UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1873

September Term, 2014

ALBA DINAJ

v.

STATE OF MARYLAND

Wright,
Reed,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: November 13, 2015

Alba Dinaj, appellant, pleaded guilty in the Circuit Court for Prince George's County to one count of robbery. The court sentenced appellant to five years, suspending the sentence except for time served, along with three years of probation and restitution. She filed a belated motion for modification, to which the State consented, and on October 30, 2013, the circuit court reduced the sentence to 360 days. On August 21, 2014, appellant filed an Emergency Petition for Writ of Error *Coram Nobis* alleging that her plea was ineffective because it failed to comply with Maryland Rule 4-242. On appeal of the circuit court's denial of her petition, appellant presents one issue for our review:

1. Did the circuit court err in concluding that appellant's guilty plea complied with Maryland Rule 4-242?

For the reasons set forth below, we answer that question in the negative.

FACTUAL AND PROCEDURAL HISTORY

This appeal has its roots in appellant's actions on March 23, 2007. On that occasion, she entered the Bank of America branch located at 9111 Riggs Road in Adelphi, Maryland and slipped the bank teller a note that read "give me all your money, don't tell your manager or I'll shoot you." After the teller handed appellant $2,539.00, she fled the scene on foot. She was later positively identified in a photo array, and, based on that identification and video surveillance footage from the bank, she was apprehended.

On October 12, 2007, appellant pleaded guilty to one count of robbery. A *nolle prosequi* was entered to all other charges including armed robbery, first-degree assault, second-degree assault, and theft. On December 6, 2007, she was sentenced to five years imprisonment, credited with one day of time served, and the remainder of her sentence was

suspended, with three years of supervised probation. She was also ordered to pay $2,200.00 in restitution to Bank of America. In November of 2008, appellant was charged with violating her probation, but the charges were dismissed on the condition that she pay the balance of the restitution owed.

After removal proceedings were initiated against her in the United States Immigration Court, appellant filed an Emergency Motion for Writ of Error *Coram Nobis* on October 15, 2013, seeking an expedited hearing to request the filing of a belated motion for modification of her sentence. Three days later, that motion was granted "by consent," and the sentencing judge reduced her sentence from five years suspended to 360 days suspended with three years of supervised probation, all of which she had completed.

Nevertheless, appellant was detained by immigration authorities under a deportation order. On August 21, 2014, she filed a second Emergency Motion for Writ of Error *Coram Nobis*, which was denied after a hearing the following day. This appeal followed.

DISCUSSION

Adopted from English common law and infrequently employed, a writ of error *coram nobis* was mainly utilized to address factual errors in earlier proceedings. *Ruby v. State*, 353 Md. 100, 104-05 (1999). A writ of error *coram nobis* allowed courts to consider facts that were not presented during trial "which were material to the validity and regularity of the proceedings," and, if known, could have impacted the judgment. *State v. Smith*, 443 Md. 572, 623 (2015) (quoting *Skok v. State*, 361 Md. 52, 68 (2000) (citation omitted)). The scope of *coram nobis* has been expanded to provide "a remedy for a convicted person who is not incarcerated and not on parole or probation, who is suddenly faced with a significant

collateral consequence of his or her conviction, and who can legitimately challenge the conviction on constitutional or fundamental grounds."[1] *Skok*, 361 Md. at 78.

Coram nobis remains, however, an "extraordinary remedy . . . [to be applied] only under circumstances compelling such action to achieve justice." *Id.* at 75 (quoting 3 Wright, Federal Practice and Procedure Criminal § 592 (2d ed. 1982)). For that reason, the Court of Appeals has subjected its use in challenging criminal convictions to several important qualifications:

> (1) 'the grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character,' *Skok*, 361 Md. at 78; (2) the '*coram nobis* petitioner must be suffering or facing significant collateral consequences from the conviction,' *id.* at 79; (3) the claim for which *coram nobis* relief is sought cannot be waived or finally litigated, *id*.; and (4) the petitioner must show prejudice, *Miller v. State*, 196 Md. App. 658, 681 (2010).

Graves v. State, 215 Md. App. 339, 348 (2013) (italics added) (parallel citations omitted). In addition, *coram nobis* is unavailable to challenge a conviction where other remedies, including post-conviction relief, exist.

The State contends that appellant waived her *coram nobis* claim "[b]y failing to seek leave to appeal following her guilty plea[.]" This argument, however, ignores Maryland Code (2001, 2008 Repl. Vol), § 8-401 of the Criminal Procedure Article (C.P. § 8-401),

[1] "A writ of error *coram nobis* remains a civil matter in Maryland, independent of the underlying action from which it arose." *Ruby v. State*, 353 Md. 100, 111 (1999). "[As such,] the filing of [a *coram nobis*] action typically initiates an entirely new action in which the defendant sets forth his or her claims. If the defendant prevails in the civil court where he or she sought collateral relief, that court then issues the writ directing the criminal court pursuant to the terms of the writ." *Id.* at 107. In the present case, the appellant filed her *coram nobis* claims in her criminal case number CT071249X.

which applies retroactively and explicitly states that "[t]he 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*." *See Graves*, 215 Md. App. at 352, *cert. dismissed*, 441 Md. 61 (2014).

The State also argues, citing the waiver provisions of C.P. § 7-106, that "aside from failing to seek leave to appeal, . . . [appellant] failed to seek to withdraw her guilty plea and did not seek post[-]conviction relief in connection with that plea when she had the opportunity to do so." C.P. § 7–106 provides that an error is waived when "in a prior petition under this subtitle" or "in any other proceeding that the petitioner began" she "could have made but intelligently and knowingly failed to make the allegation [of error]." C.P. § 7–106(b). Here, appellant's failure to seek to withdraw her guilty plea, or to seek post-conviction relief, would not constitute a waiver because her failure to do so would not constitute a "prior petition" or "other proceeding that [appellant] began" under C.P. § 7–106. *See Graves*, 215 Md. App. at 352 n.9.

The State further contends that appellant waived her right to a second *coram nobis* claim because she failed to raise the issue now presented, "that her guilty plea was deficient or faulty[,]" during her first *coram nobis* hearing. The State points out that her previous "*Coram Nobis* [petition] was filed . . . just for belated modification . . . argu[ing] that there was a waiver by [appellant for] not filing all allegations deemed non-frivolous." The State relies on C.P. § 7-106(b)(1)(i), which provides that "an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation: . . . in a . . . coram nobis proceeding began by the petitioner."

C.P. § 7-106(b)(2) states that "[w]hen a petitioner could have made an allegation of error at a proceeding set forth in paragraph (1)(i) of . . . subsection [§ 7-106(b)] but did not make an allegation of error, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation." But, a petitioner's failure to make an allegation of error "shall be excused if special circumstances exist." *State v. Gutierrez*, 153 Md. App. 462, 473 (2003) (quoting C.P. § 7-106(b)(1)(ii)(1)). The burden of proving that special circumstances do exist is on the petitioner. *Id.* at 473.

Appellant, in her first "Emergency Motion for Writ of Error *Coram Nobis* and Request for Expedited Hearing on Request to File a Belated Motion for Modification of Sentence," stated that she "could not have knowingly and intelligently entered into a guilty plea because it was not properly explained to her prior to or at the hearing." She also recognized her "risk of being deported from the United States and separated from her two sons who are both United States Citizens and her immediate family members who are all United States Citizens[,]" and acknowledged that she was "under the jurisdiction of Immigration and Customs Enforcement pursuant to a removal order issued by the Department of Homeland Security. . . . and [was being] detained at York County Detention Center . . . ."

In her second *coram nobis* action, appellant advances four different reasons, beyond her initial contention that "it was not properly explained to her prior to or at the hearing[,]" as to why her plea was not knowingly, voluntarily, and intelligently made: (1) the circuit court used an improper standard to assess whether the plea was knowing, voluntary and intelligent; (2) the court failed to inquire whether she understood the elements of robbery;

(3) she was not properly instructed about the collateral consequences of her plea arrangement; and (4) she was not informed that a jury of twelve "peers" would have to reach a unanimous verdict. She also contends that the collateral consequences have changed because, in the first *coram nobis* action "she sought the sentencing reduction to make deportation discretionary, as opposed to mandatory[,]" but now she faces "a certain deportation action." In other words, she sought no more relief than she understood was necessary to avoid certain deportation.

The State further contends that appellant's second *coram nobis* petition was properly denied based on the doctrine of laches. The State argues that laches may be applied "when there is an unnecessary delay in the assertions of one's rights and that the delay results in prejudice to the opposing party." *Liddy v. Lamone*, 398 Md. 233, 244 (2007). The passage of time by itself does not invoke the application of laches. *See Ross v. State Bd. of Elections*, 387 Md. 649, 669-70 (2005). Here, a substantial amount of time has passed, but, the State does not advance any argument of the specific prejudice that it suffered from the delay.

The *coram nobis* court did not expressly address the State's waiver and laches arguments prior to moving directly to the merits of the petition. Doing so would appear to be a rejection of the laches argument, and we understand the court's statement at the hearing that it was "not going to consider the prior motion for Writ of Error *Coram Nobis* and the limits on the relief requested at that time[, because it] . . . accepted counsel's strategy of [not including all the grounds in the first petition] . . . " a finding of special circumstances under C.P. § 7-106(b)(1)(ii).

Appellant argues that the circuit court relied on an improper standard in determining whether her plea was knowingly, voluntarily, and intelligently entered into by failing to look at the totality of the circumstances surrounding her plea agreement. In support, she advances four contentions: (1) in its analysis the circuit court relied on appellant having received a "very good" plea offer in light of the strength of the State's case against her; (2) the court did not inquire whether she understood the elements of robbery, which was the specific crime to which she entered a plea of guilty; (3) she was not properly instructed about the collateral consequences of her plea agreement; and (4) she was not informed that a jury of twelve "peers" would have to reach a unanimous verdict.

Maryland Rule 4-242(c) states in relevant part:

> The court may accept a plea of guilty only after it determines, upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. In addition, before accepting the plea, the court shall comply with section (e) of this Rule.[2]

[2] Rule 4-242(e) states:

> Before the court accepts a plea of guilty, a conditional plea of guilty, or nolo contendere, the court, the State's Attorney, the attorney for the defendant, or any combination thereof shall advise the defendant (1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship and (2) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea. The omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid.

At the hearing on October 12, 2007, the following colloquy between the court and appellant took place:

> THE COURT: Have you had the opportunity to go over the charging document with your lawyer?
>
> APPELLANT: Yes, Your Honor.
>
> THE COURT: And you understand the nature of the charges?
>
> APPELLANT: Yes.
>
> THE COURT: The plea agreement is to the charge of robbery for which the maximum penalty is 15 years. Do you understand that?
>
> APPELLANT: Yes, Your Honor.
>
> ****
>
> THE COURT: Now when you plead guilty, you give up your right to have a trial and you could elect to have a jury trial or a court trial. If you had a court trial, the judge would decide. If you had a jury trial, a jury would sit and listen. You would help to select them and the jury would have to decide whether you were guilty of these offenses. Do you understand that?
>
> APPELLANT: Yes, Your Honor.
>
> THE COURT: When you plead guilty, you're also giving up your right to require the State to prove its case against you beyond a reasonable doubt. You would be able to cross-examine or ask questions of the State's witnesses. You could bring in your own witnesses . . . . If this were a trial you would have the right to testify or you could choose not to testify and if you chose not to testify the court could not infer your involvement. Do you understand all of that?
>
> APPELLANT: Yes, Your Honor.
>
> THE COURT: Are you pleading guilty because you are guilty of this offense?
>
> APPELLANT: Yes, Your Honor.

> THE COURT: Is your mind clear? Do you understand everything that's going on in the courtroom?
>
> APPELLANT: Yes, Your Honor.
>
> THE COURT: Do you understand that if you're on parole or probation and you enter a plea, this could result in a violation of that parole or probation. And if you're not a citizen of the United States and you enter a plea, it could result in deportation or immigration proceedings? Do you understand all of that?
>
> APPELLANT: Yes, Your Honor.
>
> THE COURT: Understanding all of that, is it your right or is it your desire to enter a plea of guilty?
>
> APPELLANT: It's my desire, Your Honor.
>
> ****
>
> THE COURT: Do you have any questions you want to ask me or your lawyer before we proceed with the plea?
>
> APPELLANT: No, Your Honor.
>
> ****
>
> THE COURT: The Court finds there's a factual basis for the plea. It's freely, voluntarily given. The Defendant has knowingly, intelligently waived her rights and I will accept it.

We will address each of appellant's contentions below.

The Circuit Court's Consideration of the Plea Agreement

A determination of the validity of a guilty plea is based on the totality of the circumstances. *State v. Daughtry*, 419 Md. 35, 69 (2011). Courts are not required "to specifically enumerate certain rights, or go through any particular litany," before accepting a guilty plea. *Miller v. State*, 185 Md. App. 293, 301 (2009) (citations omitted). Rather, a

court must determine whether the person entering the plea understands "the nature of the charge and the consequences of the plea." *Daughtry*, 419 Md. at 52.

To be sure, the circuit court did mention its assessment of the plea agreement as "very good" in light of the strength of the State's case against appellant during the plea hearing. But, that was not the ultimate basis for its determination that appellant was pleading voluntarily and that she understood the nature of the charge to which she was pleading and the consequences of the plea. As we see it, the court considered the strength of the State's case and the terms of the the plea agreement as part of the totality of the circumstances.

Nature of the Charges: Robbery

The complexity of the charge to which the guilty plea is entered is relevant in determining whether the person entering a plea did so with an understanding of the nature of the charge and its consequences. *Gross v. State*, 186 Md. App. 320, 342 (2009). As appellant correctly contends, a court may not rely on "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.'" *Daughtry*, 419 Md. at 42. Nevertheless, "the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge . . . [was] explained to the defendant by his own, competent counsel." *Id.* at 59-60 (quoting *Bradshaw v. United States*, 397 U.S. 742, 748 (2011)). In other words, the court has a duty to ensure that an individual understands the nature of the charges and the consequences of the plea agreement but that does not mean that the court has to explain them itself. *See id.* at 52.

As evidenced by the plea colloquy, appellant "had the opportunity to go over the charging document with [her] lawyer;" understood "the nature of the [robbery] charge[]"; understood "the plea agreement [was] to the charge of robbery;" "understood that her plea "could result in deportation or immigration proceedings[;]" and, with that understanding she "desire[d]" to enter the plea of guilty. This was sufficient to support the conclusion that "the defendant [was] pleading voluntarily, with [an] understanding of the nature of the charge and the consequences of the plea," as required by Maryland Rule 4-242(c).

Appellant further contends that her plea was not a knowing, intelligent, and voluntary plea because the court did not discuss the individual elements of the robbery charge during her plea hearing. An admission on the record that she had discussed "the elements of the crime" with her attorney may be sufficient to show that she has entered her plea knowingly, intelligently, and voluntarily, but such an explicit admission is not necessary. *See Gross*, 186 Md. App. at 351. Again, in looking at the totality of the circumstances, the characteristics of the accused, the complexity of the charge, and its factual basis are relevant factors. *See Daughtry*, 419 Md. at 53-54 (citation omitted); *Gross*, 186 Md. App. at 342.

In *State v. Thornton*, 73 Md. App. 247, 254 (1987), this Court determined that a defendant who pleads guilty must simply understand the nature of the charges and that his or her conduct "actually falls within the charge." Appellant answered in the affirmative

when asked if she understood "the nature of the charges" that she faced, and, when asked by the court, she did not have any questions for either the court or her counsel.[3]

At the plea hearing, the State demonstrated that there was a factual basis for the plea by recounting the following:

> [O]n March 23, 2007, the [appellant] entered a [bank] located . . . in Adelphi, Maryland. . . . walked up to a teller and provided a note. . . . that said 'give me all your money, don't tell your manager or I'll shoot you.' . . . [t]hat the teller complied, sounded the alarm, turned over . . . $2,539 in funds . . . to [appellant] who is seated to the left of . . . counsel . . . [and appellant] then proceeded to take the money and fled . . . . Investigation revealed . . . that the individual who did this was [appellant]. A photo spread was arranged and shown to the security guard, . . . who identified [appellant] as the individual who entered the bank, passed the note, took the funds, and fled on foot."

See Rivera v. State, 409 Md. 176, 185-86 (2009) ("[t]he requirement in Maryland for a factual basis for a plea rests on Rule 4–242(c), which, by its terms, recognizes that the factual basis may be derived from the State's Attorney.") (alteration in original) (citations omitted). And, when asked by the court, neither appellant nor her attorney offered any additions or corrections to the State's version of events.

We are not persuaded that the charge of robbery required an in-depth discussion of its elements to ensure that appellant understood what it meant.[4] For a plea to be voluntarily, knowingly and intelligently entered, a person must understand "the nature of the offense

[3] The record contains several reference letters submitted to the Field Office Director of Immigration and Customs Enforcement after the plea hearing that indicate appellant understands the English language and had a 4.0 grade point average while studying at Montgomery College.

[4] "Robbery is the taking and carrying away of property from [someone else] [someone's presence and control], by force or threat of force with the intent to deprive the victim of the property." MJPI-Cr. 4:28 (2005); *see Stebbing v. State*, 299 Md. 331, 351 (1981).

to afford h[er] a basic understanding of its essential substance, rather than of the specific legal components of the offense to which the plea is tendered." *Priet*, 289 Md. at 288. The *Priet* Court stated that "[t]he nature of some crimes is readily understandable from the crime itself[,]" and "an armed robbery charge [is] a simple one."[5] 289 Md. at 288, 291. Here, the charge of robbery to which appellant pleaded guilty is less complex than the charge of armed robbery found to be readily understandable in *Priet*.

Immigration/Deportation Consequences

Courts need not explain every collateral consequence of a plea agreement for it to be valid. *Rivera*, 409 Md. App. at 194. Here, the circuit court satisfied the requirements of Rule 2-424(e) during the plea hearing. The court explained to appellant that if she was not a United States citizen her guilty plea could result in "deportation or immigration proceedings." When asked if she understood, she answered in the affirmative. *See Rivera*, 409 Md. at 181-82, 194 (upholding a plea agreement as valid when defendant acknowledged discussing the "immigration consequences" of a plea with his attorney).

[5] In *State v. Daughtry*, 419 Md. 35, 73 n.19 (2011) the Court, quoting Professor Lefave in Wayne R. LaFave et al., Criminal Procedure § 21.4(c) (3d ed. 2007), explains "that a mere mention of certain crimes on the record may suffice under Rule 4–242(c)'s mandate:"

> Courts have also taken into account whether or not the charge is a self-explanatory legal term or so simple in meaning that it can be expected or assumed that a lay person understands it. On this basis it has been held, for example, that the elements of a conspiracy charge should be explained by the judge to the defendant. By contrast such offenses as escape and altering a check have been deemed sufficiently straightforward that an element-by-element parsing is unnecessary.

And again, when asked if she "[had] any questions [she] want[ed] to ask [the court] or [her] lawyer" before proceeding with the plea, appellant responded that she did not.

Jury Trial

Finally, appellant challenges her plea agreement on the grounds that she "was not informed that a jury of twelve peers would have to reach a unanimous verdict . . ." if the case was tried. Nor, she contends, was she made aware that "the State faces certain hurdles in convicting her of the crime."

Again, we point out that "trial judges need not enumerate certain rights, or go through any particular litany, before accepting a defendant's guilty plea." *Daughtry*, 419 Md. at 51 (internal quotation marks omitted) (citations omitted). In accordance with that principle, there is no "specific in-court litany of advice with respect to the 'unanimity' requirement for the trial court to accept and permit the waiver, . . . of [the] right to a jury trial." *State v. Bell*, 351 Md. 709, 730 (1998). The circuit court informed appellant that, if she decided not to enter a guilty plea, she could elect a jury trial, and that she would help select the jury, which would be required to reach a verdict that she is guilty of the charges against her. She was also informed that the State, had she gone to trial, would have had to prove its case beyond a reasonable doubt. She stated that she understood everything the judge had told her, and that she had spoken to counsel. Accordingly, we are convinced that appellant was sufficiently made aware of the hurdles that the State would have faced in trying to convict her.

CONCLUSION

We acknowledge the difficulties facing appellant if she is deported, and we recognize that the State's Attorney and the circuit court have supported her past efforts to avoid that result. But, whether she is to be deported is not the issue before this Court, nor even one that it can decide. In sum, we agree with the trial court and hold that appellant's guilty plea to the charge of robbery was made knowingly, intelligently, and voluntarily, in compliance with Rule 4-242. Accordingly, the denial of her second petition for writ of error *coram nobis* is affirmed.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.