

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 0312

September Term, 2014

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GERALD HYMAN, JR.

v.

STATE OF MARYLAND

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Kehoe,  
Leahy,  
Zarnoch, Robert A.  
(Retired, Specially Assigned),

JJ.

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Opinion by Kehoe, J.

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Filed: February 22, 2016

\*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.

This appeal arises out of an attempt by Gerald Hyman to obtain a declaratory judgment that he is not required to register as a child sexual offender pursuant to the Maryland sex offender registration act (“MSORA”), codified as Title 11, subtitle 7 of the Criminal Procedure Article (“CP”). The State thought otherwise. The parties filed cross-motions for summary judgment. The Circuit Court for Anne Arundel County granted the State’s motion.

### **Background**

On January 23, 2001, and pursuant to a plea agreement, Appellant pled guilty to one count of third degree sex offense in the Circuit Court for Anne Arundel County. The offense occurred on July 14, 2000. At that time, Maryland law required Appellant to register for life on the Maryland Sex Offender Registry as a child sexual offender. *See* Md. Ann. Code, Art. 27 § 792 (d)(2)(ii)1 (2000 Cum. Supp.).<sup>1</sup>

In 2013, Appellant filed a complaint for declaratory judgment and related relief, asserting that his registration term had been extended retroactively from ten years to life in violation of the ex post facto clause of Article 17 of Maryland's Declaration of Rights. The State filed a motion for summary judgment arguing that his request should be denied because, on the date he committed the crime, Maryland law required convicted child sex

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<sup>1</sup>MSORA was amended in 2010. Appellant is now required to register for 25 years as a tier II sex offender. *See* CP § 11-707(a)(4)(ii) (2014 Supp.). A useful summary of the recent legislative history of MSORA can be found in *Rodriguez v. State*, 221 Md. App. 26, 30–33 (2015).

offenders to register for life. Therefore, reasoned the State, there was no retroactive application of the law.

Appellant then filed an amended complaint for declaratory judgment based on an entirely different legal theory. He asserted that his sex offender registration requirement was imposed as a condition of his probation and limited to three years by the sentencing judge. He sought specific performance of the plea agreement. Alternatively, Appellant asserted that his Sixth Amendment right to effective assistance of counsel was denied because his criminal defense attorney failed to notify him that lifetime sex offender registration was statutorily required for those convicted of a third degree sex offense. Appellant and the State filed cross-motions for summary judgment.

The circuit court granted the State's motion by a written order and opinion. The court concluded that it lacked the legal authority to grant Appellant's request for specific performance of the plea agreement and that a declaratory judgment action was not the appropriate manner to address his claims. The court stated:

Declaratory Judgment is not the proper [remedy] in this case because the sex offender registration law is [a] conviction-based obligation; the Court does not have the authority to change the statute or declare it inapplicable to Plaintiff. Plaintiff cites *Doe*,<sup>[2]</sup> arguing that declaratory judgment is proper for granting specific performance of the plea agreement. However, unlike *Doe*, there is no *ex post facto* application here and instead 2010 amendment to the [Registration Law] is in favor of

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<sup>2</sup>*Doe v. Dep't of Pub. Safety and Corr. Services*, 430 Md. 533 (2013).

Plaintiff [because it decreases] his obligation from lifetime registration to registration for 25 years.

Further, Plaintiff asks the Court to treat the Complaint of Declaratory Judgment as a Petition for Writ of Coram Nobis, however, the Court is unable to grant this request since Declaratory Judgment grants a civil relief in Coram Nobis grants a criminal remedy. The Plaintiff is free to seek a remedy through a petition for Writ of Coram Nobis.

Appellant filed an appeal and presents three issues, which we summarize as follows:

- (1) the circuit court erred when it denied appellant's motion for summary judgment on the basis that appellant could not obtain specific performance of the 2001 plea agreement through a declaratory judgment action;
- (2) appellant was entitled to a judgment requiring the State to specifically perform the 2001 plea agreement and the court erred in denying appellant's motion for summary judgment and this relief; and
- (3) in any event, the circuit court erred in granting the State's motion for summary judgment because there were disputed issues of material fact that barred summary judgment in the State's favor.

We will affirm the judgment of the circuit court.

### **Analysis**

A party is entitled to summary judgment in its favor when “there is no genuine dispute as to any material fact and . . . the [moving] party is entitled to judgment as a matter of law.” *Lightolier v Hoon*, 387 Md. 539, 551 (2005).

Appellant's contentions are based upon what occurred at his guilty plea proceeding. We set out the relevant transcript (emphasis added):

The Court: And do you understand your attorney has discussed your case with the State's attorney and that the State's attorney has agreed to accept a plea of guilty to [the third-degree sex offense] charge?

The Defendant: Yes, sir.

The Court: And do you understand the nature of the charges against you?

The Defendant: Yes, sir.

The Court: And have you discussed those charges with [your counsel]?

The Defendant: Yes, sir.

The Court: And has he explained to you the law that you are accused of violating, the consequences of a plea of guilty and your legal rights?

The Defendant: Yes, sir.

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The Court: Following the acceptance by this court of your guilty plea, the State's attorney recommends that **whatever sentence this Court impose be within the guidelines which, as I understand it, is probation to probation [sic] and that you register as a child sex offender**, you give blood for DNA purposes, . . . no unsupervised visitation with any minor children . . . Is that the recommendations discussed by you with your attorney that you agree to?

[Defense Counsel]: The court's indulgence.

(Pause.)

The Court: What is the answer to my question?

[Defense Counsel]: Thank you, Your Honor. Just briefly, in discussing the contact with the minor children, my client does have three minor children of his own.

[Prosecutor]: We certainly have no objection to him having contact with his own children, Your Honor.

The Court: Okay. Have contact with his own children.

Except for the plea discussion between the State's attorney and your lawyer, had he been promised anything by the State's Atty., the

police, by any agent of the government or by anyone else in authority to persuade you to plead guilty?

The Defendant: No, sir.

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The Court: **And you understand all of the terms that I just discussed with you a few moments ago? Is that right. You understand?**

The Defendant: **Yes, sir.**

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The Court: Have you had adequate time to speak to [defense counsel] about your case, are you satisfied with the services and advice he's given you?

The Defendant: Yes, sir.

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The Court: Well, I will go on with the plea arrangement. It is the judgment and sentence of this Court that you, Gerald Delaney Hyman, Jr., be committed to the custody of the Commission of Correction, to be confined under this jurisdiction for a period of years, that sentence to begin as of today. **The Court will suspend it and place you on three years of supervised probation. As a part of that probation, sir, you are to register as a child sex offender. . . .**

Based on this, appellant makes three intertwined arguments.

First, he argues that the transcript demonstrates that his plea agreement explicitly provided that he was required to register as a sex offender only for the three year period of his probation. From this premise, he argues that his sentence was illegal because it had the effect of requiring him to register for life and that, accordingly, he was entitled to specific performance of the plea agreement. To support this contention, he relies principally upon *Cuffley v. State*, 416 Md. 568 (2010).

Second, he asserts that neither of his lawyers in the criminal proceeding explained to him that he would be required to register as a sex offender at all, much less for the rest of his life. He asserts that their failure to do so violated his Sixth Amendment right to counsel. He contends that the appropriate remedy for this violation is specific enforcement of the plea agreement as he understood it.

Finally, he asserts that the circuit court could grant this relief in a declaratory judgment action. In support of this contention, he cites Judge Harrell’s concurring opinion in *Doe*, 430 Md. at 576–77, and asks us to adopt its reasoning. Appellant’s arguments are not persuasive.

We begin with the premise that “registration remains a collateral consequence of criminal punishment, and thus appellant can seek removal from the sex offender registry only through a civil action for declaratory judgment.” *Rodriguez v. State*, 221 Md. App. 26, 39 (2015) (citing *Sinclair v. State*, 199 Md. App. 130, 137 (2011)).

There is no dispute that when appellant committed his offense and when he was convicted, he was required to register for the remainder of his life. Appellant does not assert that, had he been fully informed of his obligation to register, he would have decided to plead not guilty and stand trial. Moreover, and what is dispositive in this appeal, anything that occurred, or that did not occur, at his guilty plea proceeding could not affect the duration of his obligation to register. This is because, at the time appellant

pled guilty, life-long registration was required by MSORA.<sup>3</sup> Deficiencies in the information conveyed—whether by the court in the guilty plea proceeding or by his counsel prior thereto—regarding registration had no effect on his obligation to register. The sentencing court had absolutely no authority to waive or modify MSORA’s terms. To conclude otherwise would allow a sentencing court to frustrate the important purposes of the statute through inadvertence or oversight at a guilty plea proceeding.<sup>4</sup> We cannot accept such a result.

Appellant also asserts that his Sixth Amendment right to effective assistance of counsel was denied because his defense counsel failed to notify him that lifetime sex offender registration was statutorily required for those convicted of a third degree sex offense. If this was in fact the case, then he can present a colorable argument that he pled guilty without an “understanding of the nature of the charge and the consequences of the plea[.]” Md. Rule 4-242(c). However, appellant does not attack the validity of his conviction in this proceeding and, as both the State and the circuit court have correctly pointed out, he cannot do so in a declaratory judgment action. *See Sinclair*, 199 Md. App. at 136 (A coram nobis action is the proper action to challenge the validity of a

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<sup>3</sup>Under the current version of MSORA, appellant is required to register for 25 years as a tier II sex offender. CP § 11-707(a)(4)(ii).

<sup>4</sup>In contrast, the issue in *Cuffley* was whether the trial court’s exercise of its discretion in sentencing was consistent with Cuffley’s plea agreement. 416 Md. at 573–75.



conviction because of an error of fact or law when the individual “neither confined nor on parole or probation but who suffer[s] significant collateral consequences from [his] conviction[.]” (citing *Skok v. State*, 361 Md. 52, 78 (2000)). Furthermore, the remedy sought by appellant—specific performance of the plea agreement—is not the remedy available when a defendant’s guilty plea is defective; the proper remedy is to vacate the guilty plea. *See Graves v. State*, 215 Md. App. 339, 359 (2013) (when “appellant’s plea was not knowing and voluntary . . . [the] plea must be vacated.”)

In conclusion, the circuit court did not err in granting the State’s motion for summary judgment and denying appellant’s request for a declaratory judgment that he was no longer obligated to register under MSORA. We express no opinion as to whether appellant is entitled to relief if he files a petition for writ of error coram nobis.

**THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.**