Circuit Court for Baltimore County
Case No. 03-K-02-002951

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1721

September Term, 2017

KENYATTA M. SMITH

v.

STATE OF MARYLAND

Friedman,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: May 20, 2019

*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.

Kenyatta Smith seeks relief from her unconstitutional conviction through a petition for a writ of coram nobis. Because the circuit court failed to properly evaluate the significant collateral consequences element of coram nobis analysis, we reverse. We hold instead, that as a matter of law, Smith has demonstrated that she is suffering a significant collateral consequence. In light of our conclusion that Smith demonstrated a significant collateral consequence, we remand her case for the circuit court to reconsider whether Smith's petition presents "circumstances compelling relief to achieve justice."

BACKGROUND

Kenyatta Smith was convicted of forgery and identity theft in the District Court of Maryland for Baltimore County in 2002. She noted a timely appeal of that conviction to the Circuit Court for Baltimore County and subsequently pled guilty. She was sentenced to three years' incarceration, all suspended. Since her guilty plea, Smith has made full restitution to the victim and has had no further contact with the criminal justice system.

In 2015, Smith filed a petition for a writ of coram nobis. The circuit court denied her petition without a hearing. On appeal, a panel of this Court reversed and remanded with instructions for the circuit court to hold an evidentiary hearing on Smith's petition.[1] *Smith v. State*, No. 1605, Sept. Term 2015 (filed Aug. 1, 2016). The circuit court held a hearing

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[1] In that case (*Smith I*), as here, Judge Friedman wrote a separate concurrence, advocating for the adoption of a clear standard for the second element of coram nobis relief: significant collateral consequences. *Smith v. State*, No. 1605, Sept. Term 2015 (filed Aug. 1, 2016) (Friedman, J. Concurring).

and, in a detailed nine-page opinion, again denied Smith's petition. Smith timely appealed that denial.

DISCUSSION

A petitioner seeking coram nobis relief must fulfill three substantive elements: *first*, the grounds for challenging the conviction must be of "constitutional, jurisdictional, or fundamental character;" *second*, the coram nobis petitioner must be suffering or facing "significant collateral consequences" from the conviction; and *third*, the petitioner must not have other remedies available to challenge the conviction such as a direct appeal or petition for post-conviction relief. *Skok v. State*, 361 Md. 52, 78-80 (2000) (cleaned up); *see also* Md. Rule 15-1202(b) (identifying the contents of a petition for coram nobis).[2] Because coram nobis is an extraordinary remedy, even petitioners who satisfy these three elements must also persuade the trial court that issuance of the writ will achieve justice. *Coleman v. State*, 219 Md. App. 339, 353-54 (2014).

The circuit court found that Smith met two of the three substantive elements to qualify for coram nobis relief. The circuit court found Smith established the first element because her guilty pleas were not free and voluntary, as she was not properly advised on the record of the elements of the crimes nor of the consequences of pleading guilty. *See State v. Daughtry*, 419 Md. 35, 74-75 (2011) (holding that a plea taken in violation of Md.

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[2] Sometimes counted as elements, there are also two procedural rules by which a coram nobis petitioner must abide: (1) "a presumption of regularity attaches to the criminal case, and the burden of proof is on the coram nobis petitioner;" and (2) "basic principles of waiver are applicable to issues raised in coram nobis proceedings." *State v. Rich*, 454 Md. 448, 462 (2017) (cleaned up).

Rule 4-242(c) is unconstitutional). The circuit court also found Smith established the third coram nobis element because she is not currently incarcerated, on parole or probation, and her time for taking a direct appeal has long since expired.

The circuit court found, however, that Smith was not suffering from significant collateral consequences. The circuit court reasoned that Smith's inability to obtain employment as a mortgage originator "is neither a 'significant' or 'substantial' collateral consequence nor an unusual repercussion for a person who has received convictions for both forgery and fraud."

I. Smith is suffering from significant collateral consequences

On appeal, we review whether the circuit court erred in finding that Smith was not suffering from significant collateral consequences. Because the question of whether the facts found are sufficient to satisfy the element of significant collateral consequences is one of law, we review this decision without deference. *State v. Rich*, 454 Md. 448, 470-71 (2017).

Maryland has not yet adopted a definitive test for whether a circumstance constitutes a significant collateral consequence and Maryland appellate courts have thus far provided only minimal guidance.[3]

[3] First, in *Skok v. State*, the Court of Appeals noted that exposure to enhanced sentences and potential deportation are examples of significant collateral consequences, but did not otherwise define the phrase. 361 Md. 52, 77 (2000). Second, in *Vaughn v. State*, this Court held that a petitioner for coram nobis cannot establish the significant collateral consequences element if the petitioner was aware of the consequence on the day the petitioner pled guilty. 232 Md. App. 421, 429 (2017). Neither precedent helps us resolve the question here.

We do not propose a test today, but hold that on the uncontroverted facts established, Smith met her burden to show that she faces significant collateral consequences as a result of her conviction. Smith produced evidence that shows that between 2002 and 2006, she worked her way up and became a mortgage originator. In 2005, however, the General Assembly passed legislation requiring mortgage originators to be licensed, starting January 1, 2007. 2005 Md. Laws 590 (currently codified at Md. Code, Fin. Inst. ("FI"), § 11-602(b)). Moreover, the legislation prohibits granting a license to a person who has been convicted of or pled guilty to a felony that involved an act of fraud, dishonesty, breach of trust, or money laundering. FI § 11-605(a)(2)(ii). Despite these restrictions, Smith applied for a mortgage originator's license. She was denied because the Department of Labor, Licensing and Regulation ("DLLR") found that "the documents reviewed reflect that you were convicted of a felony." She subsequently lost her job and was no longer able to work in her chosen profession. We hold that this is a significant collateral consequence, unknown to Smith when she pled guilty, and that the circuit court erred in denying her petition on this ground.[4]

II. Remand – circumstances compelling action to achieve justice

The circuit court also concluded that "the DLLR's denial of a mortgage originator's license in 2007 and [Smith's] difficulty securing employment in the financial sector do not

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[4] We distinguish the present case from *United States v. Bush*, 888 F.2d 1145 (7th Cir. 1989) because the 2007 legislation precluded Smith from maintaining her occupation as a mortgage originator. Under *Bush*, Smith's claim would fail if she merely asserted that her conviction prevented her from ascending the ranks within her occupation as a mortgage originator. *Id*. at 1150.

constitute significant collateral consequences . . . and are incommensurate with the extraordinary and compelling circumstances that warrant such relief." Because the court's error concerning the significant collateral consequences element of the coram nobis test may have influenced its determination as to whether there were "compelling circumstances" necessary to "achieve justice," *Coleman*, 219 Md. App. at 354, we remand to the circuit court to reconsider that discretionary determination in light of our holding.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REMANDED; COSTS TO BE PAID BY APPELLEE.

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Concurring Opinion by Friedman, J.

Filed: May 20, 2019

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I wholeheartedly agree with the per curiam opinion and its conclusion that the petitioner, Kenyatta Smith, has proven the significant collateral consequences condition of her application for coram nobis relief. I write separately only because, in my view, the per curiam majority does not go far enough to dispel the circuit court's erroneous conclusion that economic consequences are not significant collateral consequences on their own.

First, nothing in *Skok v. State* or its progeny compels that result. 361 Md. 52 (2000). While it is true that *Skok* identified immigration and criminal penalty enhancements as two examples of significant collateral consequences, *Id.* at 77, it did not limit the relief to those two circumstances.

Second, in coram nobis cases, our appellate courts have only defined the phrase "significant collateral consequences" to mean something that the petitioner did not know about when their guilty plea was entered. *Vaughn v. State*, 232 Md. App. 421, 430 (2017). We have not, however, given more guidance on what does or does not amount to a significant collateral consequence. This Court then, is free to define that term.

Third, when the Court of Appeals reinvigorated Maryland coram nobis law in *Skok*, it defined the significant collateral consequences element by reference to three out-of-state cases, each of which make clear that the purpose of the requirement is only to ensure that the petitioner has federal Article III standing—that is, that their petition continues to state a "case and controversy." *Skok*, 361 Md. at 79 (citing *United States v. National Plastikwear Fashions*, 368 F.2d 845, 846 (2d Cir. 1966) (holding the petitioner "failed to show any outstanding adverse legal consequences from his conviction," so his relief must be denied because "Article III of the Constitution wisely prohibits courts of the United States from

diverting their energies to matters without legal effect”); *State v. Scales*, 593 N.E.2d 181, 184 (Ind. 1992) (“[A] coram nobis petitioner must satisfy Article III case and controversy by showing present adverse legal consequences flowing from the conviction.”); *Powell v. State*, 495 S.W.2d 633, 636 (Mo. 1973) (“The applicant should allege and show that some beneficial consequences would flow from the relief sought.”)). I don’t think we ought to be making this test more difficult than *Skok* intended.

Fourth, although federal courts of appeal describe their tests for significant collateral consequences differently,[5] all seem to be clear that loss of an occupational license is sufficient to satisfy the test for significant collateral consequences. *Fleming v. United States*, 146 F.3d 88, 91 (2d Cir. 1998) (suggesting that had petitioner sought and been denied licensure as a securities broker, ever been employed as a securities broker in the past, or could obtain such employment but for his conviction, he would satisfy the test, but because he could not, his claim was “purely speculative”); *United States v. Bush*, 888 F.2d

[5] Without a Supreme Court decision to unify the result, the federal courts of appeal have described the test for significant collateral consequences along a broad continuum, ranging from the restrictive-sounding test applied in the Seventh Circuit, *see United States v. Bush*, 888 F.2d 1145, 1146 (7th Cir. 1989) (holding that a coram nobis petitioner must demonstrate an “ongoing legal disability” that serves as a “custody-substitute”), to the almost-impossible-not-to-satisfy test used by the Ninth Circuit, *see United States v. Walgren*, 885 F.2d 1417, 1421 (9th Cir. 1989) (“the presumption [is] that collateral consequences flow from any criminal conviction, and the government carries the burden of disproving this presumption”), with the Fourth Circuit somewhere in the middle. *See United States v. Mandel*, 862 F.2d 1067, 1075 n.12 (4th Cir. 1988) (holding that the loss of a law license is enough to satisfy the significant collateral consequences element, while noting that a criminal conviction “imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities”).

1145, 1150 (7th Cir. 1989) (suggesting that had Bush been barred from getting any work in his field, instead of just the positions he wants, he might have satisfied the significant collateral consequences requirement); *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988) (holding that the revocation of a law license was a sufficient basis to hold that the petitioner had suffered significant collateral consequences).[6] I suggest we follow their approach.

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[6] Perhaps because of my reliance on the *Mandel* case in my concurrence in *Smith I*, the hearing judge took great pains to distinguish *Mandel* in her opinion on remand. *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988). The hearing judge based her finding that Smith does not face significant collateral consequences on her view that Smith's case is distinguishable from Mandel's. She reasoned that Mandel's conviction was based upon behavior that is "non-criminal," and "therefore it was an extraordinary and compelling case for which coram nobis relief was required to achieve justice." The hearing judge reasoned that because Smith pled guilty, "her conduct remains criminal," so Smith should have foreseen these consequences, rendering them insignificant. Her efforts to distinguish *Mandel*, were, in my view, unsuccessful in three dimensions:

> *First*, the hearing judge distinguished *Mandel* on points that don't undermine the holding for which it was cited. In *Smith I*, I cited *Mandel* for the essential point that loss of a law license is a significant collateral consequence. Here, the hearing judge distinguished Smith's petition because Smith's conduct remains criminal. Thus, the hearing judge failed to distinguish *Mandel* in a material way—the loss of a law license is no different from the loss of a mortgage originator license.
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> *Second,* the hearing judge's assertion that Mandel's conduct is noncriminal is revisionist history. It is true that the Supreme Court has been engaged in a long term project of reducing the breadth of the federal crimes of mail and wire fraud, *McNalley v. United States*, 483 U.S. 350 (1987), and in the course of this project has rejected the theory that prosecutors could establish mail fraud by proving the State and its citizens were defrauded of the "honest and faithful services" of its public officials instead of requiring proof of a direct *quid pro quo* (as they did in Mandel's case), *Mandel*, 862 F.2d at 1074. But that does not render his conduct, by which he used his powers as Governor to artificially deflate and then inflate the value of stock

in a racetrack owned by his confederates (whose identities he helped conceal), "noncriminal." *United States v. Mandel*, 591 F.2d 1347, 1354-56 (4th Cir. 1979) ("The facts developed at trial touching upon the alleged bribery of the Governor and the alleged misrepresentation and concealment of material information by Appellants were essentially uncontroverted."). In my view, had the law required the prosecutor to prove a direct *quid pro quo* for a conviction, and so instructed the jury, it would have found the direct *quid pro quo* in disguised payments from those confederates and convicted Mandel. BRADFORD JACOBS, THIMBLERIGGERS: THE LAW V. GOVERNOR MARVIN MANDEL 236-38 (1984) (reasoning, from dissecting the Fourth Circuit en banc opinion affirming Mandel's conviction, that the *quid pro quo* "was obvious"). Moreover, these changes in the *federal* law wouldn't render this behavior noncriminal in the *state* system, which still uses the common law definition of the crime of misconduct in office. *Sewell v. State*, 239 Md. App. 571, 596 (2018) ("Misconduct in office is corrupt behavior by a public official in the exercise of his duties of office or while acting under color of office."). I have no doubt that a jury would have convicted Mandel of that crime too, had he been charged in the state system. JACOBS, *supra* at 237-38 (reasoning that the implication of the convictions and various jury instructions is that the jury found Mandel guilty of bribery and his behavior was "obviously corrupt"). Therefore, I reject the hearing judge's attempt to distinguish Mandel's case from Smith's because Mandel's behavior was, in her view, less bad than Smith's.

And, *third*, even if the hearing judge was correct that Mandel's actions could not suffice for a conviction, that does not render him more deserving of coram nobis relief than Smith. In the hearing judge's view, Mandel was a non-criminal and therefore coram nobis relief was required to achieve justice. She reasoned that because Smith's conduct remains criminal, she is not deserving of relief. It is well to remember that the writ of coram nobis exists to give relief to people *with* convictions, regardless of their actual innocence. *Mandel*, 862 F.2d at 1075 ("We are not organized to decide if the petitioners are bad men or even if they have committed crimes."); *Skok v. State*, 361 Md. 52, 80-81 (2000) ("[C]ourts have consistently held that the scope of a coram nobis proceeding encompasses issues concerning the voluntariness of a guilty or nolo contendere plea, and whether the record shows that such plea was understandingly and voluntarily made.").

(continued)

Fifth, a low threshold for significant collateral consequences also prevents an unwarranted disparity in treatment between incarcerated persons and those who are no longer (or as Smith, never were) incarcerated. An incarcerated petitioner, whose conviction was unconstitutionally defective in the same way that Smith's was, need only demonstrate the constitutional defect to merit relief under the post-conviction act. Md. Code, Crim. Proc. ("CP"), § 7-102 (allowing a convicted person to file for post-conviction relief when the judgment was imposed in violation of the Constitution of the United States or Maryland or laws of the State); *State v. Daughtry*, 419 Md. 35, 80-81 (2011) (giving retrospective effect to violations of Md. Rule 4-242(c), the rule that a guilty plea is not free and voluntary if the defendant is not advised, on the record, of the elements of the crime). By contrast, a coram nobis petitioner must additionally demonstrate a "significant collateral consequence." If we treat "significant collateral consequence" as a high threshold, we create a disparity that treats identical persons in very different and illogical ways.

Sixth, there is something perverse about the State's argument that economic hardship is not sufficient for the "significant collateral consequences" element, but subsequent offender statutes are. The State is willing to admit that a career criminal is eligible for coram nobis relief after a subsequent conviction, but that a woman who has rehabilitated herself and wants to get a job is not. Let me break that down. The State admits that someone may undo her first criminal conviction to avoid an enhanced punishment for

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Despite the hearing judge's efforts to distinguish it, *Mandel* remains a persuasive authority for the idea that an economic hardship, like the loss of a professional license, can be a significant collateral consequence under the coram nobis analysis.

her third, fourth, or fifth crime because subsequent offender statutes represent significant collateral consequences. *Skok*, 361 Md. at 77. Whatever else we might say about such a petitioner, we can't say that she has rehabilitated herself or learned from her mistakes. She keeps committing crimes. A petitioner who only demonstrates collateral consequences of a purely economic nature, as opposed to consequences stemming from a subsequent criminal act, has rehabilitated herself and has learned from her mistakes. In my view, there can be no comparison about which set of petitioners are more deserving of relief. Of course, every felon knows that there will be some economic consequences to a conviction. But if those consequences are sufficiently sudden and sufficiently severe, I see no reason that the fact they are purely economic should preclude coram nobis relief.

Seventh, I am unimpressed with claims that opening coram nobis relief to petitioners whose only collateral consequences are economic will cause the judiciary to be overrun by petitions. It is only those who have been convicted by an unconstitutional or fundamentally-flawed process that are entitled to coram nobis consideration. *Skok*, 361 Md. at 78. I refuse to be parsimonious with relief for persons to whom the judiciary itself has denied a constitutional conviction.

Eighth, it is persuasive to me (albeit not binding), that when our courts use the same phrase "collateral consequences," in the context of deciding whether an appeal is moot, that bar is exceedingly low. For example, in *Adkins v. State*, the Court of Appeals analyzed the rule that an appeal must present collateral consequences to ensure the appeal is not moot. 324 Md. 641, 643-44 (1991). There, the petitioner appealed a circuit court decision that he violated probation but he finished serving his sentence while his appeal was

pending. *Id.* The Court reasoned that because "not all collateral legal consequences need be concrete, non-speculative, or statutory," that future parole eligibility is a collateral consequence. *Id.* at 654. Similarly, in *Cane v. EZ Rentals*, the Court of Appeals held that the appeal of the circuit court's summary ejectment action in EZ Rental's favor was not rendered moot by Cane's departure from the property. 450 Md. 597, 612 (2016). The Court reasoned that there were collateral consequences of Cane's loss because such decisions affect Cane's future ability to rent a residence. *Id.* I see no reason not to afford the phrase "significant collateral consequences" the same meaning in the coram nobis context.

For these reasons, I think economic consequences are alone sufficient to establish significant collateral consequences for coram nobis.