

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1165

September Term, 2013

LESTER W. CARTER

v.

STATE OF MARYLAND

Wright,
Reed,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: March 3, 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.

The appellant, Lester W. Carter, was released from incarceration on November 10, 2005, after having served fifteen years for convictions of assault with intent to rape, false imprisonment, and battery. At the heart of this appeal is a *coram nobis* petition the appellant filed approximately seven years after his release and that the circuit court denied. A single question was presented for our review, which we rephrase:¹

1. Did the circuit court err in denying the appellant’s petition for *coram nobis* relief?

For the following reasons, we answer this question in the negative. Therefore, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On May 2, 1991, a jury in the Circuit Court for Prince George’s County found the appellant guilty of assault with intent to rape, false imprisonment, and battery in connection with an incident that occurred on September 17, 1990, involving an eight-year-old girl. On May 30, 1991, the appellant was sentenced to concurrent sentences of incarceration totaling fifteen years.² The post-conviction proceedings that followed are of no moment to the

¹ Appellant presented the following question *verbatim*:

1. Did the Honorable judge err on her opinion and order of the Court on Md. Rule 15-1202(f) Significant Collateral Consequences.

² The specific breakdown of the appellant’s sentence was, as we explained in an unreported opinion on direct appeal from the convictions, “fifteen years’ imprisonment for the assault . . . merged [with] the battery conviction, a concurrent four year sentence for false imprisonment, and three years’ probation to commence upon appellant’s release.” *Carter v. State*, No. 830, Sept. Term, 1991, at 1 (filed March 6, 1992). We affirmed the appellant’s convictions but remanded for resentencing because “the sentencing judge . . . imposed a . . . [probationary term w]ithout suspending any portion of either sentence.” *Id.*

instant appeal.³ The appellant served the duration of his sentence and was released on November 10, 2005.

The appellant did not remain unincarcerated for long, however, as he pled guilty to a charge of robbery on March 16, 2006, and was subsequently sentenced to fifteen years' imprisonment with parole eligibility. On December 17, 2012, while incarcerated at the Maryland Correctional Training Center for the 2006 robbery, the appellant filed a petition for writ of error *coram nobis* in the Circuit Court for Prince George's County.⁴ The Honorable Maureen Lamasney denied the petition without a hearing. She did so in an Opinion and Order dated June 12, 2013, in which she wrote:

[The appellant] requests that the conviction in this case be vacated because of the difficulty of finding employment with a sex offense on his record, his lack of money and of a place to live and the attitude of his family toward him.

Unfortunately, these are consequences faced by all persons released from prison after being convicted of a sexually related offense. They are not the “significant” collateral consequences required by [Md. Rule 15-1202].

Judge Lamasney's Opinion and Order was entered on June 27, 2013, and this timely appeal followed. The appellant remains incarcerated for the robbery conviction.

³ The appellant filed a petition for post-conviction relief on June 21, 1993. That petition was denied following a hearing that took place on December 10, 1993, and on April 4, 1994, we denied the appellant's application for leave to appeal.

⁴ Venue was proper for this filing pursuant to Md. Rule 15-1202(a) (“An action for a writ of error *coram nobis* is commenced by the filing of a petition in the court where the conviction took place. . . .”).

DISCUSSION

I. DENIAL OF THE *CORAM NOBIS* PETITION

A. Parties' Contentions

The appellant argues the circuit court erred in denying his petition, for two primary reasons. First, he asserts the circuit court incorrectly stated that “difficulty finding employment[,] . . . lack of money and of a place to live[,] and the [negative] attitude of his family toward him . . . are consequences faced by *all* persons released from prison after being convicted of a sexually related offense.” (emphasis added). To say that every person released from prison with a sex offense on their record faces the same hardships is, according to the appellant, an oversimplification that requires the circuit court’s judgment be reversed.

Second, the appellant contends the circuit court erred in finding that the collateral consequences he cited⁵ are not “significant” under Md. Rule 15-1202. He cites to

⁵ In his petition for writ of error *coram nobis*, the appellant cited the following as significant collateral consequences:

1. Having been “beat up on [the assault with intent to rape] conviction” while incarcerated for it in the Eastern Correctional Institution on December 28, 1992;
2. His inability to become eligible for work release from the Maryland Correctional Training Center, where he is currently incarcerated for a 2006 robbery conviction, with a sexual offense on his record;
3. That he was released from incarceration on November 10, 2005, with “only fifty dollars and nowhere to live”; and
4. That he “[c]ouldn’t even get a job at a fast food or [other] restaurant because of this assault with intent to rape conviction.”

§ 12.08.01.21 of the Code of Maryland Regulations (COMAR), which, in relevant part, states:

A. When feasible, parole plans should be completed and submitted before the parole hearing, as parole is conditioned upon an adequate release plan.

B. Elements in a Release Plan.

(1) Evidence shall be furnished to the Commission that the prospective parolee will be legitimately employed following his release. The employment requirement may be waived by the Commission where circumstances warrant a waiver.

* * *

(3) Parolees shall be allowed, in the discretion of the Commission, to return to their homes, or to go elsewhere, upon such terms and conditions as the Commission shall prescribe. . . .

The appellant argues that he cannot satisfy the elements in COMAR §§ 12.08.01.21(B)(1) and (3), *supra*, and thus cannot make parole, so long as the assault with intent to rape conviction remains on his criminal record. Specifically, he asserts that because it would be difficult to obtain employment and impossible to live in Section 8 housing with a sexual offense on his record, he cannot make the requisite showings that he “will be legitimately employed following his release,” *Id.* at § 12.08.01.21(B)(1), and able to “return to [his] home[.]” *Id.* at § 12.08.01.21(B)(3). Therefore, he contends the assault with intent to rape conviction is presently crippling his ability to make parole, which is a significant collateral consequence entitling him to *coram nobis* relief.

The State argues that “difficulty of finding employment with a sex offense on his record, his lack of money and of a place to live and the attitude of his family toward him” are not significant collateral consequences entitling the appellant to *coram nobis* relief. Therefore, the State asserts the judgment of the circuit court should be affirmed for the very reasons stated in the June 12, 2013, Opinion and Order.

The State further contends that even if the circuit court was incorrect in finding that the appellant is not facing any “significant” collateral consequences as a result of his assault with intent to rape conviction, the judgment should nonetheless be affirmed because “[the appellant] waived the belatedly claimed trial court errors upon which he predicated his *coram nobis* petition.” The State’s waiver argument is based on its contention that “[i]n his direct appeal, [the appellant] did not challenge the evidentiary matters on which he was predicating his claim for *coram nobis* relief.”

Finally, the State asserts that “inasmuch as [the appellant] waited more than twenty years to seek *coram nobis* relief, his petition was properly rejected on grounds of laches.”

B. Standard of Review

We recently outlined as follows the standard of review applicable to a circuit court’s decision to grant or deny a petition for writ of error *coram nobis*:

The writ of error *coram nobis* is an “equitable action originating in common law” whereby a petitioner seeks to collaterally challenge a conviction, frequently many years 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, 78–79 (2000). “[T]he grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character.” *Id.* at 78. 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. Because it is an “extraordinary remedy” to be granted only “under compelling circumstances,” we review the circuit court’s decision to grant or deny *coram nobis* relief under the abuse of discretion standard. *Coleman*, 219 Md. App. at 353–354.

Lombardos v. State, No. 1338 Sept. Term 2012, 2015 WL 7356491, at 5 (Md. Ct. Spec. App. Nov. 19, 2015).

C. Analysis

We shall hold that the circuit court was correct in its finding that the appellant is not entitled to *coram nobis* relief because he is not facing significant collateral consequences as a result of his assault with intent to rape conviction. We explain.

For a convicted person to be entitled to *coram nobis* relief, he or she must be “[neither] incarcerated . . . [nor] on parole or probation,⁶ . . . suddenly faced with a significant collateral consequence of his or her conviction, and . . . legitimately [able to] challenge the conviction on constitutional or fundamental grounds.” *Skok*, 361 Md. at 78 (footnote not in original). The appellant satisfies the first element of this test because, as the State recognizes in a footnote in its brief, “[t]he *coram nobis* court found that [the

⁶ This element strictly relates to incarceration, parole, or probation that is part of the sentence for the conviction being challenged. Therefore, the fact that the appellant is currently incarcerated for his 2006 robbery conviction does not affect whether he is entitled to *coram nobis* relief from his assault with intent to rape conviction.

appellant] ‘is no longer serving any portion of [the sentence he received for assault with intent to rape conviction] and is incarcerated on an unrelated offense.’” As for the third element, it was not addressed in the circuit court’s Opinion and Order because the court found that the appellant failed to show he is facing significant collateral consequences as a result of having a sexual offense on his record. Because it is our holding that the circuit court was correct with regards to the appellant’s failure to satisfy the significant collateral consequences element, we also need not address whether his assault with intent to rape conviction was the result of an “error[] of a constitutional or fundamental nature.”⁷ *Skok*, 361 Md. at 77.

We have explained that “in order to be entitled to *coram nobis* relief, the petitioner must prove that he or she is ‘suffering or facing significant collateral consequences from the conviction’ from which he seeks relief.” *Graves v. State*, 215 Md. App. 339, 353, *cert. granted*, 437 Md. 637, (2014) *and appeal dismissed*, 441 Md. 61 (2014) (quoting *Gross v. State*, 186 Md. App. 320, 332, *cert. denied*, 410 Md. 560 (2009)). Significance is not, however, the only requirement for the collateral consequences faced by a *coram nobis* petitioner. In addition to being significant, “[t]he collateral consequences must be actual, not merely theoretical.” *Graves*, 215 Md. App. at 353. Because none of the collateral consequences cited by the appellant are both significant and actual, the appellant is not

⁷ Because the three elements for *coram nobis* relief are mutually dependent, a convicted person’s failure to prove one element destroys his or her ability to obtain such relief.

entitled to *coram nobis* relief. We now address each consequence cited by the appellant in turn.

The first collateral consequence cited by the appellant in his *coram nobis* petition is an incident that occurred on December 28, 1992, in which he was beaten up in prison based on the assault with intent to rape conviction. This is not the type of collateral consequence that would entitle a convicted individual to *coram nobis* relief. The incident in which the appellant was allegedly beaten up occurred less than a year after he was convicted of assault with intent to rape and while he was still incarcerated for that conviction. The significant collateral consequences entitling someone to *coram nobis* relief, on the other hand, must be faced after that person is no longer incarcerated or on parole or probation for the challenged conviction. Because the appellant is no longer facing the consequence of the incident that allegedly occurred on December 28, 1992, it does not entitle him to *coram nobis* relief.

The appellant also cites the fact that he was released from incarceration on November 10, 2015, with “only fifty dollars and nowhere to live,” the difficulty he experienced upon his release obtaining employment with a sexual offense on his record, and animosity of some of his family members toward him as significant collateral consequences of his assault with intent to rape conviction. However, just like the incident that occurred on December 28, 1992, these collateral consequences do not entitle the appellant to *coram nobis* relief because none of them qualify as “significant.”

In *U.S. v. Bush*, 888 F.2d 1145 (7th Cir. 1989), the United States Court of Appeals for the Seventh Circuit took up the issue of whether difficulty obtaining employment and/or reputational harm entitle petitioners to *coram nobis* relief. That Court held:

Bush is under no legal disability of which a court may relieve him. Any obstacle in the path of his preferred career is of private origin. Although the conviction injures his reputation, which in turn reduces his prospects for high-profile employment, the *facts* would remain no matter what a court did. Bush concealed his ownership; Mayor Daley fired him; he was convicted under the law in force at the time (and in force again today). A writ of error *coram nobis* does not rewrite history, could not alter circumstances suggesting to prospective employers that Bush is untrustworthy (or can be embarrassed by his past). Although a court could vacate the judgment of conviction, which might affect the probability that some employers would engage him, it could not absolve Bush of the charge of crime. To say that the jury did not necessarily conclude that in 1973 Bush committed the crime of mail fraud (as the Supreme Court understood that crime in 1987) is not to say that Bush did not commit mail fraud or some other crime in 1973 by concealing his ownership. *Coram nobis* cannot vindicate a defendant; it can only correct the record books.

Difficulty in obtaining a desirable job is not a legal disability. When taking a guilty plea, the judge does not advise the defendant that among the consequences of the plea is reduced esteem in the eyes of the community, with effects on one's career.

Id. at 11149. In accord with the Seventh Circuit's decision, we hold that difficulty finding employment and a place to live and animosity of a *coram nobis* petitioner's family toward him are not "significant" collateral consequences entitling him to relief.⁸

⁸ The State points out in a footnote in its brief that "[a]lthough [the appellant] repeats . . . his complaint of [difficulty finding employment and a place to live] . . . 'and no family members waiting for him outside the prison gate,' his brief reflects that he currently resides at the Maryland Correctional Training Center." We acknowledge the (continued...)

The final collateral consequence the appellant cites as significant and entitling him to *coram nobis* relief from his assault with intent to rape conviction is his inability to make parole from his 2006 robbery conviction. Again, we disagree. It is possible that the appellant’s inability to make parole is entirely unrelated to his assault with intent to rape conviction, and therefore it does not satisfy the requirement that “[t]he collateral consequence[] must be actual, not merely theoretical.” *Graves*, 215 Md. App. at 353.

In support of his argument that his inability to make parole is a collateral consequence of his assault with intent to rape conviction, the appellant cites COMAR § 12.08.01.21(B)(3). He understands the language “to return to their homes” in that section to be a prerequisite to parole eligibility, but this understanding is misguided. That section, in its entirety, states:

B. Elements in a Release Plan.

* * *

(3) Parolees should be allowed, in the discretion of the Commission, to return to their homes, or to go elsewhere, upon such terms and conditions as the Commission shall prescribe.”

Clearly, the fact that the appellant could not live in Section 8 housing with a sexual offense on his record did not disqualify him under COMAR § 12.08.01.21(B)(3) from making parole. Section 12.08.01.21(B) does not contain a list of requirements for potential parolees

State’s point, which is that the appellant is not currently facing the consequences of difficulty finding employment and a place to live because he is presently incarcerated. However, it is our holding that even if he were not presently in incarceration, those collateral consequences would not entitle him to *coram nobis* relief.

to satisfy; instead, it simply outlines the information that should be included in parole release plans, which “should be completed and submitted before the parole hearing, as parole is conditioned on an adequate release plan.” COMAR § 12.08.01.21(A).

The appellant confuses COMAR § 12.08.01.21(B) with COMAR § 12.08.01.18, which states:

A. Consideration for Parole–General.

(1) The Commission shall have the exclusive power of parole release. In determining whether a prisoner is suitable for release on parole, the Commission considers:

- (a) The circumstances surrounding the crime;
- (b) The physical, mental, and moral qualifications of persons who become eligible for parole;
- (c) Whether there is reasonable probability that the prisoner, if released on parole, will remain at liberty without violating the laws; and
- (d) Whether the release of the prisoner on parole is compatible with the welfare of society.

(2) The Commission also considers the following criteria:

- (a) Whether there is substantial risk the individual will not conform to the conditions of parole;
- (b) Whether release at the time would depreciate the seriousness of the individual's crime or promote disrespect for the law;

(c) Whether the individual's release would have an adverse affect on institutional discipline;

(d) Whether the individual's continued incarceration will substantially enhance his ability to lead a law abiding life when released at a later date.

(3) To make these determinations the Commission examines:

(a) The offender's prior criminal and juvenile record and his response to prior incarceration, parole or probation, or both;

(b) The offender's behavior and adjustment and his participation in institutional and self-help programs;

(c) The offender's vocational, educational, and other training;

(d) The offender's current attitude toward society, discipline, and other authority, etc.;

(e) The offender's past use of narcotics, alcohol, or dangerous controlled substances;

(f) Whether the offender has demonstrated emotional maturity and insight into his problems;

(g) Any reports or recommendations made by the sentencing judge, the institutional staff, or by a professional consultant such as a physician, psychologist, or psychiatrist;

(h) The offender's employment plans, his occupational skills, and his job potential;

(i) The offender's family status and stability;

(j) The offender's ability and readiness to assume obligations and undertake responsibilities;

(k) The adequacy of the offender's parole plan and the availability of resources to assist him;

(l) Any other factors or information which the Commission may find relevant to the individual offender's consideration for parole.

Thus, the Parole Commission takes many factors into consideration when making determinations regarding “whether a prisoner is suitable for release on parole,” *Id.* at (A)(1), and the record is devoid of any evidence that the Commission’s decision to not release the appellant on parole was motivated by his assault with intent to rape conviction. Therefore, the fact that the appellant has yet to make parole from his 2006 robbery conviction falls under the category of consequences of his assault with intent to rape conviction that are “merely theoretical.”

For the reasons stated above, we hold that the circuit court was correct in its finding that the consequences cited by the appellant “are not the ‘significant’ collateral consequences required by [Md. Rule 15-1202].” As such, we hereby affirm the judgment of the circuit court.

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