UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

ON REMAND

No. 0368

September Term, 2013

THOMAS ROYAL

v.

STATE OF MARYLAND

Meredith
*Zarnoch,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: December 30, 2015

*Zarnoch, Robert A., J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

Thomas Royal ("Royal"), on November 2, 2012, filed a petition for a *writ of error coram nobis* in the Circuit Court for Baltimore City. Royal asked the circuit court to set aside his 2007 conviction for second-degree assault on the grounds that his guilty plea had not been entered voluntarily. According to Royal, the guilty plea was involuntary because, prior to acceptance of the plea, the plea judge failed to make sure that he knew the element of the charges to which he was pleading guilty.

After a hearing, Royal's petition was denied by the circuit court in a written opinion. Royal filed a timely appeal to this Court in which he claims that the Circuit Court for Baltimore City erred in denying his petition. We agree with Royal.

I.
Facts and Legal Proceedings.

A. The entry of the guilty plea.

On June 25, 2007, Royal was scheduled to go to trial on charges of second-degree assault, possession of a deadly weapon with intent to injure and fourth-degree burglary. Counsel for Royal, the prosecutor, and the plea judge, on the afternoon of June 25, had an on-the-record discussion about a possible guilty plea disposition. Royal was not present during that discussion.

The plea judge was told during the discussion that the victim of the assault and Royal had a child together and that the victim had brought two previous assault charges against Royal but the charges had both been *nol prossed*. According to Royal's counsel, Royal claimed that the victim stabbed him three times during the incident that led to Royal being

charged in the case at issue. The prosecutor, on the other hand, advised the plea judge that the victim denied that Royal had been stabbed by her. Also, the prosecutor told the plea judge that Royal, in 2001, had pled guilty to a second-degree assault charge – that had been brought by a different victim.

At the conclusion of the conference, the plea judge said that if Royal were to agree, he would accept a plea to second-degree assault and would impose a sentence of three years incarceration, with all but sixty days suspended. Royal would be placed on two years supervised probation with a special condition that he have no unlawful contact with the victim who had brought the pending second-degree assault charge.

Approximately one-hour later, Royal was brought into the courtroom. His counsel told the plea judge that Royal wished to enter a guilty plea to the second-degree assault charge. Counsel for Royal then accurately put on the record what the judge and counsel had agreed the sentence would be in the event that the plea was accepted.

The plea judge then asked Royal a series of questions, one of which was "You understand you are here charged with second-degree assault . . . . Do you understand that's what you are charged with?" Royal answered that question in the affirmative. Further questioning by the plea judge revealed that Royal was 27 years old, could read and write the English language, and that he had the benefit of a ninth-grade education. Thereafter, the plea judge did a commendably thorough job of explaining all the federally protected constitutional rights Royal was giving up by entering a guilty plea. Unfortunately, however, the plea judge

made no attempt to ascertain whether Royal understood the nature of the offense to which he was pleading guilty. More specifically, the plea judge did not explain the elements of the second-degree assault offense to Royal, nor did the court otherwise describe the charge to him nor did the court ask Royal whether he understood the elements of the offense to which he was pleading guilty and he did not ask Royal or his attorney whether the two had discussed the elements of the offense. The plea judge did ask Royal if he was "pleading guilty today" because he was, in fact, guilty. Royal answered yes to that question. At that point the plea judge then said:

> The Court having heard the responses of Mr. Royal to the questions of the Court, does find the plea tendered is freely, voluntarily and intelligently given, and accepts the same as such.

The plea judge next asked the prosecutor to put on the record the facts the State would have proven if the case had been tried. The prosecutor then said:

> The facts supporting guilty are as follows. That on April 29, 2007, at 1523 Edminson Avenue, Baltimore City, State of Maryland[,] [t]he victim in the case, Ms. Chansler Willis[,] heard somebody knocking at her door. She went to open the door, opened slightly, she couldn't see anyone, a hand was covering the peep hole. . . . And she opened it to see who it was and the defendant kicked in the door. At that time, the defendant began to punch the victim and choke the victim. And the struggle pursued (sic) for sometime until she was able to kick the defendant off of her and get help. Police officer Thomas did respond to the scene. However, the defendant had already left the location. And a warrant was issued. The photo testified (sic) the victim of this case, Ms. Chansler Willis, will identify the defendant, Thomas Royal, as the man. He's (sic) identified the defendant seated to the left of counsel. Who assaulted on the time and date mentioned. And those would be the facts supporting the guilty plea. All events did occur in Baltimore City, State of Maryland, Your Honor.

After this proffer by the prosecutor, Royal's counsel told the court that "there's no additions, corrections or modifications." Defense counsel then said: "we would (inaudible) on those facts."[1]

Next the plea judge said that he concluded that the facts presented by the State established Royal's guilt of second-degree assault beyond a reasonable doubt. The court then proceeded to sentence Royal in accordance with the plea agreement.

B. *The coram nobis petition.*

Over five years after Royal pleaded guilty to second-degree assault, he filed a petition for a *writ of error coram nobis*. He alleged that on June 22, 2010, he was convicted in the United States District Court for the district of Maryland of being a felon in possession of ammunition in violation of 18 U.S.C. §922(g)(1). In that case, the U.S. District Court sentenced him to 188 months (15½ years) in prison for the possession of ammunition conviction. Royal's 2007 conviction for second-degree assault was one of the three prior offenses that triggered a mandatory minimum federal sentence of 15 years under the Armed Career Criminal Act (hereafter the ACCA Act) and a sentencing guideline range of 188 to 235 months. He further alleged that if he had not been convicted in 2007 of second-degree assault, he would have been subject to a maximum sentence of only 120 months (10 years) and a sentencing guideline range of 63 to 78 months.

[1]The inaudible word was probably "submit."

C. *The coram nobis proceeding.*

In the circuit court, the State did not attempt to contradict Royal's contention that the second-degree assault conviction had serious adverse collateral consequences. Additionally, the State conceded that Royal had not waived any of the contentions that he was making in his *coram nobis* petition. The State's defense to Royal's petition was simply that the guilty plea he had entered in 2007 was voluntarily entered because there were facts presented to the plea judge sufficient to allow that judge to conclude that appellant, at the time he entered the guilty plea, knew the elements of the second-degree assault charge.

The circuit court judge found that Royal knew the nature of the charges to which he was pleading guilty as shown by the fact that: 1) he answered yes to the question: "You understand you are here charged with second degree assault . . . . do you understand that's what you are charged with?"and, 2) That Royal's counsel represented to the plea judge that she had discussed the plea offer with her client. According to the court, this was sufficient to show that Royal understood the nature of the charges against him. Additionally, the *coram nobis* court opined that the crime of second-degree assault is a simple offense and that the factual proffer by the prosecutor, in layperson's language, articulated the elements of second degree assault. Moreover, in the court's opinion, Royal had no personal characteristics that prevented him from not comprehending the nature of the charges to which he was pleading guilty. Based on the totality of circumstances, the judge found that Royal's plea was knowingly and voluntarily entered.

D. *Subsequent developments in Royal's federal case.*

On October 1, 2013, the Fourth Circuit Court of Appeals decided the case of *United States v. Royal*, 731 F.3d 333 (4th Cir. 2013). The court vacated Royal's federal sentence on the basis that his 2007 Maryland second-degree assault conviction "does not constitute a predicate 'violent felony' supporting a sentence enhancement" under § 924(c)(1) of the ACCA. *Id*. at 342. The Fourth Circuit's mandate was issued on November 12, 2013, which was after Royal filed his opening brief in this Court.

After the Fourth Circuit's decision, Royal's federal case was remanded to the United States District Court for re-sentencing. Because Royal's second-degree assault conviction was not subject to the ACCA enhancement provision, his federal sentencing guidelines [based in part on the inclusion of the second-degree assault conviction] was 77 to 96 months. Absent the second-degree assault conviction, Royal would have had a guideline range of 63 to 78 months. Upon remand, the court very recently sentenced Royal to 80 months in prison.

II.
Analysis

A. *Mootness.*

In its brief, which was filed before appellant was re-sentenced to imprisonment for 80 months, the State argued:

> A question is moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." *Wheeler v. State*, 160 Md. App. 566, 573 (2005) (citing *Att'y Gen. v. A.A. Co. School Bus Contractors*

> *Ass'n,* 286 Md. [324] at 327 [1979]. In this respect, *Brecker v. State*, 304 Md. 36 (1985), is pertinent to Royal's case. In *Brecker*, the legality of the appellant's sentence was an issue raised on appeal. The appellant had originally been sentenced to a term in excess of the statutory limit set for the crime. While the case was pending before the Court of Appeals, however, the trial court revised the sentence to comport with the statute. The court held that the revised sentence rendered the issue of the legality of the appellant's original sentence moot and dismissed the issue. *Id.* at 37-38.
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> * * *
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> In Royal's case, however, where, as a result of the Fourth Circuit's ruling, he is no longer suffering the significant consequences of his assault conviction upon which he predicated his claim for *coram nobis* relief in that matter, his appeal presents solely a moot issue. *Cottman*, 395 Md. at 743-44. *Brecker v. State*, 304 Md. at 37-38. Accordingly, review is not warranted and Royal's appeal should be dismissed.
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> In a footnote, the State also contended:
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> To the extent that Royal posits that he will still be subject to an increased federal sentence as a result of his 2007 state assault conviction (Appellant's Brief at 5 n.2), to the extent that such eventually can or may arise, it is inconsequential to the mootness of the within appeal. Royal's *coram nobis*, claim was predicated expressly upon his being subject to a mandatory minimum sentence under ACCA, 18 U.S.C. § 924(e). The Fourth Circuit's ruling has eliminated the sole collateral consequence upon which Royal explicitly relied and the *coram nobis* court addressed. *U.S. v. Royal,* 732 F.3d at 342.

In his reply brief, which was also submitted prior to the date that he was re-sentenced to 80 months imprisonment, Royal argued that the validity of his conviction was not moot because the second-degree assault conviction subjected him to an increase sentencing guidelines range from 77 to 96 months imprisonment rather than the lower range of 63 to 78 months imprisonment. According to Royal, this increase in the sentencing guidelines range

constitutes a collateral consequence sufficient to allow this court to grant him *coram nobis* relief. Royal characterizes as "absurd" the State's position regarding mootness and contends:

> At the time [he] filed his *coram nobis* petition, he had been sentenced under the ACCA. Thus, the ACCA sentence was the collateral consequence in place. At that time, it would have been nothing more than speculative for defense counsel to discuss the collateral consequences that [he] would be facing absent an ACCA sentence based on a future Fourth Circuit ruling that was predicated on a future Supreme Court ruling – *Descamps v. United States*, 133 S.Ct.2276 (2013).

This case does not meet the definition of "mootness" set forth in *Wheeler v. State* – the case relied upon by the State. *See State v. Hicks*, 139 Md. App. 1, 8-11 (2001) (holding that a possible increase in federal sentencing as a result of a state conviction was a "significant collateral consequence" for which *coram nobis* relief was appropriate). There plainly is an existing controversy between the parties and one that this court can provide an effective remedy by vacating the conviction and granting *coram nobis* relief.[2] As Royal points out, under the federal system, sentencing guidelines are extremely important. We take judicial notice of the fact that federal judges almost never impose an above guideline sentence. The 80 month sentence that Royal received recently is over the guideline range that would exist if we agreed with Royal and overturned his conviction by granting *coram*

[2]If Royal's assault conviction were vacated, federal law would permit him to file a post conviction petition under 28 U.S.C. § 2255 and move for vacatur of his federal sentence that was enhanced by the state conviction. *United States v. Gadsen*, 332 F.3d 224, 228 (4th Cir. 2003).

nobis relief. It is therefore clear that if appellant's conviction were vacated, it is probable that appellant's 80 month sentence would be reduced to some extent at least.

The State stresses, in making its "mootness" argument, that appellant "is no longer suffering the significant consequences of his assault conviction upon which he predicated his claim for *coram nobis* relief in this matter . . . .)." This is true. But it is black letter law in Maryland that an appellate court cannot avoid deciding a question based on mootness if, at the time of appellate review, a party may suffer significant collateral consequences as a result of a judge's ruling. *In Re: Kaela C.*, 394 Md. 432, 453 (2006). Here, that test is met.

B. *Waiver.*

The State argues that Royal waived his right to challenge his guilty plea "by his failure to seek available post conviction relief . . . ." The State did not argue waiver below. In fact, before the *coram nobis* court, the State took the exact opposite position. The prosecutor told the court that defense counsel "is correct, waiver is no longer an available argument in a *coram nobis* proceeding." The waiver argument that the State now makes is exactly the same as the one raised by the State in *Graves v. State*, 215 Md. App. 339, 352 (2013). We said in *Graves*:

> The State raises this issue [waiver] for the first time on appeal; it failed to raise this argument before the circuit court. Accordingly, it is not properly before us. *See* Md. Rule 8-131(a) (an appellate court ordinarily would not decide an

> issue 'unless it plainly appears by the record to have been raised in or decided by the trial court.")

Id. at 352.[3]

C. *The validity of the guilty plea.*

In many ways, the case of *Graves v. State, supra*, is substantially almost exactly the same as the case before us. In *Graves*, as here, the issue before the court was whether the circuit court should have granted the defendant's petition for a *writ of error coram nobis* on the basis that the guilty plea was not shown to be voluntary. In *Graves*, we held that the plea colloquy was deficient, and therefore the plea was not shown to be voluntary, due to the court's failure to make sure that Graves was aware of the elements of the charge to which he pled guilty. In *Graves*, Judge Graeff, speaking for this Court, said:

> In *State v. Daughtry*, 419 Md. 35, 42 . . . (1991), the Court of Appeals stated:
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> > allowing a trial court, in ensuring that a guilty plea is knowing, voluntary, and entered, intelligently, to rely essentially on nothing more than a presumption that "in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of . . . what he is being asked to admit" runs contrary to Rule 4-242's requirement that there be an adequate examination "on the record in open court."
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> In that case, the Court noted that "the only portion of the plea colloquy" that related to "ascertaining whether the plea was knowing and voluntary was Daughtry's affirmative response to the trial judge's question, 'Have you talked over your plea with your lawyer?'" *Id*. at 70. 18 A.3d 60. The Court held that, "where the record reflects nothing more than the fact that a defendant is represented by counsel (as in the present case) and that the defendant discussed

[3]*Graves* was not decided until after the State filed its brief in this case.

> generically the plea with his or her attorney, such a plea colloquy is deficient under Rule 4-242(c), and the plea must be vacated." *Id.* at 71. 18 A.3d 60. The Court stated that its holding applied retrospectively, noting that it did not announce a new rule because [t]he law of this State with respect to the voluntariness of guilty pleas has been the same over the past thirty years since we decided *Priet. Id*. at 79, 81, 18 A.3d 60.
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> Applying this law to the present case, it is clear that appellant's guilty plea to the charge of use of a handgun in the commission of a felony or a crime of violence was not voluntary. Here, as in *Daughtry*, the only portion of the plea colloquy that related to whether the plea was knowing and voluntary was appellant's affirmative response to the court's inquiry whether appellant had "talked this matter over with [his] attorney." Neither the court, the prosecutor, nor appellant's attorney stated on the record the nature and elements of the crime of use of a handgun in a felony or crime of violence. Defense counsel did not indicate at the plea hearing that he had explained the nature and elements of the crime to the appellant, and the appellant did not represent that he understood the charge.

215 Md. App. at 357-58 (footnotes omitted).

Here, as in *Graves*, no one at the time that the plea was entered advised Royal, on the record, as to what the elements of the charge were, no one told the plea judge that counsel had advised the defendant of the elements of the charge and no one explained to the defendant, on the record, the nature of the charge.

In this appeal, Royal argues that the circuit court's denial of his *coram nobis* petition "cannot be squared" with this court's decision in *Miller v. State*, 185 Md. App. 293 (2009), or *Graves v. State*, *supra*, or the Court of Appeals decision in *State v. Daughtry*, 419 Md. 35 (2011). We agree. In each of these cases, the petitioner's conviction was vacated because there was no on-the-record reference made to the elements of the offense during the plea

colloquy. *Graves*, 215 Md. App. at 357-59, *Miller*, 185 Md. App. at 316; and *Daughtry*, 419 Md. App. at 70-75. Moreover, in none of those cases did the plea judge explain the elements of the offense to the defendant, nor did the court ask the defendant if he understood the elements. Additionally, in none of the cases did the court ask the defendant whether he discussed the elements with his attorney nor did the court ask defense counsel whether there had been a discussion of the elements with the defendant.

Daughtry, 419 Md. App. at 75, makes it clear that there may be certain circumstances when a guilty plea can be determined to be voluntarily even though the nature of the crime to which the guilty plea has been entered, was not explicitly explained to the defendant prior to the entry of the plea. *Id*. ("We reiterate that the test, as stated in [*State v.*] *Priet*, [289 Md. 267 (1981)], in determining whether a guilty plea is voluntary under current Rule 4-242(c), is whether the totality of the circumstances reflects that a defendant knowingly and voluntarily entered into the plea"). The court went on to say that an appellate court considering the totality of the circumstances may consider, "among other factors, the complexity of the charge, the personal characteristics of the accused, and the factual basis proffered to support the court's acceptance of the plea." *Id.* (quoting *Priet*, 289 Md. at 277).

Turning to the case *sub judice*, and the "complexity of the charge" element, the State points out, correctly, that in some cases the relevant elements of the offense is a self-explanatory legal term or terms and the meaning is so simple that a layperson can be expected to understand it. *Daughtry*, 419 Md. at 72. Example of this would be an accused charged

with prison escape or possession with intent to distribute marijuana. The State maintains that the crime of second-degree assault is a crime of this type because the crime is "simple and readily understood to the layperson." We reject that argument and agree with Royal when he asserts that "Maryland assault law is far from simple." As Royal stresses, there are two degrees of assault. Second-degree assault can be committed in three distinct ways: by consummating a battery, attempting a battery, or placing a victim in reasonable apprehension of an imminent battery. *See Lamb v. State*, 93 Md. App. 422, 428 (1992). Each of these categories has its unique set of elements that have different *mens rea* and *actus reus* requirements. *Id*. These complexities, which without study can be confusing even to lawyers, makes it impossible to categorize the charge of second-degree assault as "easily understood."

Here, so far as the record shows, appellant was left in the dark about the version of second-degree assault he was charged with and was provided with no information as to the elements of that variety of second-degree assault.

It is true, as the *coram nobis* judge pointed out, that Royal was given an explanation of the factual basis for the guilty plea. But, as made clear in *Daughtry*, 419 Md. at 74 n.22 and *Miller, supra*, 185 Md. App. at 308, an explanation of the factual basis for the charge is not an adequate substitute for an explanation concerning the elements of the charge. *See also*, *United States v. Syal*, 963 F.2d 900, 905 (Sixth Circuit Court of Appeals 1992).

What happened in the *Daughtry* case is similar to what happened in the subject case. In *Daughtry*, the State, in great detail, proffered facts that were sufficient to show the factual basis for the defendant's pleas to first-degree murder and use of a handgun in the commission of a crime of violence or felony. Nevertheless, because "there was no explanation of the legal significance of those facts" that the State proffered, the *Daughtry* court held the State's proffer "in no way informed Daughtry of the requisite elements or the nature of the first-degree murder or use of a handgun in the commission of a violent felony." 419 Md. at 74, n.22

The State also argues that the *coram nobis* court was correct when it concluded that Royal understood the nature of the second-degree assault charge, based on his criminal history. In this regard, the State relies on the following paragraph from the *coram nobis* judge's opinion:

> Additionally, the transcript reflects that the prosecutor advised the plea Court that Petitioner had a prior assault charge against a different female victim in 2001. Further, the prosecutor informed the Court that the history of the parties in the instant case included two prior assaultive incidents: one in which the victim suffered a broken arm and a second in which the victim was hit with a shovel. Both the prosecutor and the defense attorney agreed that the State entered *Nolle Prosequi* in those two cases, which involved the same victim as in the instant one.

It is true that, according to a colloquy between defense counsel, the prosecutor and the plea judge, that Royal pled guilty in 2001 to second-degree assault. The record, however, is silent as to what variety of second-degree assault appellant pled guilty to in 2001 and, more

importantly, the record is completely silent as to what advice he received (if any) prior to pleading guilty.[4] Therefore, we reject the State's argument that it can be inferred that Royal knew the elements that must be proven in order to convict him of second-degree assault, based on a guilty plea entered five years before the plea at issue was entered. Moreover, it is self-evident that one cannot assume that an accused understands the element of a charge based solely on the fact that the State, at some earlier date, elected to *nol pros* that charge.

The State also argues that the "personal characteristics of the accused" supports the conclusion that he understood the elements of the charge of second-degree assault. In this regard, the State stresses that appellant said he understood and could read the English language, that he was neither under the influence of any substance that would impair his ability to understand, nor was he a patient in any mental facility or under the care of a psychiatrist or psychologist. Moreover, the State argues that Royal answered affirmatively when he was asked if he understood the charges against him." We reject the foregoing arguments. Royal was not asked "if he understand the charges against him." Instead, he answered affirmatively to the question of whether he knew that he was charged with second-degree assault and the possible penalties connected with that charge. Moreover, none of the

[4]Although this information was not before the *coram nobis* judge, the record in this case shows that when Royal was sentenced in federal court on December 19, 2013 for being in possession of ammunition as a convicted felon, having been previously convicted of a crime punishable by imprisonment for more than one year, the sentencing judge decided not to take into consideration the 2001 assault conviction because Royal was unrepresented by counsel when he pled guilty in Baltimore City to that charge.

personal characteristics of Royal support a legitimate inference that he knew the elements of second-degree assault. Royal only had the benefit of a ninth-grade education, and there is nothing, whatsoever, in the record to show that he had any post-high school education or training that would have informed him of the requisite elements of the second-degree assault charge. In fact, Royal had less education than did the defendants in *Miller* (three years of college) or *Daughtry* (tenth-grade education). And, in neither of those cases was there any indication that the defendant suffered from a mental deficiency, addiction to drugs, or anything else that would have impaired his ability to comprehend the nature of the proceedings, yet in both *Miller* and *Daughtry* it was found that the pleas were defective because there was no on the record explanation of the elements of the charges to which the defendant entered a guilty plea. *Daughtry*, 419 Md. at 71; *Miller*, 185 Md. App. at 315-16.

JUDGMENT REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY WITH INSTRUCTIONS TO GRANT ROYAL'S PETITION FOR A *WRIT OF ERROR CORAM NOBIS*; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.