UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0712

September Term, 2011

ROBERT D. CANNS

v.

STATE OF MARYLAND

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

JJ.

Per Curiam

Filed: May 25, 2016

In 2010, Robert D. Canns, appellant, filed, in the Circuit Court for Prince George's County, a petition for a writ of error coram nobis in which he challenged the validity of a 2009 guilty plea to possession of marijuana on the grounds that his trial counsel had rendered ineffective assistance of counsel by failing to advise him, a Jamaican native, that the conviction was a deportable offense. The circuit court determined that the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010),[1] was not retroactive and thus the immigration advice Canns's trial counsel provided prior to the plea did not, at that time, constitute ineffective assistance of counsel. From that decision, Canns noted this appeal. For the reasons discussed, we affirm.

BACKGROUND

2009 Criminal Proceedings

On January 12, 2009, a Prince George's County police officer initiated a traffic stop of a vehicle driven by Canns. When the officer approached the vehicle and requested Canns's license and registration, he smelled a strong odor of marijuana. The officer then asked Canns if he could search the vehicle, and, after obtaining Canns's consent, he recovered a plastic bag in the trunk containing what was later determined to be about 1,180

[1]In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Supreme Court held that the Sixth Amendment to the United States Constitution requires an attorney for a criminal defendant to inform a client whether a guilty plea carries a risk of deportation. While acknowledging that immigration law can be complex, the Supreme Court warned that, where "the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." *Id.* at 369. In other words, general advice that a pending charge "may carry a risk of adverse immigration consequences" is acceptable only "[w]hen the law is not succinct and straightforward." *Id.*

grams of marijuana. Canns was thereafter charged with possession of marijuana and possession with intent to distribute marijuana.

Prior to trial, Canns moved to suppress the marijuana recovered from his car on the grounds that it was seized in violation of the Fourth Amendment to the United States Constitution. However, before a hearing could be held on that motion, the State and the defense entered into a plea agreement. Canns agreed to plead guilty to possession of marijuana and the State agreed to *nol pros* the distribution count and recommended a suspended sentence and a three-year term of probation.

In its examination of Canns before accepting the plea, the court engaged in the following exchange with Canns:

> THE COURT: Were you born in the United States?
>
> CANNS: No, I wasn't. [2]
>
> THE COURT: **Any time you enter a plea of guilty, there are possible immigration consequences to that plea**. Based on - - I'm not an immigration judge. I'm sure [your defense counsel] has discussed it with you, and I'm sure you've considered that, **especially when you enter a plea to possession.** But knowing all that, is your desire still to proceed with this plea today?

(Emphasis added.)

[2] The transcript attributes this response to defense counsel, but it is clear from the transcript that the response was made by appellant.

Rather than respond to that question, Canns asked if he could confer with his attorney and the court took a recess. When the proceedings resumed, the following colloquy took place:

> THE COURT: We were talking about the immigration problems.
>
> [DEFENSE COUNSEL]: I advised my client about the consequences. He had some questions about that. Based on his questions, I again met with the State and agreed to refine the plea agreement, if it's all right with the Court. And I know the Court will go along with whatever we agreed with. Instead of three years unsupervised probation, having one year of supervised probation.
>
> * * *
>
> THE COURT: Are you satisfied with that?
>
> CANNS: Yes.
>
> THE COURT: Everybody in agreement with that? Do you wish to go forward with today with this plea?
>
> CANNS: Yes.
>
> THE COURT: **And you had a chance to talk to your attorney about the possible immigration consequences?**
>
> CANNS: Yes.
>
> THE COURT: Do you still wish to go forward?
>
> CANNS: Yes.

(Emphasis added.)

After the State outlined the facts underlying the crimes to which he was pleading guilty, the court found that Canns was entering the plea knowingly and voluntarily. It then found him guilty of possession of marijuana and sentenced him to a one-year term of imprisonment, all but one day of which was suspended, and placed him on supervised probation for one year. Canns did not seek leave to appeal.

Coram Nobis

In September 2010, about sixteen months after entering his plea, Canns filed a petition for a writ of error coram nobis in which he challenged the validity of the guilty plea on the grounds that his trial counsel had not advised him that a conviction for possession of more than 30 grams of marijuana was a deportable offense.[3] He claimed that he only learned of that fact, when he was taken into custody by Immigration and Customs Enforcement ("ICE").[4] Thus, he maintained that his trial attorney had failed to provide him with effective assistance of counsel.

[3] 8 U.S.C. § 1227(a)(2)(B)(i) provides:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country related to a controlled dangerous substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

[4] The U.S. Department of Homeland Security, Bureau of Immigration and Customs Enforcement, initiated removal proceedings on or about October 9, 2009, based on the May 9, 2009, conviction for possession of marijuana.

On March 11 and April 8, 2011, the circuit court held hearings on his coram nobis petition. Canns was not present at the hearing, as he was in ICE's custody in the Worcester County jail. He did, however, submit an affidavit in which he stated that he first learned that there could be immigration consequences when the trial judge mentioned that fact in his examination of Canns before accepting the plea. The plea proceeding was then halted, at his request, so that he could discuss the issue with his trial counsel who ultimately advised him that, if his term of probation was limited to one year or less, that "would eliminate any possible immigration consequences." He also stated that had he known the conviction was a deportable offense, he "would have insisted on proceeding" with the suppression motions and trial.

Jeffrey Harding, Canns's trial counsel, testified that he had planned to litigate the suppression motions, but, when he "pointed out to the prosecutor" that "there was some weakness in the case as far as the suppression motions went," the State agreed to negotiate a plea. Harding had advised Canns, at that time, that he had "about a 50/50 shot of winning the motions."

As to the immigration consequences of a plea, Harding testified as follows:

> [CORAM NOBIS COUNSEL]: Would you tell the Court what occurred during that first break where Mr. Canns asks you questions about the potential immigration consequences?
>
> HARDING: All right. This is to the best of my memory, Judge, and I will offer to the Court that this is one of hundreds that I've handled, and I've racked my brain. I've talked to the lawyer.

My best memory of how this happened is [the trial judge] stated to my client that there are could be possible immigration consequences, as they always do in the plea. My client stopped and - - asked me a question, which I don't remember what it was, but he had a question about the immigration consequences of that.

And based on that question, I did not believe that we were in a position to go forward with the plea until my client had a full understanding of his question. So we took a break. Went in the hallway.

I explained to my client that I'm not an immigration lawyer. However, I do know that there can be consequences if you're not a United States citizen, anywhere from them doing nothing about it all the way to your deportation. So you need to be clear on that.

There was a discussion, and I think my best memory is that it actually came from my client that three year probation, something, anything more than a year would have a negative - - a more negative consequence. In other words, it would have been better for him to just have a year [of probation rather than a three-year term].

* * *

[CORAM NOBIS COUNSEL]: And what did you say [to Canns], if anything, regarding the potential immigration effect of that as it relates to negotiating a probationary period of one year or less?

HARDING: Sure. **What I told him is that I don't directly know the immigration consequences of your plea. I do know it could be anywhere from the immigration not even doing anything all the way up to your deportation.**

I told him that a number of times. But if you're asking me did I specifically say the implication of this plea is you're going to be deported?

[CORAM NOBIS COUNSEL]: Or not.

HARDING: **Or not, the answer - - I mean I don't think I would have known that.**

(Emphasis added.)

As a result of the discussion between Harding and his client, the plea agreement, with the State's consent, was then revised to provide for a one-year term of supervised probation in lieu of a three-year term of unsupervised probation. Harding related that Canns was "very excited about" the plea bargain, because he would not receive any jail time.

The prosecutor, Rashid Mahdi, who handled the case also testified at the coram nobis hearing. He recalled that there "was a lot of marijuana in that car" and that he "did have to plea it down to possession of marijuana" and he "wasn't happy with that" but did so because there was some "problem," which he could not recall, "with the police officers." And he remembered that Canns was "from Jamaica" and defense counsel "did bring up the defendant's origins."

Canns's *coram nobis* counsel contended that trial counsel provided ineffective assistance to Canns in failing to advise Canns that possession of more than 30 grams of marijuana was, in fact, a deportable offense as clearly set forth in the U.S. Code. *See* footnote 3. He further claimed that Canns was prejudiced by counsel's "mis-advice" because, as set forth in his affidavit, had he known that the offense was a deportable one, he would have litigated the suppression motions and gone to trial.

The *coram nobis* court believed trial counsel's testimony that he had informed Canns of his limited knowledge of immigration law and that he had advised Canns that the plea carried a risk of deportation. The court concluded that such advice, given "pre-Padilla," was "perfectly effective assistance of counsel" and, citing decisions of this Court, noted that *Padilla, supra,* had "a prospective application only" and was "not applied to cases that predated that" decision.[5] Accordingly, the court denied the request for coram nobis relief.

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 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 (2000). "[T]he grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character." *Id.*

[5] When the *coram nobis* court ruled on Canns's petition, it relied upon *Miller v. State,* 196 Md. App. 658 (2010), in which this Court held that *Padilla v. Kentucky* did not apply retroactively in Maryland. Shortly thereafter, the Court of Appeals in *Denisyuk v. State,* 422 Md. 462, 482 (2011), held otherwise, stating that "under Maryland jurisprudence, *Padilla* is retroactively applicable to convictions . . . based on guilty pleas that came after the effective date of the 1996 changes to the immigrations laws." Later, the Court of Appeals, without explicitly stating that it was overruling *Denisyuk,* changed course and held that *Padilla* would *not* be applied retroactively in Maryland. *Miller v. State*, 435 Md. 174 (2013).

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.

The *coram nobis* court's determination of "issues of effective assistance of counsel 'is a mixed question of law and fact.'" *State v. Jones*, 138 Md. App. 178, 209 (2001), *aff'd*, 379 Md. 704 (2004). "We 'will not disturb the factual findings [of the *coram nobis* court] unless they are clearly erroneous.'" *Id.* (quoting *Wilson v. State*, 363 Md. 333, 348 (2001)). We, however, "must make an independent analysis to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed." *Id.* (quotation omitted).

Ineffective Assistance of Counsel

"Claims for ineffective assistance of counsel 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) (judgment reversed on other grounds, 136 S.Ct. 2 (2015)). Accordingly, "our analysis is two-fold: we must decide whether counsel rendered constitutionally deficient performance and whether such performance prejudiced the defendant's case." *Id.* (citing *Strickland,* 466 U.S. at 687). "The first prong – constitutional deficiency – is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under

prevailing professional norms.'" *Padilla, supra,* 559 U.S. at 366 (quoting *Strickland,* 466 U.S. at 688).

"In discerning whether performance was deficient, we start with the presumption that counsel 'rendered adequate assistance'" and "our review of counsel's performance is 'highly deferential.'" *Kulbicki, supra,* 440 Md. at 46 (quoting *Bowers v. State*, 302 Md. 416, 421 (1990)). 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).

Analysis

It could have readily been determined by counsel that the crime to which Canns pleaded guilty – possession of more than 30 grams of marijuana – was a deportable offense. *See* 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country related to a controlled dangerous substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."). After the *Padilla* decision, Canns would have had a viable claim that his counsel's advice on the immigration consequence of his plea was too vague. But, because Canns pleaded guilty before that Supreme Court's decision and because it is now settled that *Padilla* does *not* apply retroactively in Maryland (*see footnote 5, supra,* and

Miller v. State, 435 Md. 174 (2013)), the precise issue before us is whether, pre-*Padilla*, Canns's trial counsel was ineffective for not specifically advising him that the crime he was pleading guilty to was, in fact, a deportable offense.[6]

Before Canns entered his guilty plea, the trial court informed him that there were "possible immigration consequences" to the plea, "especially . . . a plea to possession." Following a short recess prompted by that comment, the court asked Canns whether he had discussed the "possible immigration consequences" with his counsel and Canns replied "yes." Canns then informed the court that he still desired to enter the plea.

Trial counsel testified at the *coram nobis* hearing (and his testimony was credited by that court), that he informed Canns that he was not an immigration lawyer and he did not "directly know the immigration consequences" of the offense at hand, but that it "could be anywhere from them doing nothing about it all the way to [his] deportation." In other words, trial counsel conveyed to Canns that the plea could have adverse immigration consequences, and he gave that advice with the caveat that his knowledge of immigration law was quite limited. Hence, although trial counsel did not advise Canns that possession of more than 30 grams of marijuana was, in fact, a deportable offense, he did put Canns on notice that the plea could result in his deportation. Before *Padilla,* such general advice did not constitute ineffective assistance of counsel. *See Chaidez v. United States,* ___ U.S. ___, 133 S.Ct.

[6] The United States Supreme Court has also held that *Padilla* has no retroactive effect. *Chaidez v. United States,* ___ U.S. ___, 133 S.Ct. 1103 (2013).

1103, 1109 (2013) (observing that prior to *Padilla,* "the state and lower federal courts . . . almost unanimously concluded that the Sixth Amendment [did] not require attorneys to inform their clients of a conviction's collateral consequences, including deportation[,]" an issue that remained unsettled until *Padilla*) (citations omitted). *See also Padilla,* 559 U.S. at 375 (Justice Alito, in his opinion concurring with the judgment only, observing that "a criminal defense attorney fails to provide effective assistance of counsel within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), if the attorney *misleads* a noncitizen regarding the removal consequences of a conviction.") (emphasis added). There was no evidence before the *coram nobis* court that Canns was misled by his counsel's advice.

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