

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1338

September Term, 2012

ALBERT J. LOMBARDOS

v.

STATE OF MARYLAND

Krauser, C.J.,
Meredith,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: November 19, 2015

*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.

In 1996, Albert J. Lombardos, appellant, pleaded guilty, in the Circuit Court for Montgomery County, to conspiracy to distribute marijuana and was sentenced to a term of five years' imprisonment, all of which was suspended. In 2011, he filed a petition for a writ of error coram nobis challenging the validity of his plea on the grounds that his defense counsel rendered ineffective assistance by failing to advise him that a conviction for conspiracy to distribute marijuana would prevent him from legally owning or possessing a firearm. Following a hearing, the circuit court denied the petition. Lombardos appealed. For the reasons that follow, we affirm.¹

BACKGROUND

Criminal Proceedings

In the summer of 1995, Lombardos was charged in the Circuit Court for Harford County with two counts of conspiracy to distribute marijuana. At about this same time, he was also charged, in the Circuit Court for Montgomery County, with distribution of marijuana and related controlled dangerous substance offenses. As part of a negotiated plea agreement involving all of the pending charges in both courts, the Harford County case was transferred to Montgomery County. At the plea hearing that followed, the State informed the Montgomery County circuit court that, under the terms of the plea agreement, Lombardos would plead guilty to one count of conspiracy to distribute marijuana (case no.

¹ This appeal had been stayed pending the Court of Appeals' decision in *State v. Smith*, No. 47, September Term, 2014. The Court of Appeals filed its decision in the *Smith* case, reported at 443 Md. 572, on July 13, 2015.

76529 originating in Harford County) and to distribution of marijuana (case no. 74989). Upon conviction of those offenses, the State would nol pros all of the remaining charges in both cases. As for sentencing, the State noted that it would not be seeking “executed jail time at this time” (for reasons to be discussed at a subsequent sentencing hearing).

In an examination of Lombardos before accepting his pleas, the court confirmed that Lombardos understood that he was facing a maximum sentence of five years’ imprisonment for each count, that he understood the nature of the offenses, and that he was not under the influence of alcohol or drugs. The court also confirmed that Lombardos, who was then thirty years old, understood the terms of the plea agreement. When asked if there were “any other conditions to the plea agreement” that had not been mentioned, Lombardos replied “no.” Lombardos further agreed that, aside from the terms of the plea agreement, no one had made “any threats, promises, or inducements to get [him] to plead guilty.”

In its proffer of facts in support of the pleas, the State related that in the spring of 1995, Lombardos had been a target of investigation by the Maryland State Police, who had learned that he was a “supplier of marijuana.” On various dates in April and May of 1995, Lombardos supplied a street-level dealer (who had become a police informant) with “pounds” of marijuana. The defense accepted the State’s proffer without any corrections or additions. And Lombardos admitted that he was pleading guilty to conspiracy to distribute marijuana and to distribution of marijuana because he was, in fact, guilty of those offenses.

Eight months later, Lombardos returned to court for sentencing. At sentencing, Detective Jean Hobbs of the Montgomery County Police Department, was present in court to attest to the fact that, since his arrest, Lombardos had cooperated with the police and that his cooperation had led to the arrest of twelve to fourteen individuals and to the seizure of approximately thirty pounds of marijuana and “tens of thousands of dollars.” Because Detective Hobbs indicated a desire that Lombardos “continue to perform services . . . on an informant type basis,” the parties asked the court to impose a suspended sentence and a period of unsupervised probation and that, as a “special condition” of his probation Lombardos was to “provide reasonable cooperation with law enforcement authorities.”²

The court then sentenced Lombardos to a suspended sentence of five years’ imprisonment for the distribution offense and to a concurrent and suspended sentence of five years’ imprisonment for the conspiracy to distribute offense, and imposed a two year period of unsupervised probation. Lombardos did not seek leave to appeal nor pursue relief under the uniform post-conviction procedure act.

The defense did, however, file a timely motion for reconsideration of the sentence imposed for the distribution offense. The motion made clear that Lombardos was “not requesting any relief in the misdemeanor conspiracy case,” but was seeking modification only of the sentence for distribution (a felony offense) because he was “desirous of

² It was suggested that Lombardos’ probation be unsupervised (instead of supervised) because Parole and Probation were generally not amenable to a supervised probationer involving himself “in the criminal milieu,” even as a police informant.

maintaining the civil rights associated with not being a convicted felon.” A hearing on that motion was held on October 1, 1998, nearly two and one-half years after Lombardos was sentenced. At that hearing, the defense informed the court that, since sentencing, Lombardos had continued to cooperate with the police, that he had not incurred any new arrests, and that he and his wife had established a successful swimming pool business. At the conclusion of the hearing, the court vacated Lombardos’s sentence for distribution and imposed probation before judgment. As there was no request to modify the sentence for conspiracy to distribute marijuana, the sentence for that offense was not altered.

Coram Nobis Petition

In 2011, Lombardos filed a petition for writ of error coram nobis in case no. 76529 (the case that had originated in Harford County) claiming that his guilty plea to conspiracy to distribute marijuana was not entered knowingly and voluntarily because his trial counsel had rendered ineffective assistance of counsel. Specifically, Lombardos claimed that his attorney had not informed him that a conviction for conspiracy to distribute marijuana, a misdemeanor offense in Maryland, would prohibit him, under federal law, from possessing a firearm because the allowable penalty for that offense exceeded one year of imprisonment. He further claimed that, had he known that a conviction for conspiracy to distribute marijuana would prohibit his right to “bear arms,” he would have either not pleaded guilty or would have sought a probation before judgment.

On May 10, 2012, the circuit court convened a hearing of the petition. Lombardos testified that, before entering his plea, he had understood that if he pleaded guilty, he would “not lose” any of his “civil liberty rights.” He claimed that he had made it clear to his defense counsel, and to the police officers who wanted him to work as an informant, that he wanted to retain all of his “rights,” including his ability to “protect [himself] with a firearm” and “to purchase the firearm.” He explained that he was “informed” that, if he “did the plea” and “did everything that they asked of [him], that this would all go away” and that he “wouldn’t lose [his] gun rights.”

On cross-examination, Lombardos admitted that, in the years leading up to his arrest, he had “sold pounds and pounds of pot.” Although he remembered that the Harford County case was transferred to Montgomery County and handled along with the Montgomery County case, he could not recall the specific charges in either case nor could he recall the specific terms of the plea agreement. In fact, he could not remember what charges he pleaded guilty to or the sentences that were imposed. And he only “vaguely” remembered returning to court for a modification of his sentence for distribution.

Lombardos testified that, in 2008 (approximately twelve years after his conviction), he applied for a permit to carry a concealed weapon in Virginia, where he now resides. On his application, he admitted that he had a previous “misdemeanor conviction.” Although the permit was issued, when Lombardos later attempted to purchase a firearm at a gun show in Virginia he was told by a Virginia State Police officer that his concealed weapon’s permit

was issued in error. Lombardos then contacted an attorney, who informed him that he “apparently” could not legally own a gun. Consequently, he voluntarily relinquished the concealed weapon permit Virginia had previously issued to him.

Lombardos testified that he next hired a Virginia attorney “who specializes in civil liberty rights” who filed a “petition” on his behalf.³ As a result of that petition, Lombardos testified that “the State of Virginia restored [his] rights” and that he is able to “own a gun in Virginia.” Nonetheless, he claimed that he has been advised that federal law prohibits him from owning or possessing a firearm of any type because the conspiracy to distribute marijuana offense, a misdemeanor under Maryland law, is deemed a felony under federal law because it is punishable for more than a year in prison.

Philip Armstrong, the attorney who represented Lombardos in the criminal case at issue, testified for the State. He confirmed that, when the charges were brought against Lombardos, it was alleged that Lombardos had been “involved in moving a lot of pot.” Armstrong moved to transfer the Harford County case to Montgomery County because, in his words, Harford County “take[s] a more severe view of these types of cases.” He further recalled that Detective Hobbs, an undercover narcotics detective, was involved in the case and she was very interested in securing Lombardos’s cooperation. “[I]t was apparent,” Armstrong testified, that Lombardos “was in enough hot water that in the absence of some

³The nature of this “petition” is not clear from the record before us.

cooperation agreement, he ran a very substantial likelihood not only of being convicted of a felony, but also doing some time.”

Armstrong testified that the plea agreement provided that the Harford County case would be transferred to Montgomery County, Lombardos would “get no jail,” Lombardos would cooperate with the police, and if Lombardos successfully completed probation, he would receive “favorable consideration” on a motion for reconsideration of the distribution sentence “to get a PBJ on the felony.” Armstrong further stated that he recalled that the defense agreed not to seek a probation before judgment on the conspiracy to distribute offense. “I think that was part of the deal,” Armstrong recalled. When asked if he would have discussed that with Lombardos, Armstrong replied: “Of course.” “[H]e knew that that was the deal going in and coming out,” Armstrong assured the court.

Armstrong also remembered that although Lombardos was concerned about his “civil liberties,” he advised him that “his first concern ought to be not being a convicted felon and that was why part of the plea agreement contemplated” that if he cooperated with the police and successfully completed probation the court would consider revising his sentence on the distribution offense to a probation before judgment.

As to the conspiracy to distribute offense, Armstrong related that he told Lombardos that “he had to eat it.” He further advised him that the conspiracy offense was a “misdemeanor.” And, although he could not recall a specific conversation, he “probably would have told” Lombardos that he did not believe the conspiracy conviction would be “an

impediment to him owning, possessing, or using a firearm.” Armstrong explained: “my recollection, at the time, was that federal law was such that, at that time, it didn’t prohibit him from using, possessing, whatever a gun. I knew that Maryland treated it as a misdemeanor.” Moreover, while Armstrong could not say that he “specifically told him that this [conspiracy conviction] would permit him to own or possess a firearm,” he noted that “it was real low on the triage list.” The first “goal” was to keep Lombardos out of jail and the second was to avoid a felony conviction.

Armstrong further testified as follows:

[STATE]: Did he ever say to you that if he couldn’t be sure that he would retain all of his civil rights, that he wanted to get to trial?

ARMSTRONG: I don’t have any recollection of Mr. Lombardos having ever said that - -

[STATE]: Yes.

ARMSTRONG: - - but I do have recollection of this being a sufficiently serious case - -

[STATE]: Yes.

ARMSTRONG: - - that he was getting an offer he couldn’t refuse here, and that that was pretty much the tenor of our discussions.

When asked if he thought, at the time, that the plea agreement was in Lombardos’s best interest, Armstrong replied: “the answer is unequivocally yes.”

Coram Nobis Ruling

The coram nobis court denied relief. As set forth in a memorandum opinion, the court first determined that Lombardos had waived his right to challenge the validity of the plea by failing to file an application for leave to appeal the conviction. But, even if not waived, the court found that Lombardos had failed to demonstrate that he suffered a significant collateral consequence as a result of the conspiracy to distribute conviction. The court noted that Lombardos had testified that, in 2008, Virginia had granted him a permit to carry a concealed weapon and, despite some subsequent confusion as to whether he was entitled to the permit, Virginia ultimately “restored” his civil liberty rights and he was now entitled to own a gun in his home state of Virginia. The court further found that Lombardos’s claim that federal law prohibits him from owning or possessing a firearm was “speculative.”

The court also rejected Lombardos’s claim that his defense attorney had provided ineffective assistance of counsel. The court found that he had not shown that Armstrong’s performance was deficient or that, but for Armstrong’s failure to advise him of the potential inability to possess a firearm as a result of the conspiracy to distribute conviction, he would not have pleaded guilty and would have insisted on going to trial. The court concluded that Armstrong had negotiated a very favorable plea agreement and that due to counsel’s efforts Lombardos “not only avoided a jail sentence, but was granted unsupervised probation,” and later given “probation before judgment on the felony charge.” Moreover, the court found

that Lombardos's testimony, that he would have gone to trial had he known that his right to own or possess a firearm would be effected by the conspiracy conviction, was not credible. The court found Armstrong's testimony was "extremely credible." Accordingly, the court determined that Lombardos failed to demonstrate that his attorney had provided ineffective assistance of counsel or that his plea was not entered knowingly and voluntarily.

Finally, after noting that "[c]oram nobis relief is an extraordinary remedy and should be employed only upon compelling circumstances," the court found that the "facts of this case do not compel the implementation of this extraordinary remedy."

DISCUSSION

Standard of Review

The writ of error coram nobis is an "equitable action originating in common law" whereby a petitioner seeks to collaterally challenge a conviction, frequently many years after the judgment has become final. *Coleman v. State*, 219 Md. App. 339, 354 (2014), *cert. denied*, 441 Md. 667 (2015). The writ is available to "a convicted person who is not incarcerated and not on parole or probation" and who is "suffering or facing significant collateral consequences from the conviction." *Skok v. State*, 361 Md. 52, 78-79 (2000). "[T]he grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character." *Id.* at 78. Relief is warranted "only under circumstances compelling such action to achieve justice." *Id.* at 72 (quoting *United States v. Morgan*, 346 U.S. 502, 511-512 (1954)). "[A] presumption of regularity attaches to the

criminal case, and the burden of proof is on the coram nobis petitioner.” *Id.* at 78. Because it is an “extraordinary remedy” to be granted only “under compelling circumstances,” we review the circuit court’s decision to grant or deny coram nobis relief under the abuse of discretion standard. *Coleman*, 219 Md. App. at 353-354.

Lombardos claimed that he was denied his constitutional right to the effective assistance of counsel when his attorney failed to advise him, before he entered his plea, that a conviction for conspiracy to distribute marijuana would deprive him of his right to bears arms. “Claims for ineffective assistance of counsel,” like the one now before us, “are evaluated under the United States Supreme Court’s decision in *Strickland v. Washington*, 466 U.S. 668 (1984),” *Kulbicki v. State*, 440 Md. 33, 46 (2014), which established a “two-prong” test. First, “we must decide whether counsel rendered constitutionally deficient performance” and second “whether such performance prejudiced the defendant’s case.” *Id.* (citing *Strickland*, 466 U.S. at 687).

“In discerning whether performance was deficient, we start with the presumption that counsel ‘rendered adequate assistance.’” *Id.* (quoting *Bowers v. State*, 302 Md. 416, 421 (1990)). And to satisfy the prejudice prong in the context of a guilty plea, the petitioner must establish that there “is a reasonable probability that, but for counsel’s errors, [he or she] would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). *Accord Denisyuk v. State*, 422 Md. 462, 470 (2011). In short, “the

burden is on the petitioner to prove that counsel's performance was deficient and that the deficient performance prejudiced the defense." *Oken v. State*, 343 Md. 256, 283 (1996).

Analysis

Lombardos first contends that the circuit court erred in finding that he had waived his right to seek coram nobis relief because he had not sought leave to appeal following his guilty plea for conspiracy to distribute marijuana. We agree. Section 8-401 of the Criminal Procedure Article of the Md. Code (enacted in 2012), which provides that "the failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error coram nobis," is to be applied retroactively, as the Court of Appeals held in *State v. Smith*, 443 Md. 572 (2015), and thus Lombardos's failure to seek leave to appeal did not extinguish his right to seek coram nobis relief.⁴

Lombardos next asserts that the circuit court erred in concluding that he had not suffered a significant collateral consequence as a result of the conspiracy to distribute conviction. He maintains that this conviction, "under the federal scheme [18 U.S. C. §922 (g)(1)], is a disqualifying crime that expressly prohibits him from possessing a firearm."

⁴ The State also maintains that Lombardos waived his right to seek coram nobis relief by failing to raise his claim in a post-conviction proceeding. The State did not raise this issue in the circuit court and, therefore, it is not properly before us. *Graves v. State*, 215 Md. App. 339, 352 (2013); Md. Rule 8-131(a) (an appellate court ordinarily will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court."). The State also asserts for the first time on appeal that Lombardos' claim for coram nobis relief is barred under the doctrine of laches. That too is not properly before us. *Id.*

Finally, Lombardos asserts that the circuit court erred in concluding that he was not denied the effective assistance of counsel when he entered his plea. He maintains that Armstrong's "performance was constitutionally deficient" because he should have advised him that a conviction for conspiracy to distribute marijuana would effect his right to possess or own a gun. In support of his position, he points to the National Legal Aid and Defender Association's "Performance Guidelines for Criminal Representation" which he claims provides that "defense counsel should advise their clients, prior to entry of a plea, of any 'civil disabilities' that are a consequence of the contemplated plea."

Lombardos also insists that he established that he was prejudiced by his counsel's deficient performance. Although acknowledging that the circuit court did not credit his testimony, he claims that the testimony of Armstrong (his trial counsel) "verified and corroborated" his testimony that, if he had known that the conviction would hinder his right to bear arms, he would have gone to trial. He points to the fact that his trial counsel confirmed that he was concerned about his right to own or possess a gun and claims that his attorney admitted that "it was likely that he misinformed him of what the consequences of the conviction would be."

Even if we assume that Lombardos was suffering a significant collateral consequence as a result of the conviction and assume that Armstrong misinformed him about the effect of the conviction on his right to own or possess a firearm, we are not convinced that the circuit court erred in not crediting Lombardos's claim that, had he been properly advised,

he would not have pleaded guilty and would have insisted on going to trial. In other words, we are not persuaded that the circuit court’s credibility determinations and its factual findings were clearly erroneous. Lombardos ignores Armstrong’s testimony that this was a “sufficiently serious case”; that absent the plea agreement, Lombardos likely would have been convicted of distribution and required to serve time in prison; and that he did not recall Lombardos ever suggesting that he would reject the plea agreement and go to trial if pleading guilty meant he might lose his right to own or possess a firearm. Lombardos also overlooks Armstrong’s testimony that protecting Lombardos’s “civil rights” was “real low on the triage list” as the first goal was to keep him out of jail. In sum, we have no reason to disturb the circuit court’s conclusion that Lombardos failed to satisfy *Strickland*’s prejudice prong.

Finally, we find no abuse of discretion in the court’s ultimate decision that, even if Lombardos had established an ineffective assistance claim, the “facts of this case do not compel the implementation of this extraordinary remedy.” As we observed in *Coleman, supra*, “judgment finality is not to be lightly case aside; and courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases.” 219 Md. App. at 354 (quoting *United States v. Denedo*, 556 U.S. 904, 916 (2009)).

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