Circuit Court for Baltimore County
Case No. 03-K-08-005217

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2064

September Term, 2015

MAX LUDTKE

v.

STATE OF MARYLAND

Berger,
*Krauser,
Thieme, Raymond G., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: July 18, 2017

*Krauser, J., now retired, participated in the hearing of this case while an active member of this Court and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Max Ludtke, appellant, pleaded guilty, in the Circuit Court for Baltimore County, to a single count of distribution of child pornography. Five years later, Ludtke filed a petition for a writ of error coram nobis, challenging the voluntariness and validity of his plea. When that petition was denied, he noted this appeal, contending that the circuit court erred in finding that he knowingly and voluntarily pleaded guilty, and that the circuit court erred in finding that the factual basis of the plea proffered by the State established the elements of distribution of child pornography.

In response, the State contends that the circuit court's denial of Ludtke's petition for a writ of error coram nobis can be affirmed on the grounds that it failed to allege "collateral consequences." But, as that claim was not raised below, it is, in effect, waived. In any event, for the reasons that follow, we conclude that the circuit court did not err in denying Ludtke's petition for a writ of error coram nobis. Consequently, we affirm.

Search and Arrest

In October 2006, Detective Chris Raut, of the Baltimore County Police, performed a digital search using "known child pornography keywords," on an internet connected computer, on the peer-to-peer[1] software program known as "LimeWire." After completing

[1] A "peer-to-peer" computer software program provides computer users the ability to directly distribute to, and directly download digital files from, other users on the same network of connected computers. And, these so-called "shared" files can include music, video, and text files, as well as other computer software programs. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

the search, the detective downloaded, from a single source, a computer file entitled "Pedo (PTHC) very willing premature little girls hussyfan R at ygold baby J avi." The downloaded file consisted of a pornographic video of a prepubescent female child engaging in intercourse with an adult male. The source's Internet Protocol address[2] was later found to be linked to a residence in Nottingham, Maryland, where Ludtke and his mother, the owner of that residence, lived.

On November 5, 2008, armed with a warrant, police searched the Ludtke residence. During that search, police found a computer, inside a room of that residence that Ludtke's mother had informed them was her son's bedroom. After police subsequently found that the computer contained child pornography, Ludtke was charged with one count of distribution of child pornography and two counts of possession of child pornography.

Plea Hearing

Although Ludtke retained James E. Crawford, Esquire, to represent him, he was represented, at the plea hearing, by a member of Mr. Crawford's firm, Zachary Groves, Esquire. Mr. Crawford did testify, at the coram nobis proceeding, however, that, prior to the plea hearing, he did discuss Ludtke's case with Mr. Groves "at least two or three times."

[2] "IP addresses identify computers on the Internet, enabling data packets transmitted from other computers to reach them." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, n.1 (2005).

At the plea hearing, Ludtke, in response to Mr. Grove's questions, affirmed that he had discussed the elements of the offenses charged with counsel, and, at that hearing, he provided the court with a signed waiver of rights, which included an acknowledgement that, as "a result of plea," he understood that he would "have to register for 10 yrs as Sexual Offender." That consequence of his plea was reiterated by the prosecutor, when he stated, on the record, that a term of the plea agreement was that Ludtke "shall register as an offender under the Maryland Statute Criminal Procedure Article 11-701(h)," the sex offender registration statute. The prosecutor then laid out the factual basis of Ludtke's plea, which he concluded by asserting that, at trial, Ludtke "would be identified as the individual who searched for child pornography, downloaded it onto his computer using LimeWire software, then made it available for others to download – upload I should say – from his computer." Mr. Groves, Ludtke's counsel, then confirmed that the State's articulation of the facts was "a fair and accurate statement," and that he had "no additions, corrections, or modifications."

The court then found Ludtke guilty of one count of distribution of child pornography, and the State nol prossed the remaining two counts of possession of child pornography. The court thereafter sentenced Ludtke to five years of imprisonment, with all but six months suspended, and five years of probation. The six unsuspended months of imprisonment were to be served on home detention.

Coram Nobis Hearing

On November 3, 2014, Ludtke filed a petition seeking a writ of error corum nobis. In that petition, Ludtke contended, first, that his plea was defective, because the State failed to present facts sufficient to establish that his plea was knowingly, voluntarily, and intelligently made, and second, that the factual basis for the plea, provided by the State at the plea hearing, did not support the charge to which he pleaded guilty, namely, distribution of child pornography.

At the conclusion of the hearing, on Ludtke's coram nobis petition, the circuit court denied that petition, finding "no basis" for Ludtke's claim that his "decision to enter a guilty plea was not knowingly, intelligently and voluntarily entered into." In so ruling, the court pointed out that "the record establish[ed] that [Ludtke] understood the nature of the charge that he was pleading to," that Ludtke "agreed to the factual basis that was read into the record to support the plea," and that "[n]ot only was he questioned [as] to the voluntariness and knowledge of the plea by the trial judge," but that "he also executed and submitted a written waiver of his rights acknowledging a full understanding of the manner in which he choose to proceed." The court further found "no merit in [Ludtke's] allegation that the factual basis to support his guilty plea was legally insufficient." The "facts as given," declared the court, "clearly establish that Petitioner not only downloaded child pornography from a sharing program, but in doing so allowed others to view and download child pornography from his computer."

I.

A "writ of error coram nobis is an independent, civil action that a convicted individual, who is neither serving a sentence nor on probation or parole, may bring to collaterally challenge a criminal conviction." *Smith v. State*, 219 Md. App. 289, 292 (2014). It "is extraordinary relief designed to relieve a petitioner of substantial collateral consequences outside of a sentence of incarceration or probation . . . that did not exist at the guilty plea hearing . . . ." *State v. Smith*, 443 Md. 572, 654 (2015) (emphasis added).

A coram nobis petitioner must allege:

> (1) grounds that are of a constitutional, jurisdictional or fundamental character, (2) that [the petitioner] is suffering or facing significant collateral consequences from the conviction, (3) that the grounds for challenging the criminal conviction were not waived or finally litigated in a prior proceeding, and (4) that [the petitioner] is not, as a result of the underlying conviction, incarcerated or subject to parole or probation such that he would possess another statutory or common law remedy.

Smith v. State, 219 Md. App. 289, 292 (2014) (citations omitted).

The State claims that Ludtke did not allege, either in his petition or at the hearing below, that he is "suddenly facing serious collateral consequences" as a result of his conviction. As Ludtke admits, his petition is insufficient on its face, as it does not allege a collateral consequence, which was not known by him at the time he entered his guilty plea.

But the State did not raise this issue below and thus it has not been preserved for appellate review. *See Graves v. State*, 215 Md. App. 339, 354 (2013) ("[T]he State failed to raise below its present contention regarding appellant's failure to establish collateral

consequences of his conviction [in his coram nobis petition]. Thus . . . we decline to address this argument.").

II.

Ludtke contends that his guilty plea was "defective because the voir dire did not establish that it was knowingly, voluntarily, and intelligently entered." Specifically, Ludtke claims that the record fails to establish that he understood the nature of the charge to which he pleaded guilty. We disagree.

In assessing the validity of a plea on appeal, we look at the "totality of the circumstances," *State v. Daughtry*, 419 Md. 35, 71 (2011), to determine whether, under Maryland Rule 4–242(c), the "defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea." Although a defendant's mere mention, in response to the court's inquiry, that he had spoken about the plea with his lawyer is insufficient to establish his or her knowledge of the charge, if a defendant's statements to the trial court confirming "that either he understands personally or was made aware by, or discussed with, his attorney the nature of the charges against him" is "strong evidence, absent other circumstances tending to negate a finding of voluntariness (e.g., mental incapacity, lack of grasp of English language, etc.) that the defendant entered the guilty plea knowingly and voluntarily." *Daughtry*, 419 Md. at 70, 74-75. Furthermore, "a lawyer's testimony at a coram nobis hearing concerning having advised a defendant prior to the guilty plea . . . may be considered . . . in determining whether a defendant [pleaded]

'voluntarily, with understanding of the nature of the charge' within the meaning of Maryland Rule 4–242(c)." *State v. Smith*, 443 Md. 572, 654 (2015).

Charged, under Section 11-207(a)(4), of the Maryland Code, Criminal Law Article, which provides that a "person may not . . . knowingly . . . distribute, or possess with the intent to distribute any matter, visual representation, or performance . . . that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct," Ludtke, at his plea hearing, confirmed that he had discussed the elements of his charges with his counsel. Under *Daughtry*, such an admission, as noted earlier, is "strong evidence" that a plea was knowingly and voluntarily entered. *Daughtry*, 419 Md. 35, 74-75. Indeed, as our Court stated in *Gross v. State*, "when a defendant . . . says on the record that he has discussed the elements of the crime to which he is pleading guilty with his attorney, that representation is sufficient to show that the plea was knowingly entered." 186 Md. App. 320, 351 (2009).

But, although Ludtke admits, in his brief, that he informed the court that he had discussed the elements of the charges with his counsel, he nonetheless maintains, as he did at the coram nobis hearing below, that the "critical mens rea element of 'knowing' conduct was never imparted to [him] and thus, his guilty plea was not entered in a constitutional manner." In support of this claim, Ludtke principally relies on statements his counsel made, after he entered his plea and before sentence was imposed. At that time, his attorney, Mr. Groves, stated that "in this instance when the items were downloaded it was downloaded in a shared file situation, so given that it was in that type of file, it could be

distributed in that file but it wasn't as if he was sending it to other individuals" and that "it was [Ludtke's] opinion or his thought process that it was by accident, and there was no kind of intent or kind of malicious belief that he was doing this just to download minor children." These statements showed, claims Ludtke, that his counsel "wrongly informed [him] of the elements of the offense" to which he pleaded guilty, as his counsel "clearly believed mistaken or accidental downloading was sufficient to establish the knowing mens rea . . . was sufficient to convict."

But, at the coram nobis hearing, Ludtke's other counsel, Mr. Crawford, pointed out that the statements that his colleague, Mr. Groves, had made, during the sentencing phase of the plea hearing, were "clearly" made "in the mitigation portion of the hearing," explaining that Mr. Groves "was simply trying to show the Court" that "this wasn't just him intentionally trying to distribute. There could have been other factors involved." Mr. Crawford then reiterated that, based on his discussions with Ludtke, he knew that Ludtke had been using LimeWire "[s]ince he was 12 years old," and was "absolutely" familiar with the platform and its capabilities.

Mr. Crawford further advised the coram nobis court of the following: that, prior to the plea hearing, Ludtke "his Mom and [I] had talked about [Ludtke] being on that program [LimeWire] for years, since he was a young teenager, and I'm convinced he thoroughly understood" how LimeWire worked. Mr. Crawford then acknowledged that Ludkte understood the "sharing portion" of LimeWire, further stated that he had discussed "in

detail" with Ludtke what distribution of child pornography entailed, and that he and Ludtke "absolutely" talked about whether Ludtke knowingly used LimeWire and knowingly made child pornography available to others.

Accordingly, given "totality of the circumstances," including his co-counsel's testimony at the coram nobis hearing, *see Smith*, 443 Md. 572, 654 (2015), and Ludtke's confirmation that he had discussed the elements of his charges with his counsel, *see Daughtry*, 419 Md. at 74-75, we hold that the circuit court did not err in finding that Ludtke understood the nature of the charges against him and that his plea was knowingly, voluntarily, and intelligently made.

III.

Ludtke next contends that the facts alleged by the State are insufficient to support a finding of distribution, under Section 11-207(a)(4), of the Maryland Code, Criminal Law Article. He specifically asserts that neither the "knowing" element, nor the "actual distribution" element, were supported by the facts proffered by the State. We disagree.

"[U]nder Maryland Rule 4-242(c), when facts are admitted by the defendant and are not in dispute," as occurred at the plea hearing below, "the judge need only apply the facts to the legal elements of the crime charged to determine if an adequate factual basis exists." *Metheny v. State*, 359 Md. 576, 603 (2000). That application we review for "the abuse of discretion . . . ." *Id.*

Ludtke was convicted under Section 11-207(a)(4), of the Maryland Code, Criminal Law Article, which provides that a "person may not knowingly promote, advertise, solicit, distribute, or possess with the intent to distribute any matter, visual representation, or performance that depicts a minor engaged in sadomasochistic abuse or sexual conduct." For the purpose of that section, "'knowingly' means having knowledge of the character and content of the matter," and "'distribute' means to transfer possession." Md. Code Ann., Crim. Law § 11-201.

Ludtke claims that the State's proffer that Ludtke "would be identified as the individual who searched for child pornography, downloaded it onto his computer using LimeWire software, then made it available for others to . . . upload . . . from his computer" did not establish the mens rea element, of "knowing distribution" of the offense, as the State only asserted that he "made [the child pornography] available for others." But, in making that claim, Ludtke ignores Section 11-201, of the Maryland Code, Criminal Law Article. That statute, as noted earlier, simply requires that the accused have "knowledge of the character and content of the matter" and that was established by express reference, in the proffer, to the titles of the video that detectives traced to Ludtke's computer: "Pedo (PTHC) very willing premature little girls hussyfan R at ygold baby J avi." And, although not mentioned below, "PTHC" is "an apparent acronym for 'pre-teen hardcore,' a term associated with child pornography." *See United States v. Flyer*, 633 F.3d 911, 914 (9th Cir. 2011).

Moreover, the State proffered that the "video depicted a prepubescent female child engaging in vaginal intercourse with what appears to be an adult male" and that Ludtke "would be identified as the individual who searched for child pornography, downloaded it onto his computer . . . then made it available for others," statements with which Ludtke's counsel agreed, in fact, his counsel declared that the factual basis proffered by the State was "a fair and accurate statement." We therefore conclude that the court below did not abuse its discretion in determining that the factual proffer was sufficient to support the mens rea element of "knowing distribution" of the offense to which Ludtke pleaded guilty.

Ludtke also claims that the State's proffer did not support the "distribution" element of Section 11-207(a)(4), of the Maryland Code, Criminal Law Article. He suggests that the prosecutor's statement, at the plea hearing, that Ludtke "made" the child pornography "available for others to download . . . from his computer," was insufficient. That is, Ludtke insists that, as he "merely ma[de] available the downloaded material," through his use of the LimeWire software, actual distribution was not proffered.

To bolster that claim, Ludtke invokes, as persuasive authority, *United States v. Durham*, a decision of the United States Court of Appeals for the Eight Circuit. In that decision, the Eighth Circuit, in determining whether an enhanced sentence was properly imposed for distribution of child pornography, "rejected any suggestion . . . [that] a distribution enhancement [of the defendant's sentence can be] based merely on a defendant's use of a file-sharing program." *United States v. Durham*, 618 F.3d 921, 931

(8th Cir. 2010). "Rather, the enhancement must be decided on a case-by-case basis depending on the facts at hand," stated that federal appellate court. *Id.* at 931.

However, the facts of *Durham* differ materially from those presented in the instant case. A critical distinction is that the investigating officer, in *Durham*, did not download the files from Durham's computer. Rather, the "only proof available," as was noted at sentencing, "demonstrated [that] child pornography files were made available for upload, but there was no evidence of any files actually being uploaded from Durham's computer." *Id.* at 924.

But, in the instant case, the factual proffer presented by the State, and agreed to by Ludtke, stated that the investigating officer "was able to complete a [] download" of the child pornography video "from a single source," that is, Ludtke's computer, and thereby established "distribution." *See United States v. Chiaradio*, 684 F.3d 265, 282 (1st Cir. 2012) ("The fact that distribution [of child pornography through the use of a peer-to-peer network] was effected to an undercover law enforcement officer does not mitigate the fact that distribution occurred.") Accordingly, the circuit court did not abuse its discretion in finding that there was a sufficient factual basis supporting the distribution charge.

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