parker had, in fact, suffered significant collateral consequences as a result of his state convictions. *Id.*

V. Conclusion.

We will follow the path we set forth in *Parker* and vacate the judgment of the circuit court and remand the case to hold a hearing on Smith’s petition for a writ of error coram nobis. Like in *Parker*, we caution: “[t]o repeat, we simply recognize that appellant’s petitions stated a cause of action for coram nobis relief.” *Id.* at 688. We make no conclusions about the underlying merits of Smith’s contentions.

In addition, we note that because *Parker* was decided before *State v. Smith*, 443 Md. 572 (2015), where the Court of Appeals held “that a lawyer’s testimony at a coram nobis hearing concerning having advised a defendant prior to the guilty plea of the nature of the charges against him or her is admissible,” *id.* at 654, that on remand, the circuit court may, in its discretion, take testimony concerning whether and to what extent Smith was advised or aware of the nature and elements of the offenses to which she pleaded guilty and may, in its discretion, revisit its decision concerning the voluntariness of Smith’s guilty plea.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY VACATED.
CASE REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE PAID BY
BALTIMORE COUNTY.**

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I concur with the majority that this matter must be remanded for a hearing. I write separately to express my views on the standard that the trial court ought to apply at the hearing that we are requiring it to hold.

As the majority reports, eligibility for a writ of coram nobis requires three elements: “(1) ‘a convicted person who is not incarcerated and not on parole or probation’ as a ‘result of the challenged conviction’; (2) ‘who is suddenly faced with a significant collateral consequence of his or her conviction’; and (3) ‘who can legitimately challenge the conviction on constitutional or fundamental grounds.’” Slip Op. at 2 (quoting *Skok v. State*, 361 Md. 52, 78-80 (2000)). In my view, the first element serves merely to distinguish those eligible for coram nobis relief from those eligible for post-conviction relief. The second element serves to insure that there is a live “case or controversy” for a court to resolve.¹ Finally, the third element does the heavy lifting in

¹ See *United States v. Darnell*, 716 F.2d 479, 481 (7th Cir. 1983) (“The petitioner also must demonstrate present adverse legal consequences flowing from the conviction sufficient to satisfy the ‘case or controversy’ requirement of Article III.”); *United States v. Nat’l Plastikwear Fashions, Inc.*, 368 F.2d 845, 846 (2d Cir. 1966) (“[Petitioner’s] initial allegations failed to show any outstanding adverse legal consequences from his conviction and one-month sentence ... , which were necessary to give the district court jurisdiction of his application to vacate the judgment of conviction even under the liberal scope of coram nobis. ... However sympathetic we may be to the desire to be rid of the stigma of even a one-month’s sentence for a misdemeanor, Article III of the Constitution wisely prohibits courts of the United States from diverting their energies to matters without legal effect.”); *Indiana v. Scales*, 593 N.E.2d 181, 184 (Ind. 1992) (“[A] coram nobis petitioner must satisfy Article III ‘case and controversy’ by showing present adverse legal consequences flowing from the conviction.”).

ensuring that coram nobis relief is reserved for extraordinary and compelling cases: it ensures that relief can be granted only when there was a significant error—of constitutional or fundamental dimension—in the original conviction.

My view, that the test for “significant collateral consequences” is not supposed to be quite so high a bar as the trial court originally set it, is reinforced by my review of cases from other jurisdictions. In *United States v. Mandel*, for example, the United States Court of Appeals for the Fourth Circuit was considering former Maryland Governor Marvin Mandel’s application for a writ of coram nobis. The Fourth Circuit found that Governor Mandel’s reputational and economic harm (presumably his disbarment) was sufficient to satisfy the “significant collateral consequences” element. *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988) (“[c]onviction of a felony imposes a *status* upon a person[,] which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities”) (quoting *Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J. dissenting)); see also *United States v. Morgan*, 346 U.S. 502, 512-13 (1954) (“Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected.”); *Powell v. State*, 495 S.W.2d 633, 635-36 (Mo. 1973) (“Federal courts have required that a defendant who

seeks to set aside a judgment of conviction after having served his sentence demonstrate that ‘he is suffering from present adverse consequences ... to be entitled to (coram nobis) ... The applicant should allege and show that *some beneficial consequences* would flow from the relief sought. Nothing is here alleged as to the consequences of the relief sought.’) (emphasis added) (citations omitted). Thus, it is my view that economic harm, even without more, can satisfy the “significant collateral consequences” element of the test for issuance of the writ of coram nobis.