Circuit Court for Baltimore City
Case Nos. 57901751, 57901755

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 881

September Term, 2019

CHARLES E. WITHERSPOON

v.

STATE OF MARYLAND

Friedman,
Shaw Geter,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: May 21, 2020

In 1979, appellant, Charles E. Witherspoon, was convicted, by a jury sitting in the Criminal Court of Baltimore,[1] of robbery with a dangerous and deadly weapon and carrying a concealed weapon on his person and was sentenced to twenty-three years' imprisonment. Although no transcripts from that proceeding exist, the parties presume that the jury instructions given at that trial were "advisory only," as was then required under Maryland law.[2]

Thirty years later, after Witherspoon had completed serving the sentences for his 1979 convictions, he pled guilty, in the United States District Court for the District of Maryland, to interference with commerce by robbery and possession of a firearm in furtherance of a crime of violence and was sentenced to a total term of 180 months' imprisonment. Claiming that his federal sentence had been enhanced because of his 1979 Maryland convictions, Witherspoon subsequently filed a petition for writ of error *coram nobis*, in the Circuit Court for Baltimore City, seeking vacatur of those convictions. In that petition, he relied upon *Unger v. State*, 427 Md. 383 (2012), and its progeny, which permitted collateral attacks on convictions entered by courts that had given "advisory only" jury instructions in criminal trials. The circuit court denied that petition, prompting this appeal.

[1] The Criminal Court of Baltimore was one of the predecessor courts of what is now the Circuit Court for Baltimore City, which was established pursuant to 1980 Md. Laws, ch. 523, ratified, Nov. 4, 1980, effective Jan. 1, 1983.

[2] A "presumption of regularity attaches to the criminal case[.]" *Skok v. State*, 361 Md. 52, 78 (2000).

For the reasons that follow, we shall affirm.

BACKGROUND

Very little of the record in this case still exists. Apart from the pleadings, exhibits, and transcripts created as part of the *coram nobis* proceedings, the remainder of the record comprises the docket entries and copies of the two indictments. From the latter we can glean that, on December 21, 1978, Witherspoon committed an armed robbery of a Dale S. Brown; that the proceeds of that robbery were $25 and a set of keys; and that the weapon used was a knife.

We also know that, on July 20, 1979, a jury in the Criminal Court of Baltimore found Witherspoon guilty of robbery with a dangerous and deadly weapon and carrying a concealed weapon on his person. On September 5, 1979, the court imposed consecutive sentences of twenty years' imprisonment for armed robbery and three years' imprisonment for the concealed weapon offense.

Witherspoon noted an appeal, but his notice of appeal was stricken, apparently because it was untimely, and, thus, no transcript of his 1979 trial was ever produced. He subsequently sought postconviction relief, but his petition was denied.[3]

While incarcerated at the Eastern Correctional Institution, serving the sentences for the 1979 convictions, Witherspoon, on two different occasions in 1990, committed assaults, at least one of which was against a correctional officer. In one of those cases, he

[3] In his *coram nobis* petition, Witherspoon averred that a postconviction petition "was not filed in this case." No copy of the petition, or of the memorandum opinion denying it, which are referenced in the docket entries, is in the record before us.

was convicted, in the Circuit Court for Somerset County, and sentenced to one year of incarceration, to be served consecutively to the sentences he was already serving. In the other, he was convicted, in the same court, and sentenced to ten years' imprisonment, to be served consecutively to the twenty-year sentence he was serving for the 1979 armed robbery. Finally, on October 29, 2004, Witherspoon was mandatorily released from the Division of Corrections.

On May 9, 2008, Witherspoon, with four others, robbed, at gunpoint, an armored car "in the vicinity of Lexington Market" in Baltimore City. He was subsequently charged, in the United States District Court for the District of Maryland, in four counts, of a fourteen-count indictment, for his role in that robbery: (1) conspiracy to interfere with commerce by robbery; (2) interference with commerce by robbery; (3) possession of a firearm in furtherance of a crime of violence; and (4) possession of a firearm by a convicted felon.

While his federal charges were pending, on June 22, 2008, Witherspoon was charged with armed robbery of a liquor store in Baltimore City. He was ultimately convicted of a single count of possession of a regulated firearm after previously having been convicted of a felony and was sentenced to five years' imprisonment.

In the federal case, Witherspoon and the Government reached a plea agreement, whereby he would plead guilty to counts two and three of the indictment; the Government would dismiss the remaining counts; and the guideline range for imprisonment would be 360 months to life. Witherspoon pled guilty, pursuant to that agreement, and, on December 23, 2009, the District Court sentenced him to consecutive terms of 96 months on count two

and 84 months on count three, for a total term of 180 months (that is, fifteen years) of imprisonment, followed by 36 months of supervised release, to be served consecutively to any state sentences then outstanding.

In 2012, the Court of Appeals announced a sea change in Maryland postconviction law. That year, in *Unger v. State*, *supra*, 427 Md. 383, the Court held that a prisoner, who had been convicted, like Witherspoon, in a jury trial prior to December 1980,[4] in which the jury had been given "advisory only" instructions, was entitled to a new trial, despite having failed to object to the instruction. *Unger*, 427 Md. at 411.

In 2014, Witherspoon, acting pro se, filed a Motion to Vacate Sentence, in the Circuit Court for Baltimore City, in the apparent hope that, were that motion granted, he then could seek a reduction in his federal sentence. The circuit court denied his motion, and, in an unreported opinion, we dismissed the ensuing appeal as untimely, without prejudice to Witherspoon's right to seek *coram nobis* relief. *Witherspoon v. State*, No. 1355, Sept. Term, 2014, slip op. at 10–11 (filed Dec. 2, 2015). In 2016, Witherspoon, acting through counsel, filed a petition for a writ of error *coram nobis*, in the Circuit Court for Baltimore City, seeking vacatur of his 1979 convictions.

[4] The significance of the December 1980 time frame was the decision of the Court of Appeals in *Stevenson v. State*, 289 Md. 167 (1980). In *Stevenson*, the Court of Appeals, in a marked departure from previous case law, interpreted Article 23 of the Maryland Declaration of Rights ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.") as applicable only in those situations where there was a "sound" dispute as to "the law of the crime" or "the legal effect of the evidence," *Unger*, 427 Md. at 411.

The State responded to that petition, raising several arguments: first, that Witherspoon's claim was barred by laches; second, that his petition failed to comply with Maryland Rule 15-1202 (concerning filing requirements for *coram nobis* petitions) and should therefore be dismissed; third, that Witherspoon failed to demonstrate that he was entitled to the "extraordinary remedy of *coram nobis;*" and, finally, that he failed to allege significant collateral consequences sufficient to justify relief.

The circuit court held a hearing on Witherspoon's *coram nobis* petition and, thereafter, issued a memorandum opinion and order, denying it, on the ground that he had failed to prove that he was suffering from a significant collateral consequence. Witherspoon timely noted this appeal.

DISCUSSION

The Parties' Contentions

Witherspoon contends that the circuit court erred in finding that he was not suffering from a significant collateral consequence as the result of his 1979 convictions and thereby denying his *coram nobis* petition on that basis. According to him, those tainted convictions caused him to be deemed a "career criminal" and that it "is not possible that [his 2009 federal] sentence was not enhanced, at least in part, by the 1979 convictions." He bases the latter conclusion on the fact that the 1979 convictions contributed six points out of the fourteen points total that were assessed for his criminal history under the United States Sentencing Guidelines and that, but for the 1979 convictions, he would have been able to secure a more favorable plea bargain on his federal charges.

The State counters that Witherspoon, in accepting the Government's plea bargain in his federal case, "waived" his claim that his 1979 Maryland convictions should be vacated. It further asserts that Witherspoon failed to prove that, but for the 1979 convictions, the Government would have offered him a more favorable plea bargain. And, finally, the State contends that it is far from clear that, were we to grant the relief he seeks, he would be able to obtain resentencing in his federal case, given that one of the terms of his federal plea agreement was that, "with respect to the calculations of the advisory guideline range, no other offense characteristics, sentencing guideline factors, potential departures or adjustments . . . will be raised or are in dispute."[5]

Analysis

The ancient writ of *coram nobis* was historically available to correct errors of fact, "affecting the validity and regularity of" a judgment. *Skok v. State*, 361 Md. 52, 67 (2000) (quoting *Madison v. State*, 205 Md. 425, 432 (1954)). It has been repurposed, in modern times, to permit collateral attacks on criminal convictions, where the petitioner alleges a "fundamental" error in the underlying proceeding, he or she is "suddenly faced with a significant collateral consequence" as a result of the conviction, "no other remedy is presently available," and there were "sound reasons for the failure to seek relief earlier." *Id.* at 72–73, 78. It is an "extraordinary remedy," justified "only under circumstances

[5] The State also renews its contention, initially raised in its response to Witherspoon's *coram nobis* petition, that laches bars his claim. Because resolution of that issue is unnecessary to our decision in this appeal, we decline to address it.

compelling such action to achieve justice." *Hyman v. State*, 463 Md. 656, 671 (2019) (quoting *State v. Smith*, 443 Md. 572, 597 (2015)).

Resolution of a *coram nobis* claim is guided by several basic principles: "a presumption of regularity attaches" to the underlying criminal case, and the petitioner bears the burden of proof; and, moreover, principles of waiver and final litigation of claims, as set forth in the Maryland Uniform Postconviction Procedure Act, also apply to *coram nobis* claims. *Skok*, 361 Md. at 78–79. In keeping with the "extraordinary nature of a *coram nobis* remedy," we review a circuit court's ultimate decision to grant or deny the writ for abuse of discretion. *Hyman*, 463 Md. at 674 (quoting *State v. Rich*, 454 Md. 448, 470–71 (2017)) (cleaned up).

1. Waiver

We assume without deciding that Witherspoon did not waive his *coram nobis* claim under the terms of his federal plea agreement. The language at issue provides:

> The parties agree that, with respect to the calculations of the advisory guideline range, no other offense characteristics, sentencing guideline factors, potential departures or adjustments (set forth in either the U.S.S.G. or Title 18, U.S.C. § 3553) will be raised or are in dispute.

In the related context of appeal waivers, we note that the language typically employed in federal courts is clear and unequivocal, and does not merely imply waiver, as does the language here. For example, in *United States v. Thornberry*, 670 F.3d 532 (4th Cir. 2012), the waiver at issue expressly provided that the defendant "knowingly and voluntarily" waived "his right to seek appellate review of any sentence of imprisonment or fine imposed by the District Court, or the manner in which the sentence was determined,

on any other ground whatsoever including any ground set forth in 18 U.S.C. § 3742, so long as that sentence of imprisonment or fine" was "below or within the Sentencing Guideline range corresponding to" an agreed-upon offense level. *Id.* at 534. *See also United States v. Lo*, 839 F.3d 777, 782 (9th Cir. 2016) (appeal waiver provided that the defendant "agree[d] to give up" his "right to appeal" his "convictions, the judgment, and orders of the Court," and that he "agree[d] to waive any right" to "appeal any aspect" of his sentence); *United States v. Hardman*, 778 F.3d 896, 898 (11th Cir. 2014) (appeal waiver provided that, to "the maximum extent permitted by federal law," the defendant "voluntarily and expressly waive[d] the right to appeal his conviction and sentence and the right to collaterally attack his conviction and sentence in any post-conviction proceeding").

Moreover, a "valid and enforceable appeal waiver . . . only precludes challenges that fall within its scope." *Garza v. Idaho*, 586 U.S. __, 139 S. Ct. 738, 744 (2019) (quoting *Hardman*, 778 F.3d at 899). Thus, even if we were to construe the language in Witherspoon's plea agreement as a knowing and voluntary waiver, whether the scope of such a waiver would preclude a subsequent motion under 18 U.S.C. § 2255 is unclear. *See, e.g.*, *In re Sealed Case*, 702 F.3d 59, (D.C. Cir. 2012) (holding that an appeal waiver, the scope of which expressly included both "the sentence" and "the manner in which it was determined," did not preclude an appeal from a restitution order). We need not, however, further consider this issue because we conclude the circuit court did not abuse its discretion in denying the requested relief.

2. Merits of Witherspoon's Coram Nobis Claim

Witherspoon alleges a "fundamental" error in his 1979 trial, namely, that the trial court's instructions to the jury on the law were "advisory only." Although he bears the burden to prove that the jury was so instructed, a seemingly impossible burden to carry, given the lack of transcripts from the 1979 trial, this is an unusual instance in which the presumption of regularity actually supports the conclusion that "advisory only" jury instructions were given.

At the time of Witherspoon's trial, Maryland Rule 757 required that in "every case in which instructions are given to the jury," the "court shall instruct the jury that they are the judges of the law and that the court's instructions are advisory only."[6] Given the Court of Appeals' rejection, in *State v. Waine*, 444 Md. 692 (2015), of the State's argument that a reviewing court should apply a case-by-case approach and "determine whether there is a 'reasonable likelihood' that the jurors understood the court's Article 23 instruction as allowing them to convict a defendant on less than proof beyond a reasonable doubt," and

[6] Maryland Rule 757 (1979) is the antecedent to present-day Rule 4-325, which governs jury instructions in criminal trials. The principal difference between the two rules is that the former rule, unlike Rule 4-325, provided that the court "may, and at the request of any party shall, give those advisory instructions to the jury as may correctly state the applicable law" and that, in "every case in which instructions are given to the jury," the court "shall instruct the jury that they are the judges of the law and that the court's instructions are advisory only." Md. Rule 757 b. The constitutional underpinning of former Rule 757 was Article 23 of the Maryland Declaration of Rights, which provides in pertinent part: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Although the constitutional provision remains, subsequent judicial interpretations, beginning with *Stevenson v. State*, 289 Md. 167 (1980), and culminating in *Unger v. State*, 427 Md. 383 (2012), have changed its use.

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its adoption of a categorical, structural-error approach, *id.* at 703, 705, we assume that the court, in Witherspoon's trial, did exactly what Rule 757 b required.[7]

Whether Witherspoon established that he was actually suffering from a significant collateral consequence as a result of his 1979 convictions is, however, another matter. We have said that a significant collateral consequence "must be actual, not merely theoretical." *Graves v. State*, 215 Md. App. 339, 353 (2013), *cert. granted*, 437 Md. 637, *appeal dismissed*, 441 Md. 61 (2014) (citing *Parker v. State*, 160 Md. App. 672, 687–89 (2005)); *Parker*, 160 Md. App. at 687–89 (explaining that a petitioner's allegation that, as a result of the challenged conviction, his federal sentence was enhanced was sufficient to state a cause of action but that, on remand, he would be required to prove that allegation).

As we see it, the court did not abuse its discretion in finding that appellant failed to prove he faced significant collateral consequences as a result of the conviction. Whether the Government would have offered Witherspoon a more favorable plea bargain than the one he actually received, had the 1979 convictions been vacated, is highly speculative. Given Witherspoon's extensive criminal history, which included, not only his 1979 convictions, but also, two assaults committed while he was incarcerated, and two armed robberies, committed within weeks of each other in 2008, it is almost inconceivable that

[7] *Unger* precludes application of either waiver or final litigation as a bar to Witherspoon's claim. *Unger*, 427 Md. at 390–91.

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the District Court would have imposed a lesser sentence than it did (which was well below the top of the guideline range).[8]

A court abuses its discretion when its decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Faulkner v. State*, __ Md. __, No. 42, Sept. Term, 2019, slip op. at 42 (filed Apr. 27, 2020) (citation and quotation omitted). Applying that standard here, we cannot say that the circuit court abused its discretion in denying Witherspoon's *coram nobis* petition.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS ASSESSED TO APPELLANT.

[8] In any event, the federal guidelines are advisory, not mandatory, *United States v. Booker*, 543 U.S. 220, 259–60 (2005), and, moreover, a federal court, in imposing sentence, may consider criminal conduct that did not result in a conviction. 18 U.S.C. § 3661; *see United States v. Watts*, 519 U.S. 148, 157 (1997) (*per curiam*) (holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence").