Circuit Court for Prince George's County
Case No: CT970238A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 194

September Term, 2018

LAMIN KENNETH SESAY

v.

STATE OF MARYLAND

Nazarian,
Wells,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: August 12, 2019

In 2018, Lamin Sesay, appellant, filed his fourth petition for writ of error coram nobis in the Circuit Court for Prince George's County. The purpose of the petition, and those previously filed, was to attempt to overturn guilty pleas entered in 1997 in order to avoid deportation. The coram nobis court concluded that "[a]ll of the issues raised" in the fourth petition had "already been fully and fairly litigated and ruled on" and, therefore, denied relief. Mr. Sesay appeals that decision. We disagree with the court's conclusion that the issues raised in the petition were previously litigated and resolved, but we shall affirm the judgment denying relief because Mr. Sesay's claims are waived.

BACKGROUND

In 1997, Mr. Sesay was charged in a 33-count indictment with robbery with a dangerous weapon, first-degree assault, use of a handgun in the commission of a crime of violence or felony, and related offenses. The charges arose after five masked and armed assailants entered a retail business and held up the store manager and an employee. The assailants stole approximately $2,120 and the employee's wallet containing his credit and identification cards. Mr. Sesay was later identified as one of the assailants and the stolen credit and identification cards were recovered from a nightstand in his bedroom.

On July 1, 1997, Mr. Sesay pled guilty to one count of robbery with a dangerous weapon and one count of use of a handgun in the commission of a felony. In a signed written "waiver of rights at plea" form, Mr. Sesay acknowledged that he was facing 20 years' imprisonment for each count. The court sentenced him to five years' imprisonment for the armed robbery and to a mandatory five-year term, without parole, for the handgun

offense, to run concurrently with the armed robbery sentence. Mr. Sesay did not seek leave to appeal from his guilty plea.

Petition I

In 2005, Mr. Sesay filed his first petition for writ of error coram nobis ("Petition I"). He maintained that the guilty plea was not entered knowingly and voluntarily because he was not advised on the record of the plea hearing of 1.) the elements of the offenses, 2.) the right to a bench trial, 3.) the State's burden to prove guilt beyond a reasonable doubt, and 4.) the collateral consequences of the plea. With regard to the last allegation, he asserted that the trial court had failed to advise him, as a non-citizen, that deportation was a potential collateral consequence of the convictions.[1]

During a hearing on the petition held on August 5, 2005, Mr. Sesay testified that, because of the 1997 convictions, he could not receive his "green card" and he was facing deportation. He testified that he had retained immigration counsel, who was currently representing him with regard to his immigration status.

The transcript of the guilty plea hearing confirmed that Mr. Sesay was not explicitly advised on the record of the elements of the offenses, his right to a bench trial, or potential immigration consequences if he was a non-citizen. Consequently, the coram nobis hearing centered primarily on whether trial counsel had advised Mr. Sesay of the elements of the

[1] Petition I is not in the record before us. The allegations Mr. Sesay raised in that petition are taken from the transcript of the August 5, 2005 hearing on the petition and from this Court's opinion affirming the court's denial of relief. *See Sesay & Sesay v. State*, Nos. 1559 & 1560, Sept. Term, 2005 (filed August 18, 2006).

offenses and his right to a court trial before the guilty plea was entered. Mr. Sesay also testified, as follows, about the immigration advice he was given.

> [CORAM NOBIS COUNSEL]: Did [trial counsel] ever discuss with you the immigration consequences of your guilty plea?
>
> MR. SESAY: No, because he knew none of that.
>
> [CORAM NOBIS COUNSEL]: Pardon?
>
> MR. SESAY: He knew nothing about that.
>
> [CORAM NOBIS COUNSEL]: Were you aware when you entered the guilty plea that in 1995 a law had changed that made you deportable upon conviction of a crime that carried more than one year incarceration?
>
> MR. SESAY: No.

In arguing that Mr. Sesay's guilty plea was not entered knowingly and voluntarily, coram nobis counsel noted, among other things, that: "[H]e was also never advised of collateral consequences. He wasn't by his attorney."

The coram nobis court denied relief and on appeal this Court affirmed the judgment. *Sesay and Sesay v. State*, No. 1559 & 1560, Sept. Term, 2005 (filed August 18, 2006).[2] In addressing the trial court's failure to advise Mr. Sesay about the possibility of immigration consequences if he pled guilty, we concluded that, at the time Mr. Sesay entered the plea, Rule 2-242 did not require the court to provide such advice. As such, we found "no error

[2] Mr. Sesay and his brother had both filed petitions for writ of error coram nobis, which were heard together by the circuit court and consolidated on appeal.

in the court's failure to advise [Mr. Sesay] of potential negative consequences to [his] immigration status[.]" *Slip op.* at 21.[3]

Petition II

In 2014, Mr. Sesay filed a second petition for writ of error coram nobis, in which he challenged the validity of the guilty plea on the ground that neither the trial court nor trial counsel had advised him of the elements of the offenses to which he pled guilty ("Petition II"). In an affidavit attached to the petition, Mr. Sesay stated that, upon his release from the Division of Correction in 2000, he was placed in the "care custody" of Immigration

[3] When Mr. Sesay entered his guilty plea in 1997, Rule 2-242(c) provided, in pertinent part:

> The court may accept a plea of guilty only after it determines, upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that (1) the defendant is pleading voluntarily, with understanding of the nature of the charges and the consequences of the plea; and (2) there is a factual basis for the plea.

In 1999, a subsection (e) of the Rule was added and read in part:

> [T]he court, the State's Attorney, the attorney for the defendant, or any combination thereof shall advise the defendant (1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship and (2) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea. The omission of advice concerning the collateral consequences does not itself mandate that the plea be declared invalid.

This section of Rule 4-242 has since been amended and is presently subsection (f).

and Naturalization Services and, but for an ongoing civil war in his native Sierra Leone, would have been deported. He also attested that he is unable to become a United States citizen or obtain a green card due to the 1997 convictions. The circuit court declined to consider the petition "on grounds that have already been decided."[4]

Petition III

In 2015, Mr. Sesay filed a third petition ("Petition III"), which appears identical to Petition II, in which he again asserted that the guilty plea was invalid because neither the court nor trial counsel had advised him on the record of the plea hearing of the elements of the offenses to which he was pleading guilty. He attached the same affidavit that was included with Petition II.

On March 11, 2016, the court convened a hearing on the petition. Mr. Sesay's trial counsel testified, with his examination directed at whether he had discussed with Mr. Sesay the elements of the offenses before the guilty plea was entered. (Although Mr. Sesay continued to assert that he was facing deportation, trial counsel was not asked whether he had discussed any immigration consequences with his client.) The coram nobis court denied relief, finding that the issue raised in the petition had been "fully and fairly litigated before the Court of Special Appeals" and, further ruled that it was barred by the doctrine of laches. Mr. Sesay noted an appeal, which was later struck.

[4] It does not appear that the court issued an order denying relief. The docket entries indicate only that a hearing was set for September 26, 2014, with an entry on that date stating: "The court will not hear the petition on grounds that have already been decided."

Petition IV

Petitions I, II, and III were filed with the assistance of counsel. In 2018, Mr. Sesay, representing himself, filed a fourth petition for writ of coram nobis ("Petition IV"). This time, he alleged that his guilty plea was not entered knowingly and voluntarily based on his claim that, when he inquired about any possible immigration consequences to his plea, his trial counsel had told him that he "would not have anything to worry about" because he had been in the United States for more than 10 years. He alleged that deportation was a primary concern at that time because he had immigrated to the United States at age seven, "all of his family" resided in the United States, and his native Sierra Leone was embroiled in a civil war and "to be deported into [that] chaotic environment was what [he] feared more than losing at trial." He alleged that, although trial counsel had "assured" him that he "would not be deported," upon his arrival at the Division of Correction to begin his sentence, he learned that he was not eligible for "boot camp" because an "immigration detainer" had been lodged against him.[5]

Mr. Sesay also asserted that in 2017 he had met with the prosecutor in his case, who was then in private practice, and allegedly learned from her that, on the day he entered his

[5] In his brief filed in this Court, Mr. Sesay reiterates that, following sentencing, when he arrived at the Maryland Reception Diagnostic and Classification Center for "classification," he was notified of an immigration detainer. He further relates that he was then sent to Roxbury Correctional Institution to serve his sentence and while there he was "given a final order of deportation by an immigration judge," and when he was released in 2000 "he was handed over to ICE." Thus, by his own admission, Mr. Sesay learned of the deportation consequence of his guilty plea almost immediately after sentencing. He did not, however, file a petition for post-conviction relief while in custody.

guilty plea, his attorney had informed the prosecutor that Mr. Sesay would be deported after completing his prison sentence and, therefore, a term of probation was not necessary.[6] Based on this information, he claimed that the prosecutor and defense counsel, acting in "collusion," had "concealed" the "invalid plea agreement" from both him and the trial court.

In sum, Mr. Sesay alleged that his "defense counsel was ineffective" for failing "to investigate" the immigration consequences and for providing him with "misadvice" about deportation. And he asserted that the misinformation "deceived" him into pleading guilty, thereby rendering his plea invalid. The State opposed the petition, noting that it was the fourth request for coram nobis relief, and pointed to this Court's 2006 decision finding no error in the trial court's failure to advise Mr. Sesay of possible immigration consequences. The State also maintained that the petition was barred by laches.

The coram nobis court denied relief, without a hearing. The court found that Mr. Sesay had "raised no new issues" in Petition IV and "[a]ll of the issues raised have already been fully and fairly litigated and ruled on." The court interpreted our August 18, 2006 opinion (affirming the denial of Petition I) as "stating that Petitioner was aware of all of his rights and the consequences that came with pleading guilty."

DISCUSSION

As the State points out, on appeal Mr. Sesay (who continues to represent himself) does not contend that the coram nobis court erred in denying his petition, but instead

[6] Mr. Sesay did not attach an affidavit to his petition.

reiterates the claims he made in the petition itself. The State correctly asserts that the only issue properly before us is whether the coram nobis court erred or abused its discretion in denying relief.

The State maintains that the coram nobis court "properly concluded that Mr. Sesay's claims pertaining to the voluntariness of his guilty plea were finally litigated and/or barred by the law of the case doctrine." The State further asserts that his claim of ineffective assistance of counsel is waived because it could have been, but was not, raised in an earlier proceeding initiated by him.

Initially, to the extent that the coram nobis court interpreted our August 18, 2006 opinion as concluding that Mr. Sesay was aware of the immigration consequences of pleading guilty when he entered the plea, that interpretation is incorrect. The issue before us in that appeal was whether the trial court had erred in failing to advise Mr. Sesay on the record of the plea hearing that a change in his immigration status could be "among the potential collateral consequences of a conviction." *Sesay & Sesay v. State*, Nos. 1559 & 1560, Sept. Term, 2005 (filed August 18, 2006), slip op. at 20. We pointed out that a 1999 amendment to Rule 2-242 requiring that a defendant be advised of possible immigration consequences of a guilty plea was not in effect when Mr. Sesay pled guilty in 1997 and nothing in the Rule mandated a retroactive application. We, therefore, found "no error in the *court's* failure to advise [Mr. Sesay] of potential negative consequences to [his] immigration status, and agree[d] with the coram nobis court that such advice was not required." Slip op. at 21 (emphasis added). We did not address, as it was not an issue on appeal, whether trial counsel's alleged misadvice regarding immigration consequences

rendered Mr. Sesay's guilty plea invalid. We also disagree with the coram nobis court's conclusion that Mr. Sesay "raised no new issues" in Petition IV and "[a]ll of the issues raised have already been fully and fairly litigated and ruled on." As the State at least implicitly acknowledges, his claim of ineffective assistance of counsel was not raised in any of the previous petitions for coram nobis relief.

Nonetheless, we hold that Mr. Sesay was not entitled to the relief he sought in Petition IV because he waived the claims by not raising them in an earlier proceeding. We, therefore, shall affirm the judgment of the coram nobis court. *See Parker v. State,* 402 Md. 372, 398 (2007) (noting the "well-settled rule of appellate procedure that, on direct appeal, an appellate court will ordinarily affirm on any ground adequately shown by the record").

To be entitled to coram nobis relief, the "petitioner must satisfy five conditions," one of which is that "the issue must not be waived[.]" *Hyman v. State*, 463 Md. 656, 672 (2019). The Court of Appeals has instructed that "'[b]asic principles of waiver are applicable to issues raised in coram nobis proceedings'" and "'the same body of law concerning waiver . . . of an issue, which is applicable under the Maryland Post Conviction Procedure Act . . . shall be applicable to a coram nobis proceeding challenging a criminal conviction.'" *Smith v. State*, 443 Md. 572, 599 (2015) (quoting *Skok v State*, 361 Md.52, 79 (2000)). On appeal, we review the waiver issue de novo. *Hyman*, 463 Md. at 674.

Under the Post Conviction Procedure Act, an allegation of error as to a "fundamental constitutional right" is waived if the petitioner "could have made but intelligently and knowingly failed to make the allegation" in a prior proceeding. Md. Code Ann., Criminal Procedure, § 7-106(b)(1).; *Hyman,* 463 Md. at 672; *Curtis v. State,* 264 Md.

132, 139-40 (1978). "[A]llegations of ineffective assistance of counsel and a plea that was not intelligent and knowing implicate fundamental constitutional rights[.]" *Hyman*, 463 Md. at 673.

"When a petitioner could have made an allegation of error" in an earlier proceeding but did not, "there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation." Crim. Proc. § 7-106(b)(2). If the presumption is not rebutted, failure to "make an allegation of error shall be excused if special circumstances exist." Crim. Proc. § 7-106(b)(1)(ii)(1).

In Petition I, Mr. Sesay challenged the validity of his guilty plea based on the trial *court's* failure to advise him of potential immigration consequences. In Petition IV, he challenged the validity of the guilty plea based on trial *counsel's* alleged misadvice of the immigration consequences, something that he could have raised in Petition I (II or III). By his own admission, Mr. Sesay learned of the government's intent to deport him in 1997 when he reported to the Division of Correction to begin his sentence. Thus, at that time he would have known that trial counsel's alleged assurance that he would not be deported was incorrect. Yet, in 2005 when he filed Petition I he did not include that ground in support of his claim that his guilty plea was not entered knowingly and voluntarily and, therefore, he waived it. *Hyman*, 463 Md. at 676 (holding that a new ground in support of a claim that a guilty plea was not entered knowingly and voluntarily was waived when the petitioner could have, but did not, raise it in a previously filed petition for coram nobis relief in which he had also challenged the validity of the guilty plea).

We turn now to Mr. Sesay's claim of ineffective assistance of counsel based on his trial attorney's alleged "affirmative misadvice" of the immigration consequences of his guilty plea. As noted, Mr. Sesay learned of the deportation consequence of his guilty plea when he began his prison sentence and was told he was not eligible for "boot camp" because an immigration detainer had been lodged against him. At the 2005 hearing on Petition I, Mr. Sesay testified that he was facing deportation and had retained immigration counsel to represent him in that matter. Although in Petition IV he claimed that deportation was his primary concern when he was charged in 1997 and that his trial counsel had assured him he would not be deported if he pled guilty to the armed robbery and handgun offenses, he failed to make that assertion in Petition I (II or III) despite knowing at that time that the alleged immigration advice trial counsel had provided was obviously incorrect.[7] In short, Mr. Sesay could have but did not raise the ineffective assistance of counsel claim in an earlier proceeding that he had initiated.

In addition, Mr. Sesay did not rebut the presumption that he intelligently and knowingly failed to raise this claim earlier. In Petition IV, he merely asserted that he "did not knowingly and intelligently fail to allege these grounds because he was never advised of his right to do so, either by trial counsel or the trial court." He did not, however, address

[7] We note that Mr. Sesay's allegations in Petition IV that trial counsel had discussed his immigration status with him and assured him he would not be deported because he had been in the U.S. for at least 10 years is contradicted by his testimony at the 2005 hearing that trial counsel did not discuss the immigration consequences of the guilty plea with him because "[h]e knew nothing about that."

why he did not raise the ineffective assistance of counsel claim in Petition I (II or III) or allege any "special circumstances" to excuse his failure to do so. As the State points out, Mr. Sesay was represented by an attorney on Petition I, a different attorney on Petition II, and another attorney on Petition III, and by 2005 he had also retained separate immigration counsel. Thus, Mr. Sesay's assertion that neither trial counsel nor the trial court had advised him of his right to file an ineffective assistance of counsel claim does not rebut the presumption that he intelligently and knowingly failed to raise this claim in one of his earlier petitions in which he had benefit of advice from both coram nobis counsel and immigration counsel.

Finally, the allegation that the former prosecutor advised Mr. Sesay in 2017 that his trial counsel was, in fact, aware of the deportation consequence of his plea does not change our conclusion that he waived the ineffective assistance of counsel claim. First, this allegation was not supported by affidavit. Second, and more significantly, it does not alter the fact that the allegation that trial counsel gave him incorrect information about the immigration consequences of his guilty plea could have been raised in Petition I. The new information allegedly learned from the former prosecutor was merely another ground in support of the same ineffective assistance of counsel claim.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.