Circuit Court for Baltimore City
Case No: 802009022

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2160

September Term, 2018

SEAN SCOTT

v.

STATE OF MARYLAND

Friedman,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 1, 2019

Sean Scott appeals the denial, by the Circuit Court for Baltimore City, of his petition for writ of error coram nobis. Because the issue on appeal is waived, we affirm.

BACKGROUND

In 2002, Mr. Scott pleaded guilty to second-degree assault and was sentenced to two years' imprisonment, all but time served suspended, and placed on probation for two years. In 2006, after receiving an enhanced sentence in a federal case based on his status as a "career criminal," Mr. Scott filed a petition for writ of error coram nobis in the circuit court in which he alleged that the trial court erred in accepting his guilty plea because it was not entered knowingly and voluntarily ("Petition I"). He raised four grounds in support of his claim.[1] The coram nobis court ruled that Mr. Scott had waived the right to file the petition because he had failed to file an application for leave to appeal following the entry of the guilty plea and, if not waived, the petition was barred by laches. Nonetheless, the court addressed and rejected Mr. Scott's claim that the plea was not entered knowingly and voluntarily. On appeal, this Court agreed with the circuit court that Mr. Scott had waived the right to seek relief, citing *Holmes v. State*, 401 Md. 429 (2007),[2] and, accordingly, did

[1] As grounds for his claim that his plea was not entered knowingly and voluntarily, Mr. Scott asserted that: 1) he was not advised of the presumption of innocence; 2) he was not advised of his right to counsel "at trial or on appeal"; 3) he was not advised of the nature of the offense to which he was pleading guilty; and 4) his attorney "did not advise him of the rights he would be giving up [by pleading guilty], prior to the on-the-record advisement." He supported the allegations with the transcript from the plea hearing.

[2] In *Holmes*, the Court of Appeals held that a rebuttable presumption arises that a person has waived his or her right to seek coram nobis relief when the person pleads guilty and, at the plea hearing, has been advised of the right to seek an appeal and fails to do so.

not address laches or the circuit court's ruling on the merits of the claim. *Scott v. State,* No. 1211, September Term, 2008 (filed June 30, 2009).

In 2012, Mr. Scott filed a second petition for writ of error coram nobis in which he again alleged that his guilty plea was not entered knowingly and voluntarily ("Petition II"). As grounds, he asserted that there was nothing on the record of the plea hearing to indicate that he had been advised of the nature and elements of second-degree assault and hence, he maintained that the plea was invalid under *State v. Daughtry,* 419 Md. 35 (2011). The court denied relief, without addressing the merits, ruling once again that Mr. Scott had waived his right to file the petition. On appeal, this Court reversed in light of the legislature's enactment in 2012 of Section 8-401 of the Criminal Procedure Article (effectively overruling *Holmes*) which provides: "The 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." Accordingly, this Court remanded the case to the circuit court for further proceedings. *Scott v. State,* No. 1102, September Term, 2013 (filed May 22, 2014).

Upon remand, Mr. Scott filed an amendment to Petition II to include an additional ground in support of his claim that his guilty plea had been entered involuntarily, namely, that the trial judge had improperly asserted himself into the plea negotiations. He cited *Barnes v. State,* 70 Md. App. 694 (1987) as legal authority for his claim. His factual support consisted of the transcript from the plea hearing and his affidavit in which he stated, among other things, that he "sincerely did not wish to plead guilty but did so in light of constant persuasion by the trial court and his defense counsel" and because, during a recess in the proceedings, his attorney informed him that, if he did not plead guilty, "the judge

would be angry and that the State would seek the maximum sentence and the judge would give it to [him]." Mr. Scott did not address why he failed to include this ground in Petition I.

The coram nobis court denied relief, concluding that, "based on the totality of the circumstances," "the plea colloquy sufficiently apprised [Mr. Scott] of the nature and elements" of second-degree assault.[3] The court also concluded that the trial judge did not improperly insert himself into the plea negotiations. Rather, the court found that the "trial judge did not negotiate a plea deal with [Mr. Scott] as seen in *Barnes*, instead the trial judge explained to [him], with the help of his attorney, the risks that could arise if [he] proceeded to trial." Among other things, the court noted that, after the plea offer was discussed with Mr. Scott, the trial court took a recess and following that recess Mr. Scott stated his desire to plead guilty and, in an examination prior to the acceptance of the plea, he clearly indicated that he was entering the plea voluntarily. In short, the coram nobis court found that the matter was akin to that in *Ballentine v. State*, 293 Md. 518 (1982), where the Court of Appeals held that, although it was fair to assume that the trial judge "did participate in the plea bargaining process," *id.* at 524, the judge's comments regarding the much harsher sentence the defendant was facing in the event that he did not plead guilty did not render the plea involuntarily entered where, after hearing those comments, the court recessed and upon resumption of the proceedings the defendant agreed to plea guilty and indicated that it was a free and voluntary decision. *Id.* at 522-23.

[3] Mr. Scott does not challenge that ruling on appeal.

DISCUSSION

On appeal, Mr. Scott contends that the coram nobis court erred in rejecting his allegation that the trial judge had exceeded his role in the plea negotiations, thereby rendering his plea involuntarily entered. As discussed below, we hold that he waived this claim by failing to raise it in Petition I. *See Parker v. State*, 402 Md. 372, 398 (2007) (noting the "well-settled rule of appellate procedure that, on *direct appeal*, an appellate court will ordinarily *affirm* on any ground adequately shown by the record.").

The State asserts that Mr. Scott's claim is barred by the law of the case doctrine because he could have raised the issue "in either of his earlier coram nobis petitions and failed to do so." We disagree that the law of the case doctrine applies because the voluntariness of Mr. Scott's plea was not addressed on appeal. *See Holloway v. State*, 232 Md. Appl. 272, 279, 284 (2017) (Under the law of the case, "once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling." The doctrine also applies to "questions that *could have been raised and decided on appeal*[.]") This Court's decisions in Mr. Scott's first two appeals focused exclusively on Mr. Scott's ability to seek coram nobis relief and did not address his claims. Thus, the law of the case doctrine is inapplicable. Waiver, however, is applicable.

In *Skok v. State*, 361 Md. 52 (2000), the Court of Appeals expanded the scope of the writ of error coram nobis to include challenges to criminal convictions, but set forth certain limitations, including that the issue must not be waived. *Id.* at 79. In *Skok*, and since that decision, the Court has stated that "'[b]asic principles of waiver are applicable to issues raised in coram nobis proceedings'" and "'the same body of law concerning waiver . . . of

an issue, which is applicable under the Maryland Post Conviction Procedure Act . . . shall be applicable to a coram nobis proceeding challenging a criminal conviction.'" *Smith v. State*, 443 Md. 572, 599 (2015) (quoting *Skok*, 361 Md. at 79). Under the Post Conviction Procedure Act, an allegation of error is waived if the petitioner "could have made but intelligently and knowingly failed to make the allegation" in a prior proceeding. Md. Code Ann., Criminal Procedure, § 7-106(b).

In *State v. Syed*, 463 Md. 60, 104 (2019), a post-conviction case, the Court of Appeals noted that, if a petitioner advances a fundamental constitutional claim "but failed to assert all grounds upon which that claim is made, he waived any allegation upon which" the constitutional "claim could have been made but was not." In *Hyman v. State*, ___ Md. ___ No. 18, September Term, 2018 (filed May 20, 2019), the Court of Appeals applied this principle in a coram nobis case. There, the petitioner filed a petition for coram nobis relief in which he alleged that he had received ineffective assistance of counsel during his plea and sentencing hearing and that his guilty plea to third-degree sex offense was not entered voluntarily. The court denied relief. Some years later he filed a second petition for coram nobis relief and again alleged that his trial counsel had provided ineffective assistance and that his plea was not entered voluntarily, and as grounds stated that both claims arose from having been coerced into accepting the plea because his trial counsel had failed to advise him of the actual length of the mandatory sexual offender registration term. *Slip op.* at 9. The coram nobis court denied relief and upon its review, the Court of Appeals held that Hyman had waived the claim. Specifically, the Court noted that, although Hyman had raised claims of ineffective assistance of counsel and an involuntarily entered guilty plea

in his first coram nobis petition, he failed to raise "the *particular consequence* – the duration of his sex offender registration period – that he raises now [in his second petition for coram nobis relief] as the *ground* underlying his two claims, and the question is whether he could have" when he filed the first petition. *Slip op.* at 21 (emphasis in the original). The Court then readily concluded that Hyman could have raised the contention in his first petition because, at that time, he knew or reasonably should have known of the duration of the registration period. *Id.* Thus, the Court held that "[t]he omission of this ground on which his previously-raised claims could have rested renders the ground waived." *Id.* at 22.

In our view, *Hyman* is controlling here. Mr. Scott could have raised the contention that the trial judge impermissibly interfered with the plea negotiations (thereby rendering his plea involuntary) in Petition I, in which he also raised the claim that his plea was not entered voluntarily. We discern no reason why Mr. Scott could not have raised this particular ground in Petition I, and he offers no excuse for not having done so. Therefore, the contention is waived.

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