

Circuit Court for Anne Arundel County
Case No. C 02 CV 18 003748

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2341

September Term, 2019

STATE OF MARYLAND

v.

CARLOS FLORENCIO-SANTIAGO

Kehoe,
Gould,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: May 14, 2021

*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.

In February 2018, appellee Carlos Florencio-Santiago pled guilty to assault in the second degree in the District Court of Maryland for Anne Arundel County. The District Court granted him probation before judgment (“PBJ”) and placed him on supervised probation for 360 days. In December 2018, Mr. Florencio-Santiago filed a petition for postconviction relief in the Circuit Court for Anne Arundel County, alleging that his counsel had been ineffective for failing to inform him of the immigration consequences of his guilty plea. The circuit court granted the petition, vacated the “conviction and sentence” imposed by the District Court, and granted him a new trial. The State filed an application for leave to file an appeal pursuant to Md. Rule 8-204, which this Court granted. *See State v. Carlos Florencio Santiago*, ALA No. 1038, 2019 Term.

In its brief, the State presents one question, which we have re-phrased:

1. Is Mr. Florencio-Santiago, whose criminal case had been resolved through a PBJ, eligible to file a postconviction petition?
2. Did the postconviction court err in finding that Mr. Florencio-Santiago’s counsel had rendered ineffective assistance?
3. Did the postconviction court err in failing to make a specific finding that Mr. Florencio-Santiago was prejudiced by trial counsel’s shortcomings?^[1]

Because the postconviction court lacked jurisdiction over Mr. Florencio-Santiago’s petition, we vacate its order and remand with instructions to dismiss the petition. We will not address the second and third questions raised by the State.

¹ The State presents the issue as:

Did the circuit court err when it granted Florencio-Santiago’s post-conviction petition?

Background

In 2017, Mr. Florencio-Santiago was involved in a dating relationship with Mary B. They broke up, and he came to her place of work to speak to her. They got into an argument, and, according to the factual proffer made by the prosecutor at the District Court proceeding, Mr. Florencio-Santiago “began to bear-hug the victim. [Ms. B.] told him to stop, to let her go. She started yelling for help.” A bystander intervened and pushed Mr. Florencio-Santiago away. He got in his vehicle and drove off. Ms. B. filed a complaint with the police, and Mr. Florencio-Santiago was charged with second-degree assault.

On February 20, 2018, Mr. Florencio-Santiago appeared in the District Court for a guilty plea proceeding. He pled guilty to second-degree assault. As part of his plea agreement, the State agreed to ask that the court to dispose of the charge through probation before judgment. *See* Md. Code, Crim. Law § 6-219. The court accepted the plea agreement, and Mr. Florencio-Santiago was granted a PBJ and placed on supervised probation for a period of 360 days with the special condition that he stay away from Ms. B. The docket entries of the District Court proceeding do not indicate that Mr. Florencio-Santiago’s probation was revoked.

Mr. Florencio-Santiago is an undocumented immigrant. He has been granted DACA (“Deferred Action for Childhood Arrivals”) status. However, because he pled guilty to a

second-degree assault related to domestic violence, his continued eligibility for DACA protection is in jeopardy.²

On January 17, 2019, Florencio-Santiago filed a petition for post-conviction relief in the Circuit Court for Anne Arundel County. At the hearing, Florencio-Santiago testified that his attorney never asked him about his immigration status and never told him that he could be deported for pleading guilty to a charge that was domestically related.

Mr. Florencio-Santiago's attorney also testified. His attorney stated that his firm had an immigration team that dealt with immigration issues and that he knew that Florencio-Santiago's situation presented one. He also said that it was his practice to discuss these issues with defendants. He testified that he thought he had told Mr. Florencio-Santiago that he could be deported. Finally, he told the court that he never asked Mr. Florencio-Santiago about his DACA status.

The transcript from the guilty plea proceeding, however, conflicts somewhat with the testimony that Mr. Florencio-Santiago and his attorney gave at the post-conviction hearing. Specifically, the guilty plea transcript makes it clear that counsel was aware of his client's DACA status. At one point in the proceeding, counsel asked to approach the bench and

² In his brief to this Court, Mr. Florencio-Santiago asserts that a “domestically-related second degree assault constitutes a ‘significant misdemeanor’ according to [the] U.S. Department of Homeland Security [and that] [t]his class of person is considered the second highest priority for removal” from this country. He cites a DHS memorandum titled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” at 3–4, available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (last viewed July 17, 2020).

informed the court that Mr. Florencio-Santiago was a “DACA recipient” and asked for an “immigration-friendly type of sentence.” Moreover, although Florencio-Santiago testified at the post-conviction hearing that he had no idea that his guilty plea could lead to deportation, the transcript suggests otherwise. Before he pled guilty, counsel asked Mr. Florencio Santiago whether he understood that “if [he was] not a U.S. citizen [that pleading guilty] could have a negative consequence on [his] immigration status.” And twice Mr. Florencio-Santiago stated that he understood that fact.

These discrepancies notwithstanding, the post-conviction court concluded that Mr. Florencio-Santiago’s attorney provided ineffective assistance of counsel for three reasons. First, Mr. Florencio-Santiago’s attorney failed to ask about his immigration status before he pled guilty in the District Court. Second, his attorney failed to discuss the consequences of pleading guilty with his law firm’s immigration team. And third, Mr. Florencio-Santiago’s attorney failed to advise him that a guilty plea in a case marked “domestically related” would prevent him from renewing his DACA status, a consequence that “could be easily determined from reading the removal statute.”³ For these reasons, the post-conviction court granted Mr. Florencio-Santiago’s petition, vacated his PBJ, and ordered that he be granted a new trial.

After the post-conviction court issued its memorandum opinion and order, the State filed an application for leave to appeal pursuant to Md. Rule 8-204. In its application, the State raised one issue:

³ The post-conviction court did not cite the removal statute in its opinion.

Did the Post Conviction Court err when it found that trial counsel provided ineffective assistance of counsel?

A panel of this Court granted the State’s application “as to the issue raised in the application.” *See State v Florencio Santiago*, A.L.A. No. 1038, 2019 Term.

Analysis

In its brief, the State presents three arguments. Two relate to what the State asserts are defects in the post-conviction court’s fact-finding and legal analysis. The third is that Mr. Florencio-Santiago was not entitled to file a petition for post-conviction relief because he had never been convicted of an offense. As to the last, Mr. Florencio-Santiago cries foul; he argues that the contention is not preserved for appellate review because it was neither raised to the post-conviction court nor included in the State’s application for leave to file an appeal. The State responds that we should consider the issue anyway pursuant to our discretion under Md. Rule 8-131(a) to address an unpreserved issue “if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.” We will address the State’s argument, albeit for a different reason.

We considered similar contentions in *Moultrie v. State*, 240 Md. App. 408, 418–19, *cert. denied*, 466 Md. 208 (2019), *abrogated on other grounds by Franklin v. State*, 470 Md. 154 (2020). In *Moultrie*, the unsuccessful petitioner filed an application for leave to appeal the judgment of the post-conviction court that denied his petition. In his application, he raised two issues, and the application was granted “to address the two questions presented in Applicant’s application for leave to appeal.” *Id.* at 416. In his brief, however,

Moultrie raised an additional issue. In explaining why we would not address the third issue, we stated:

Ordinarily, when this Court limits the grant of an application for leave to appeal to certain specific issues, the limitation is binding both on the litigants themselves and on the appellate panel that reviews the briefs and decides the case. In exceptional circumstances, however, the appellate panel, in its discretion, may permit an appellant to raise an issue that was not encompassed in the order granting leave to appeal.

Without endeavoring to identify all of the circumstances that might accurately be described as “exceptional,” we can say that they would certainly include the circumstances under which a panel of this Court could depart from a prior decision under the doctrine of the law of the case. Those circumstances include a change in the controlling authority or a conclusion that the earlier decision “was clearly erroneous and would work a manifest injustice.” *Turner v. Housing Auth. of Baltimore City*, 364 Md. 24, 34, (2001). The prior decision should not be reconsidered simply because the appellate panel “has a different opinion or has changed its position.” *Hawes v. Liberty Homes, Inc.*, 100 Md. App. 222, 231 (1994).

We see no exceptional circumstances in this case. In our discretion, therefore, we choose not to entertain the questions that Moultrie did not raise in his application for leave to appeal.

240 Md. App. at 418–19 (cleaned up).

In contrast to *Moultrie*, this case presents an exceptional circumstance: The State asserts that the Maryland Postconviction Procedure Act does not authorize a court to grant relief in a case, such as Florencio-Santiago’s, in which the trial court granted the defendant a PBJ and never entered a guilty verdict. A “defect of jurisdiction may be either in respect to the person, the subject matter, or the authority to render the particular judgment or decree, a judicial determination outside the issues being without jurisdiction and void.” *Fooks’ Executors v. Ghingher*, 172 Md. 612, 620 (1937); see also *Green v. McClintock*,

218 Md. App. 336, 357, *cert. denied*, 440 Md. 462 (2014) (The scope of subject matter jurisdiction includes whether “the subject matter of this dispute falls outside the scope of what the [post-conviction court was] empowered to decide.”). Subject-matter jurisdiction can be raised at any time, including for the first time on appeal. Md. Rule 8-131(a). For these reasons, we will address the State’s jurisdictional argument.

The UPPA, codified as Md. Code, Crim. Proc. §§ 7-101–301, “applies to a person *convicted* in any court in the State who is: (1) confined under sentence of imprisonment; or (2) on parole or probation.” Md. Code, Crim. Proc. § 7-101 (emphasis added). This section, which has been termed the “custody requirement,” is “jurisdictional” and must be satisfied at the time a postconviction petition is filed. *Kranz v. State*, 459 Md. 456, 467 (2018) (citing *McMannis v. State*, 311 Md. 534, 536–41 (1988)).

The statute authorizing a court to impose probation before judgment is Crim. Proc. § 6-220, which states in relevant part (emphasis added):

(b)(1) When a defendant pleads guilty or nolo contendere or is found guilty of a crime, a court may stay the entering of judgment, defer further proceedings, and place the defendant on probation subject to reasonable conditions if:

(i) the court finds that the best interests of the defendant and the public welfare would be served; and

(ii) the defendant gives written consent after determination of guilt or acceptance of a nolo contendere plea.

* * *

(f) On violation of a condition of probation, the court may enter judgment and proceed as if the defendant had not been placed on probation.

(g)(1) On fulfillment of the conditions of probation, the court shall discharge the defendant from probation.

(2) The discharge is a final disposition of the matter.

(3) *Discharge of a defendant under this section shall be without judgment of conviction and is not a conviction for the purpose of any disqualification or disability imposed by law because of conviction of a crime.*

In *Myers v. State*, 303 Md. 639 (1985), the Court of Appeals considered whether a PBJ was a “conviction” for the purposes of a statute that barred convicted perjurers from testifying. The issue in *Myers* was whether a State’s witness, who had been found guilty of perjury in a different proceeding and had been given a PBJ, was eligible to testify at Myers’s trial. *Id.* at 640. At that time, Maryland Code, Courts & Jud. Proc. § 9-104 provided: “A person convicted of perjury may not testify.”⁴ Because the statute did not define the term “convicted,” the Court ascertained its meaning from “the context of § 9-104.” *Myers*, 303 Md. at 642.

In the process of concluding that an entry of a PBJ for perjury did not bar the defendant from testifying in a subsequent proceeding, the Court examined the legislative history of Crim. Proc. § 6-220, which was then codified as Md. Code, Art. 27 § 641.⁵ *Myers*, 303 Md.

⁴ Courts & Jud. Proc. § 9-104 was repealed in 2016. *See* 2016 Md. laws, ch. 530.

⁵ Former Art. 27 § 7641 stated in pertinent part:

(a) Probation after plea or finding of guilt; power of court to provide terms and conditions; waiver of right to appeal from judgment of guilt.-(1)(i) Whenever a person accused of a crime pleads guilty or nolo contendere or is found guilty of an offense, a court exercising criminal jurisdiction, if satisfied that the best interests of the person and the welfare of the people of the State would be served thereby, and with the written consent of the person after determination of guilt or acceptance of a nolo contendere plea, may stay the

(continued)

645–47. In 1975, the General Assembly amended the statute to what, other than changes in wording and organization, is now Crim. Proc. § 6-220. The Court explained (emphasis added):

By this 1975 amendment, the General Assembly expressed its unmistakable intent that the disposition of probation before judgment not be a conviction. This intent is further supported by § 641(c) of Art. 27, which provides that satisfactory discharge from probation “is not a conviction for purposes of any disqualification or disability imposed by law because of conviction of crime.” Thus, a probationer who fulfills the terms and conditions of his probation avoids the stigmatizing effect of a criminal conviction.

Based on the foregoing, we hold that probation before judgment under § 641 is not a “conviction,” and a person who receives probation before judgment is not convicted of the crime for which he has been found guilty, unless the person violates the probation order and a court enters a judgment on the finding of guilt.

Myers, 303 Md. at 646–48 (footnote omitted).

In *Gakaba v. State*, 84 Md. App. 154 (1990), we were presented with the precise issue that presently is before us. The charges against Gakaba had been disposed of by PBJ and he filed a petition for post-conviction relief pursuant the statutory predecessor to the

entering of judgment, defer further proceedings, and place the person on probation subject to reasonable terms and conditions as appropriate.

* * *

(c) Fulfillment of terms of probation.-Upon fulfillment of the terms and conditions of probation, the court shall discharge the person from probation. The discharge is final disposition of the matter. Discharge of a person under this section shall be without judgment of conviction and is not a conviction for purposes of any disqualification or disability imposed by law because of conviction of crime.

UPPA. Specifically, we considered whether a PBJ results in a conviction, because the version of the post-conviction relief act then in force⁶ applied “only to ‘[a]ny person *convicted of a crime* and either incarcerated under sentence of death or imprisonment or on parole or probation[.]’” *Id.* at 155 (quoting former Art. 27, § 645A(a)) (emphasis added). Relying upon *Myers*, which held that “the disposition of probation before judgment” is not a conviction, 303 Md. at 647, we concluded that a criminal proceeding resulting in a PBJ could not “be collaterally attacked by a post conviction proceeding” unless the PBJ subsequently “is revoked and a formal judgment of conviction entered.” *Gakaba*, 84 Md. App. at 156-57. We found additional confirmation for that conclusion in the PBJ statute, which then (as it still does today⁷) required that an accused execute a written appeal waiver as a precondition for eligibility to receive a PBJ. We reasoned that because “a defendant may not seek a direct appeal from a probation before judgment, it seems logical that he should also be forbidden from collaterally attacking a probation before judgment under the

⁶ The UPPA contains the same restriction. *See* Crim. Proc. § 7-101. The only substantive difference between the statute in effect at the time *Gakaba* was decided and the current statute is that the former also applied in cases which resulted in a sentence of death. The current postconviction statute no longer contains a reference to persons sentenced to death, given the repeal of the death penalty. 2013 Md. Laws, ch. 156.

⁷ *Compare* Md. Code (1957, 1987 Repl. Vol.), § 641(a)(1), (a)(3) (providing that a PBJ could not be entered unless the defendant consented in writing to the stay of judgment, thereby waiving “the right to appeal from the judgment of guilt by the court at any time”) *with* CP § 6-220 (b)(1)(ii), (e)(1) (same).

Post Conviction Act.” *Id.* at 156. Accordingly, we ordered that Gakaba’s postconviction petition be “dismissed for want of jurisdiction.” *Id.* at 155.

We acknowledge that the context in which the UPPA uses the term “convicted” differs from the context in *Myers*, where the Court of Appeals concluded that the term should be construed in its “legal and technical sense.” *Myers*, 303 Md. at 643. We note, nonetheless, that the term “convicted” has appeared in every iteration of the UPPA since its enactment in 1958 and that there is no indication that the legislature intended that the word “convicted” be given any meaning other than its legal and technical one.

Mr. Florencio-Santiago asserts that there is a tension between our holding in *Gakaba*, on the one hand, and the holdings in *Rivera v. State*, 409 Md. 176 (2009), and *Abrams v. State*, 176 Md. 600 (2007), on the other. *Rivera* and *Abrams* both held that a PBJ is a “conviction” for purposes of coram nobis, primarily because the “critical issue” in those cases was “whether the finding of guilt did or will in fact cause significant collateral consequences to the person petitioning for coram nobis relief.” *Rivera*, 409 Md. at 192 (quoting *Abrams*, 176 Md. App. at 617). However, the fact remains that Crim. Proc. § 7-101 states in explicit terms that relief under the UPPA is limited to those who have been “convicted,” and the *Myers* Court held that

probation before judgment under [the statutory predecessor to Crim. Proc § 6-220] is not a “conviction,” and a person who receives probation before judgment is not convicted of the crime for which he has been found guilty, unless the person violates the probation order and a court enters a judgment on the finding of guilt.

303 Md. at 647–48.

We are aware, of course, that we can revisit our holding in *Gabaka*. We are also aware that the issue in *Myers* was different from the one presented in this case. But we cannot shrug off the broad, categorical language in the Court of Appeals’ holding in *Myers*.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS REVERSED. THE CASE IS REMANDED WITH INSTRUCTIONS TO DISMISS THE PETITION. COSTS TO BE ASSESSED TO APPELLEE.