UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2354

September Term, 2014

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DANIEL ANDERSON

v.

STATE OF MARYLAND

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Wright,
Graeff,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

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Opinion by Graeff, J.

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Filed: May 25, 2016

On July 29, 2003, Daniel Anderson, appellant, pleaded guilty to unlawful possession of cocaine in the Circuit Court for Baltimore City. On February 25, 2014, appellant filed a petition for writ of error coram nobis, which he amended on May 9, 2014, arguing that he received ineffective assistance of counsel, and the State had insufficient evidence to support a conviction. On June 4, 2014, the circuit court denied appellant's petition**.**

On appeal, appellant presents the following questions for this Court's review, which we have consolidated and rephrased as follows:

1. Did the circuit court err in denying appellant relief on the ground that he received ineffective assistance of counsel?

2. Did the circuit court err in denying appellant relief on the ground that appellant's guilty plea was invalid because there was insufficient evidence proffered by the State to support a conviction?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

On July 29, 2003, appellant pleaded guilty in the Circuit Court for Baltimore City to one count of unlawful possession of cocaine. In exchange for the plea, appellant received a sentence of time served.

The court conducted an on-the-record colloquy to ensure that appellant's plea was entered knowingly and voluntarily. Appellant indicated that he understood his rights, was satisfied with his attorneys, and understood the charges against him and the potential penalties that could be imposed. He understood that he was on probation in another criminal case and that pleading guilty could constitute a violation of that probation and result in the imposition of suspended sentences. When the court asked appellant about his

citizenship, appellant stated that he was not born in the United States. Neither appellant nor defense counsel responded definitively to the court's follow-up inquiry regarding whether appellant was a citizen of the United States or subject to deportation if convicted. The following then occurred:

> [PROSECUTOR]: Your Honor, this issue came up previously when he was in front of Judge Heard for arraignment. The Defense Attorney was supposed to look into it. He does have a prior conviction for attempted distribution, CDS possession. He has not been deported, based upon that.
>
> THE COURT: Mr. Anderson, I'm not sure what your status is as to convictions in this case. It's possible. It's possible that because you're not a natural born, or naturalized American citizen, it's possible that you could be deported back to Jamaica. Do you understand that?
>
> DEFENDANT ANDERSON: Yes, sir.
>
> THE COURT: Understanding that, sir, do you still wish to continue with your guilty plea here today?
>
> DEFENDANT ANDERSON: Yes, sir.
>
> THE COURT: Thank you. Gentlemen, do you have any questions of either the Court or your lawyer in reference to your proceedings today, Mr. Anderson?
>
> DEFENDANT ANDERSON: (Inaudible response.)
>
> * * *
>
> THE COURT: Do you still wish the Court to accept your plea of guilty here today, Mr. Anderson?
>
> DEFENDANT ANDERSON: Yes, sir.

The court found that appellant's plea was entered freely, voluntarily, knowingly, and intelligently, and it accepted his plea of guilty.

The prosecutor then provided a proffer of the evidence that the State would have presented had the case gone to trial:

> On October the 4th, 2002, at approximately 4:15 p.m., officers executed a search and seizure warrant at 229 South Fulton Street. Upon their arrival, the Defendant would be identified as seated to my right, was sitting on the steps of 229 South Fulton with Dwayne Cornwall (phonetic). The officers entered the home and located the Co-Defendant, Christophers, standing in the living room. Recovered from the third floor, front bedroom, was a jacket with eight white-top vials of suspected cocaine. Third floor, rear bedroom, one gelatin capsule of heroin, a pair of pants with one white-top vial of cocaine and personal papers in the name of the Defendant. In the basement was one red-top vial of cocaine. In the kitchen, an electronic scale and packaging. All individuals were arrested. The search incident to arrest. Recovered from the Defendant was $30. Co-Defendant Christophers had $93. Both of these individuals used 229 South Fulton Street as their home address. Suspected CDS was submitted for analysis. The vials tested positive for cocaine, Schedule II, gelatin capsule tested positive for heroin, Schedule I.
>
> After reviewed by Defense Counsel, the State would offer State's Exhibit No. 1, the chemical analysis. All events occurred in the City of Baltimore, State of Maryland, Your Honor. And that would be the facts in support of the plea.

Defense counsel offered no objection, corrections, or modifications. The court then found, beyond a reasonable doubt, that appellant was guilty of the offense charged, and pursuant to a plea agreement, it sentenced appellant to time served, plus court costs. Appellant claims that he currently is involved in removal proceedings.

On February 25, 2014, appellant filed a petition for writ of error coram nobis, and on May 9, 2014, he filed an amended petition. On June 4, 2014, the circuit court denied appellant's petition.

In denying the petition, the court first addressed appellant's claim of "ineffective assistance of counsel, under the Supreme Court's analysis in *Strickland v. Washington*, 466 U.S. 668 (1984)," which sets forth the standard for an ineffective assistance of counsel claim, "and by extension, *Padilla v. Kentucky*, 559 U.S. 356 (2010)," in which the Supreme Court held that an attorney is deficient if he or she fails to advise a client of possible deportation consequences attendant to pleading guilty to a criminal offense. The court found that, under the deficiency prong of the *Strickland* test, "counsel failed to properly advise [appellant] of the immigration consequences of his guilty plea," and therefore, appellant's "defense counsel performed deficiently under the first prong of *Strickland*, in accordance with the Supreme Court's analysis and holding in *Padilla*." The circuit court found, however, that appellant's claim failed to satisfy the second prong of the *Strickland* test because he was not prejudiced by his counsel's failure to advise him. Noting that appellant "*was* in fact advised that he could be deported as a result of entering a guilty plea; albeit by the court and not by counsel," the court found that appellant "nevertheless desired to proceed" with the plea.

The circuit court also rejected appellant's claim that the evidence that was proffered by the State at the plea hearing was insufficient to support a conviction because there was an insufficient nexus between him and the premises. Noting that the State proffered that "the [appellant] used 229 South Fulton Street as his home address," the court found that the evidence was sufficient to show that appellant was in constructive possession of the drugs recovered from 229 South Fulton Street.

## DISCUSSION

### I.

### Timeliness of Appeal

The State initially suggests that appellant's notice of appeal "may not have been" filed timely, and if so, it is subject to dismissal. Although not couched as a motion to dismiss the appeal, we will address the timeliness issue.

The docket entries in this case indicate that the circuit court's order, constituting the final judgment on appellant's coram nobis claims, was entered onto the docket on June 5, 2014. A subsequent docket entry indicates that the case was closed by the clerk on that date. The next docket entry, dated December 24, 2014, indicates that a notice of appeal was filed. A notation following that entry states that a motion to file a belated appeal was filed by appellant's counsel and the original notice of appeal was filed on July 3, 2014, but "due to Clerk's error it was not processed."[1]

Under these circumstances, the notice of appeal was timely filed. Maryland Rule 8-202(a) states, in pertinent part, as follows: "Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." Thus, appellant had 30 days from June 5, 2014, the date that the clerk entered judgment onto the docket, to file an appeal.

[1] The record supports this notation. The Motion to File Belated Appeal asserted that appellant's original motion was timely filed, and it was due to an error of the clerk's office that it was not entered onto the docket until months later. Attached to that motion was a copy of appellant's original notice of appeal, which bore a date-stamp of July 3, 2014.

As the Maryland appellate courts have made clear, a pleading or paper is "filed" on the date that the clerk receives it. *Molé v. Jutton*, 381 Md. 27, 34 (2004); *Bond v. Slavin*, 157 Md. App. 340, 351 (2004). "A pleading or paper is filed by *actual delivery* to the clerk." *Bond*, 157 Md. App. at 351.

Here, the record is clear that appellant delivered to the clerk of the circuit court a copy of his notice of appeal on July 3, 2014, which was within the 30 day window. That the clerk failed to enter it onto the docket until several months later is of no consequence; we are concerned only with the date of delivery of the notice. Accordingly, appellant's notice of appeal was timely filed, and we will proceed to the merits of his claims.

## II.

## Writ of Coram Nobis

The Court of Appeals recently explained that "[c]oram nobis is extraordinary relief designed to relieve a petitioner of substantial collateral consequences outside of a sentence of incarceration or probation where no other remedy exists." *State v. Smith*, 443 Md. 572, 623 (2015). To be eligible for coram nobis relief, however, several requirements must be met:

> (1) "the grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character" . . . ; (2) "a presumption of regularity attaches to the criminal case, and the burden of proof is on the coram nobis petitioner" . . . ; (3) "the coram nobis petitioner must be suffering or facing significant collateral consequences from the conviction" . . . ; (4) the issue raised in a coram nobis action must not be waived or finally litigated . . . ; and (5) there must not be another statutory or common law remedy available."

*Id*. at 623-24 (quoting *Skok v. State*, 361 Md. 52, 78-80 (2000)).

Appellant raises two issues in support of his coram nobis petition. First, he argues that he received ineffective assistance of counsel. Second, he asserts that his plea was invalid because there was an insufficient factual basis to support a conviction. We will address each ground, in turn.

## III.

## Ineffective Assistance of Counsel

Appellant argues that he received ineffective assistance of counsel because his counsel failed to properly advise him that he could be deported as a result of his guilty plea. To prevail on a claim of ineffective assistance of counsel, a defendant must show:

> (1) that counsel's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different, i.e., a probability sufficient to undermine confidence in the outcome.

*State v. Adams*, 406 Md. 240, 293 (2008) (quoting *State v. Borchardt*, 396 Md. 586, 602 (2007)), *cert. denied*, 556 S. Ct. 1133 (2009). *Accord Strickland*, 466 U.S. at 687. The defense must show both deficient performance and prejudice as a result of counsel's deficient performance. *See In re Parris W.*, 363 Md. 717, 725 (2001) (both prongs of the test must be shown to establish ineffective assistance of counsel).

Here, appellant contends that, pursuant to *Padilla*, *supra*, and *Denisyuk v. State*, 422 Md. 462 (2011), counsel was obligated to inform him of deportation consequences, but at "no time was [he] ever advised that a conviction would make him automatically deportable." He asserts that, "as a result of defense counsel's errors, [he] pleaded guilty

and proceeded on the statement of facts waiving his trial rights, not knowing that he was automatically deportable."

The State argues that appellant's counsel was not deficient under the first prong of the *Strickland* test because subsequent case law has clearly established that the rule enunciated in *Padilla* should not be applied retroactively to any case decided prior to that decision. *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013); *Miller v. State*, 435 Md. 174, 192 (2013). It contends, therefore, that the coram nobis court erred in finding that appellant satisfied the first *Strickland* prong. In any event, the State argues, appellant's claim still fails on the prejudice prong of the *Strickland* test because the record clearly demonstrates that, before the circuit court accepted his guilty plea, the judge advised appellant that he could be deported as a consequence of his plea, and he still proceeded to plead guilty.

In *Padilla*, 559 U.S. at 360, the Supreme Court held that "constitutionally competent counsel" was required to advise Mr. Padilla that his conviction for drug distribution would subject him to automatic deportation. In determining whether advice regarding immigration consequences of a guilty plea was within the ambit of effective assistance of counsel, the Court held that, due to the high stakes and "unique nature of deportation," the test for ineffective assistance of counsel set forth in *Strickland*, is applicable to advice regarding deportation. *Padilla*, 559 U.S. at 365-66. With respect to the first prong in *Strickland*, 466 U.S. at 689, whether counsel's representation "fell below an objective standard of reasonableness," the Court determined that, where the deportation

consequences of Mr. Padilla's guilty plea were clear based on the language of the relevant immigration statute, this first prong was met. *Padilla*, 559 U.S. at 368-69. The Court left the determination regarding *Strickland*'s second prong, prejudice to the defendant, to the state court. *Id*. at 369.

In *Denisyuk*, the Court of Appeals first considered whether the decision in *Padilla* applied retroactively. It examined numerous state and federal appellate decisions addressing this issue, and it determined that the decisions favoring retroactive application "represent the better reasoned view," 422 Md. at 479, stating that "*Padilla* is an application of *Strickland* to a specific set of facts."[2] *Id*. at 479, 481.

In *Chaidez*, 133 S. Ct. at 1105, however, the Supreme Court held that "*Padilla* does not have retroactive effect." It noted that "'a case announces a new rule,'" and is effective prospectively only, "'when it breaks new ground or imposes a new obligation' on the government." *Id*. at 1107 (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)). When, on the other hand, the Court merely applies "a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes." *Id*.

[2] In *Denisyuk v. State*, 422 Md. 462, 481, 483-84 (2011), the Court of Appeals cited the Supreme Court's comment in *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) that, "'[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea,'" identifying the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (effective April 1, 1997), as the point at which "the prevailing professional norms dictated that defense counsel advise their clients of the immigration consequences of the plea."

The Court explained that, in *Padilla*, rather than addressing how *Strickland* applied to a particular set of facts, the Court began its analysis by addressing "*whether* the *Strickland* test applied ('Should we even evaluate if this attorney acted unreasonably?')." *Id*. at 1108. The Court determined that, because the latter question came to it unsettled, its answer, that *Strickland* applied, constituted a new rule. *Id*.

In support of its determination that its holding in *Padilla* created a new rule, the Court noted that all 10 federal appellate courts to consider the question posed in *Padilla*, as well as approximately 30 state courts, had determined that counsel's failure to inform a defendant of the deportation consequences of a guilty plea was not a violation of the Sixth Amendment. *Id*. at 1109. Accordingly, in deciding *Padilla*, the Court "altered the law of most jurisdictions." *Id*. at 1110. The Court determined that "*Padilla*'s holding that the failure to advise about a non-criminal consequence could violate the Sixth Amendment would not have been–in fact, was not–'apparent to all reasonable jurists' prior to [its] decision," and thus, *Padilla* announced a new rule. *Id*. at 1111 (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)). Accordingly, the Court held that, "[u]nder *Teague*, defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding." *Id*. at 1113.

In *Miller*, the Court of Appeals revisited the issue of retroactivity, and it found *Chaidez* to be controlling. It stated that it could not "create a federal remedy denied by the Supreme Court," 435 Md. at 201, and in the absence of support from the Supreme Court for the retroactivity of Miller's alleged federal constitutional violations, his claims could

"only be redressed were we to find independent state bases for so doing," which the Court did not. *Id.* at 197. It explained:

> The issue before us in the instant case, thus, becomes whether Miller's claims of involuntariness or ineffective assistance of counsel resulting from his failure to be advised of the adverse immigration consequences of his plea had independent state bases in Maryland in 1999. When queried on this point at oral argument, Miller's counsel could not identify any such state bases for affording Miller relief, because there are none.

*Id.* at 198.

Specifically, in finding that no state basis existed in support of Miller's claim for involuntariness or ineffective assistance of counsel, the Court noted that it "had consistently recognized ineffective assistance of counsel claims prior to 1999 as governed by the Sixth Amendment rather than Article 21 and had never 'offer[ed] a plain statement that [our] references to federal law were 'being used only for the purpose of guidance, and did not themselves compel the result . . . reached.'" *Id*. (quoting *Arizona v. Evans*, 514 U.S. 1, 10 (1995)). Rather, the Court had "flatly stated that, '[t]here is no distinction between the right to counsel guaranteed by the Sixth Amendment and Art. 21 of the Maryland Declaration of Rights.'" *Id*. at 199 (quoting *State v. Tichnell*, 306 Md. 428, 440 (1986)).

This analysis is dispositive of the instant case. We agree with the State that appellant's claims of ineffective assistance of counsel are foreclosed by *Miller*.[3] He is not entitled to coram nobis relief in this regard.

## IV.

## Sufficiency of the Evidence to Support a Conviction

Appellant next argues that there was not a sufficient factual basis to support his plea. He asserts, as he did below, that the State's proffer failed to show a sufficient connection between him and 229 South Fulton Street to support a theory of constructive possession of the drugs recovered from that location.

Maryland Rule 4-242(c) provides:

> (c) **Plea of Guilty.** The court may not accept a plea of guilty, including a conditional plea of guilty, until after 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, the court determines and announces on the record 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 (f) of this Rule. The court may accept the plea of guilty even though the defendant does not admit guilt. Upon refusal to accept a plea of guilty, the court shall enter a plea of not guilty.

The Court of Appeals has explained that the purpose of the factual basis requirement "is to ensure that the accused is not convicted of a crime that he or she did not commit."

[3] We further agree with the circuit court that appellant could not satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984) because the court advised appellant that it was possible that his plea could result in his being deported, appellant stated that he understood that, and he proceeded with the plea.

*Rivera v. State*, 409 Md. 176, 194 (2009). Similarly, this Court explained in *State v. Thornton*, 73 Md. App. 247, 255 (1987), *cert. denied*, 312 Md. 127 (1988), that the factual basis requirement "'protect[s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" (Quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

Here, we agree with the circuit court that the proffer provided a sufficient factual basis for the plea of guilty to unlawful possession of cocaine. The facts indicated that drugs were found in a place that appellant identified as his home, while appellant was there. Accordingly, there was a sufficient factual basis to conclude that appellant was guilty of the offense charged, even if, as appellant alleges, it was erroneous to refer to the letters found in the residence. The circuit court properly denied appellant's petition for a writ of coram nobis.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**