Circuit Court for Somerset County
Case No. 19-K-97-5173

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1356

September Term, 2016

CHARLES L. WARD

v.

STATE OF MARYLAND

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

JJ.

Opinion by Thieme, J.

Filed: April 17, 2018

This appeal arises from the denial of a petition for a writ of error coram nobis filed in the Circuit Court for Somerset County by appellant, Charles Ward, in which he claimed that the trial court violated Md. Rule 4-215 by failing to "determin[e] and announc[e] on the record that appellant "knowingly and voluntarily waiv[ed] the right to counsel" when finding that appellant had waived his right to counsel through inaction. Appellant presents us with the following question:

> Did the trial court err in denying appellant's petition for writ of error coram nobis, after requiring appellant to proceed to trial *pro se*, in violation of Maryland Rule 4-215(e) without a knowing and voluntary waiver of counsel?

For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

The relevant pre-trial history of this case leading up to appellant being tried without counsel was thoroughly set forth by this Court in *Ward v. State*, No. 1218, Sept. Term 1998 (filed June 11, 1999), as follows:

> Appellant was a resident of the state of New York. His convictions stem from a June 24, 1997 traffic stop in Somerset County, Maryland.
>
> Appellant's trial was initially scheduled for October 22, 1997. Appellant was a half hour late for court that day, however, and failed to call the court to apprize [sic] it that he was on his way. Prior to appellant's arrival, the court issued a bench warrant and directed that appellant's bond be forfeited. Appellant was served with the bench warrant upon his arrival in court. The court reset bond at a higher amount, and appellant was able to meet it.
>
> The trial was rescheduled for January 21, 1998. On that date, appellant appeared in court with Public Defender R. Patrick Hayman. While no transcript of the proceeding is included in the record, the docket entries reflect that appellant requested permission to discharge Hayman. He further moved to continue the case so that he could hire a private attorney. The court granted both requests and rescheduled the trial for March 25, 1998. A form

included in the trial folder, dated January 21, 1998 and signed by both appellant and Judge Long, states, in pertinent part:

> [Appellant] appeared before me today pursuant to Maryland Rule 4-215 because no appearance of counsel had been entered. I have ascertained that the defendant has received a copy of the charging document(s).
>
> Also, I advised the defendant:
>
> 1. Of the nature of the charges against him and any lessor-included offenses and the range of allowable penalties including mandatory and minimum penalties, if any;
>
> 2. That he has the right to be represented by a lawyer at every stage of these proceedings;
>
> 3. That a lawyer can render important assistance to him in determining whether there may be defenses to the charges or circumstances in mitigation thereof and in preparing for and representing him at trial;
>
> 4. That even if he intends to plead guilty, a lawyer may be of substantial assistance in obtaining and developing information which could affect the sentence or other disposition;
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> ***
>
> 9. That if he appears for trial without a lawyer, the Court could determine that he had waived his right to have a lawyer by neglecting or refusing to retain a lawyer or to make timely application to the Public Defender for a lawyer and in that event the case would proceed to trial even though he was not represented by a lawyer.

In connection with the form, the docket entries for January 21, 1998 include the notations: "Initial Appearance Hearing Held" and "Initial Appearance Form signed and filed."

On March 23, 1998, two days before the trial was to take place, appellant filed a "Certificate of Illness," signed by a doctor, by which he requested that the trial again be continued. The court denied the request on March 24. Appellant appeared for trial on March 25, 1998 but did not have counsel. Appellant explained that he had spoken with an attorney who

wanted to be paid $5,000.00 before he would represent appellant. Appellant had been working and saving money to pay for the attorney, but had injured his back in a car accident several weeks earlier and had been unable to work since then. He therefore did not yet have the money to pay the attorney.

The court indicated that, the day before, it had asked the prosecutor to call the office of the doctor whose signature appeared on the "Certificate of Illness" to verify appellant's condition. In this way, the court had learned that the doctor who signed the certificate was a chiropractor rather than a medical doctor and that the chiropractor had not conducted any tests upon appellant but had taken appellant's word that he was injured. Initially, the court indicated that it would not grant a continuance. It told appellant:

> Now, frankly you requested previously more than two months ago to discharge counsel in this case. You were advised that you were to have another attorney enter an appearance for you. You have not done so. The court believes that you have unfairly taken advantage of the generosity of this court. You appeared for court without an attorney. The court believes there is no meritorious reason for you not [sic] to be before this court without an attorney. Effectively the court believes that you have waived your right to counsel by discharging the public defender and by failing to have an attorney to enter an appearance for you. That means that the case is going to proceed to trial today even though you are not represented, certainly that was one of the things the court advised you the last time you were here when you were given an initial appearance. The case will go to trial today. The court finds that you have waived your right to an attorney.

Despite the court's ruling, appellant informed it that he was only "fifteen hundred dollars away from hiring" the private attorney. He added that he would get the money from his mother, and that he needed only one week. At that point, the prosecutor interjected that, when she spoke with the chiropractor, she never asked whether appellant had been seen by a medical doctor in the same office. The court instructed the prosecutor to again call the chiropractor's office to ascertain whether appellant had been seen by a medical doctor. It stated: "I [w]ould appreciate if you would do so before the court makes a final decision as to whether or not it's going to go forward with this case."

The court called a short recess while the prosecutor made the phone call. The prosecutor then reported that the call had confirmed that appellant

had not seen a medical doctor. Nevertheless, the court agreed to continue the case. It stated:

> Mr. Ward, I'm going to continue this case one more time very, very, very, very reluctantly. … I'm still not persuaded that you had an unreasonable period of time. I'm going to continue this case.

The court advised appellant:

> Mr. Ward, I don't know what your condition is, but I can tell you I've already found that – I didn't find there was a meritorious reason for you to be without an attorney in this case. You just told me at bench before the phone calls were made that you were going to get the money one way or the other. The only thin[g] you have going for you is that you've appeared every time, albeit you've been here every time. This case will be scheduled within thirty days or as soon as possible. You had better be here and better be prepared to go forward with or without an attorney. I've told you this a couple of times. I don't usually continue cases. Do you hear me?

The case was rescheduled for April 29, 1998. Again, appellant appeared without counsel. He informed the court that he had raised the $5,000.00 for the private attorney, and that he had called the attorney the day before to let him know. The attorney, however, had indicated that he did not have enough time to prepare. He would not enter his appearance in the case unless appellant was able to obtain a continuance. The prosecutor then stated that she had spoken with the attorney after appellant spoke with him. The prosecutor had informed the attorney that she would "vehemently oppose" a continuance. She added that the attorney

> indicated to me if I would send him all the information I had, which I did, through the fax machine, that he may have one of his associates … here today to represent [appellant]. He did not know. It depended on further contact with the defendant. I did fax all that information to him[.]

The court then summarized the procedural history of the case. It concluded:

> The court believes that you have had more than ample opportunity to obtain the services of an attorney. That you voluntarily discharged the public defender. The court believes that it has been very generous to you. And the court believes

> that there is no meritorious reasons [sic] for you to appear today without an attorney. Accordingly, the case will go forward even though you are not represented.

Ward v. State, Slip Op. at 2-7.

The case then proceeded to trial and appellant was convicted of possession with intent to distribute cocaine, possession of cocaine, and possession of marijuana. The court sentenced him to fifteen years' imprisonment. Thereafter, appellant took a direct appeal to this Court where he contended that the trial court violated his right to counsel, and Maryland Rule 4-215, when determining that appellant had waived his right to counsel through inaction. This Court disagreed and affirmed the judgments of the circuit court. *Ward v. State*, Slip Op. at 9-15. We found that the circuit court correctly applied Md. Rule 4-215, and neither abused its discretion in failing to grant yet another continuance for appellant to obtain counsel, nor abused its discretion in finding that appellant had waived his right to counsel through inaction.

As earlier noted, in 2014, appellant filed a petition for a writ of error coram nobis contending that the trial court violated Md. Rule 4-215 by failing to "determin[e] and announc[e] on the record that appellant "knowingly and voluntarily waiv[ed] the right to counsel" when finding that appellant had waived his right to counsel through inaction. The circuit court denied appellant's petition. This appeal follows.

DISCUSSION

A writ of error coram nobis is an extraordinary remedy justified only when circumstances compel such an action to achieve justice. Coram nobis is available to raise fundamental errors when attempting to show that a criminal conviction was invalid under

the circumstance "where no other remedy is presently available and where there were sound reasons for the failure to seek relief earlier." *State v. Rich*, 454 Md. 448, 461 (2017), *Skok v. State*, 361 Md. 52, 72-73 (2000); *see also State v. Smith*, 443 Md. 572, 597 (2015). As observed in *Rich,* the Court of Appeals has outlined five requirements for obtaining coram nobis relief.

> First, "the grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character." *Skok*, 361 Md. at 78 (citing *United States v. Morgan*, 346 U.S. 502, 512 (1954)). Second, "a presumption of regularity attaches to the criminal case, and the burden of proof is on the coram nobis petitioner." *Id*. (citing *Morgan*, 346 U.S. at 512). Third, "the coram nobis petitioner must be suffering or facing significant collateral consequences from the conviction." *Id*. at 79. Fourth, "[b]asic principles of waiver are applicable to issues raised in coram nobis proceedings. Similarly, where an issue has been finally litigated in a prior proceeding, and there are no intervening changes in the applicable law or controlling case law, the issue may not be relitigated in a coram nobis action." *Id*. (citation omitted) (citing *Morgan*, 346 U.S. at 512). Fifth, "one is not entitled to challenge a criminal conviction by a coram nobis proceeding if another statutory or common law remedy is then available." *Id*. at 80.

Rich, 454 Md. at 462.

Finally Litigated and Law of the Case

As indicated above, so long as there are "no intervening changes in the applicable law or controlling case law," a coram nobis petitioner may not re-litigate any claims that have been "finally litigated." *Skok*, 361 Md. at 79. The concept of "finally litigated" is rooted in the statutes governing petitions for post-conviction relief. *See* Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP"), § 7-101 *et seq*. According to CP §7-106(a), among other methods not here relevant, a contention earns the status of

"finally litigated" when "an appellate court of the State decides on the merits of the allegation … on direct appeal[.]"

On direct appeal, appellant raised, as he did in his petition for a writ of error coram nobis, a claim that the trial court violated Md. Rule 4-215, and we decided against appellant "on the merits of the allegation." As a result, appellant is precluded from raising the contention he raised in his petition for a writ of coram nobis because that contention was "finally litigated."

Appellant is also precluded from raising his coram nobis contention because this Court's holding on direct appeal became binding on the parties as "law of the case." *Holloway v. State*, 232 Md. App. 272, 284 (2017) (holding that Holloway was precluded from raising, in a petition for writ of error coram nobis, a claim that either was, or could have been, raised on direct appeal). With certain exceptions, under the law of the case doctrine, "'[n]either questions that were decided nor questions that could have been raised and decided on appeal can be relitigated.'" *Id*. at 284 (quoting *Kline v. Kline*, 93 Md. App. 696, 700 (1992)). *Holloway* explained that it is "well settled" that the law of the case doctrine does not apply when one of three exceptional circumstances exists:

> the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision on the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.

Holloway, 232 Md. App. at 285.

In his brief filed in this Court, Appellant mentions neither "finally litigated" nor "law of the case." Concomitantly, appellant makes no effort to persuade us that any of the

applicable exceptions to those doctrines apply here.[1] He mentions no changes in the "applicable law or controlling case law" that might have navigated the "finally litigated" hurdle. Likewise, he makes no effort to demonstrate that there was a subsequent trial with different evidence, a change in controlling authority, or that the decision of this Court on appellant's direct appeal was clearly erroneous and worked a manifest injustice to avoid "law of the case" bar to re-litigating his claims.

Had appellant chosen to somehow distinguish his coram nobis claims from the claims he raised on direct appeal, he likely would fare no better because, under the law of the case doctrine, in addition to being precluded from raising the claims this Court already decided on direct appeal, he is also precluded from raising any claims that he could have raised on direct appeal but did not. It is clear that the contentions that appellant raised in his coram nobis petition could have been raised in his direct appeal.

Because all of appellant's coram nobis contentions either could have been raised on direct appeal, or were, in fact raised on direct appeal, he is prohibited from litigating them in a petition for a writ of error coram nobis.

[1] Although appellant failed to mention any exceptions to "finally litigated" or "law of the case" in his brief in this Court, during the hearing on his petition in the circuit court, and during oral argument in this Court, appellant contended that this Court's decision in *Westray v. State*, 217 Md. App. 429 (2014), *rev'd on other grounds*, 444 Md. 672 (2015) (holding that the "determine and announce" requirement found in Md. Rule 4-215(b) was mandatory) reflected a change in law which met the applicable exceptions. We are not persuaded that this is so. As we explain under the heading *Merits*, *infra*, the "determine and announce" requirement did not become part of Md. Rule 4-215 until about a decade after appellant's trial. On direct appeal, we addressed whether the trial court complied with Md. Rule 4-215 as it was written at that time, and we found that the trial court did not violate the Rule. We are persuaded that that determination "finally litigated" any contention that the trial court violated Md. Rule 4-215 and is the "law of the case."

Merits

Even if we were to find that appellant was not precluded from raising his contention that the trial court erred by not determining and announcing on the record that his waiver of counsel was knowing and voluntary, we would still affirm the judgment of the coram nobis court for a very simple reason. While it is true that, in *Westray*, this Court found that the "determine and announce" requirement found in Md. Rule 4-215(b) was mandatory, that requirement did not become part of Md. Rule 4-215 until January 1, 2008. *See One Hundred Fifty-Eighth Report of the Rules Committee*, Md. Reg. Vol. 34, Issue 21, at 1873 (October 12, 2007) (proposing the "determine and announce" requirement); Rules Order dated December 4, 2007, Md. Reg. Vol. 34, Issue 26, at 2250 (December 21, 2007) (adopting the proposed amendment). We are aware of no authority suggesting that that change was intended to apply retrospectively. Quite to the contrary, the December 4, 2007 Rules Order specifically provides that the changes to the rules in that Order "apply to all actions commenced on or after the 1st day of January, 2008[.]" Because appellant's trial took place about a decade before the applicable rule change, it had no effect on his case.

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