Circuit Court for Howard County
Case No. 16-56495

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2416

September Term, 2016

GERALD HYMAN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: February 15, 2018

This case is before us on appeal from an order of the Circuit Court for Anne Arundel County denying a petition for writ of error coram nobis filed by Gerald Hyman, appellant. Hyman raises three questions[1] for our consideration in this appeal, which we have rephrased and consolidated into a single question:

> Whether the circuit court erred in denying Hyman's petition for writ of error coram nobis.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

The event giving rise to Hyman's conviction occurred on July 14, 2000, when Hyman, then thirty years old, engaged in purportedly consensual vaginal intercourse with a fourteen-year-old girl at a Days Inn hotel in Anne Arundel County. Hyman was

[1] The questions, as presented by Hyman, are:

> I. Did the Coram Nobis court err by holding that sex offender registration is not a "significant collateral consequence" of pleading guilty to third degree sex offense?
>
> II. Did the Coram Nobis court incorrectly hold that Mr. Hyman's 6th Amendment right to counsel was not violated despite Trial Counsel's deficient counsel for him to plead guilty to third degree sex offense without advising him of the consequences?
>
> III. Did the Coram Nobis court err in holding that the trial court's presumption that Mr. Hyman understood the nature and consequences of pleading guilty to third degree sex offense was not a violation of his constitutional right to due process?

subsequently charged with third-degree sexual offense, second-degree sexual offense, and fourth-degree sexual assault.

On June 21, 2001, Hyman entered a guilty plea to third-degree sexual offense in the circuit court. Pursuant to a plea agreement Hyman received a sentence of three years' incarceration, all of which were suspended, and three years' supervised probation. The remaining charges were nolle prossed. At his plea hearing, Hyman was advised that he would be required to register as a child sex offender as a result of his conviction. At the time of Hyman's sentencing, a "child sex offender" was required to register as a sex offender for life, *see* Md. Code, Art. 27 § 792(d)(2)(ii) (2000 Cum. Supp.) Hyman was not specifically informed, on the record, of the length of time he would be required to register. Hyman asserts that he was not informed at any point prior to his plea of the length of time he would be required to register as a sex offender.

In 2001, Hyman completed a sex offender registration form that indicated (incorrectly) that he was required to register for ten years. The registration form Hyman completed in 2002 similarly provided incorrect information indicating that he was required to register for ten years. Hyman's 2003 registration form indicated that his registration term was "lifetime."[2]

In 2006, Hyman was convicted of a federal drug offense and sentenced to seventy-eight months' incarceration in federal prison. On October 6, 2006, Hyman filed a petition for writ of error coram nobis in the circuit court. His petition was filed *pro se* and raised

[2] Both "10 Year" and "Lifetime" are checked off under the "Registration Term" section, but "10 Year" is crossed out and "Lifetime" is both checked and initialed.

allegations of ineffective assistance of counsel. Hyman asserted that his trial attorney was ineffective because he failed to meaningfully consult with him prior to the entry of the guilty plea, compelled him to plead guilty, and failed to properly prepare the case for trial. Hyman further asserted that his guilty plea was not entered knowingly and voluntarily. Hyman claimed that, due to his prior conviction for a sex offense, he was not permitted to participate in a residential drug abuse program administered by the Federal Bureau of Prisons. The circuit court denied Hyman's petition for coram nobis relief. This Court affirmed the denial as moot because, at the time the case came before this Court, Hyman had been released from federal prison and, therefore, his ineligibility for the federal drug abuse program was no longer a collateral consequence.

In 2008, Hyman received a form titled "Notice of Sexual Offender Registration Requirements" from the Department of Safety and Corrections that informed him he was required to register for life. The Maryland Sex Offender Registration Act was amended in 2010. As a result of the 2010 amendments, Hyman's registration period was reduced from life to twenty-five years. *See* Md. Code 2001, 2008 Repl. Vol., 2016 Supp.), § 11-707(a)(4)(ii) of the Criminal Procedure Article. [3]

On March 29, 2013, Hyman filed a civil complaint seeking declaratory relief. Hyman argued that the period of time during which he was required to register as a sex offender had been extended from ten years at the time of his sentencing to life, in violation

[3] We set forth a summary of the recent legislative history of the Maryland Sex Offender Registration Act in *Rodriguez v. State*, 221 Md. App. 26, 30-33 (2015).

of the *ex post facto* clause of Article 17 of Maryland's Declaration of Rights. The State filed a motion for summary judgment, arguing that Hyman was required to register for life at the time of sentencing, and, therefore, there was no retroactive application of the law to Hyman's circumstances.

Thereafter, Hyman filed an amended complaint setting forth an entirely different legal theory. Hyman asserted that his sex offender registration requirement was imposed as a condition of his probation and was limited to the three-year probationary period imposed by the sentencing judge. Hyman sought specific performance of the terms of his plea. Hyman argued alternatively that his trial counsel was ineffective because he failed to notify him that lifetime sex offender registration was statutorily required for individuals convicted of third-degree sex offense. Following a hearing, the circuit court granted the State's motion for summary judgment. The circuit court ruled that it did not have the authority to order specific performance of the plea. The circuit court further commented that Hyman was "free to seek a remedy through a petition for Writ of Coram Nobis." We affirmed.

On June 7, 2016, Hyman filed the petition that forms the basis for the present appeal. Following a hearing, the circuit court denied Hyman's petition for coram nobis relief. This appeal followed.

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. *Coleman v. State*, 219 Md. App. 339, 354 (2014). Relief is available pursuant to the writ for "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. "[A] presumption of regularity attaches to the criminal case, and the burden of proof is on the coram nobis petitioner." *Id.* at 78. The writ of error coram nobis is an "extraordinary remedy" to be granted only "under compelling circumstances," and we review the circuit court's decision to grant or deny coram nobis relief applying the abuse of discretion standard. *Coleman*, *supra*, 219 Md. App. at 353–354.

DISCUSSION

I. Waiver

A petitioner's right to coram nobis relief, or even consideration thereof, hinges upon the allegations not having been waived. "Basic principles of waiver are applicable to issues raised in coram nobis proceedings." *Skok v. State*, 361 Md. 52, 79 (2000). "[T]he same body of law concerning waiver and final litigation 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." *Id.*

Section 7-106(b)(1) of the Criminal Procedure Act provides that "an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation . . . in a. . . coram nobis proceeding began by the petitioner . . . or . . . in any other proceeding that the petitioner began." This waiver "shall be excused if special circumstances exist" and the petitioner bears the "burden of proving that special

circumstances exist." *Id.* Additionally, "there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation" when the petitioner could have raised the allegation of error in a prior proceeding, but failed to do so. CP § 7-106(b)(2).

The State asserts that the issues raised by Hyman are waived because Hyman failed to raise the issues in his initial coram nobis petition in 2006. According to Hyman, he believed at the time of sentencing that he would be required to register as a sex offender for a period of three years and only later learned that he would be required to register for life (subsequently reduced to twenty-five years). The State asserts that any claim relating to the registration period is waived because, assuming *arguendo* that Hyman, in fact, believed that he would be required to register only during his three-year term of probation, Hyman became aware that he would have to register for a longer period of time shortly after his sentencing.

Indeed, as early as 2002, when Hyman received a form indicating that he was a ten-year registrant, Hyman learned that he would be require to register beyond the probationary period. In 2003, Hyman was provided with a form on which both "10 Years" and "Lifetime" were marked, although the "10 Years" indication was crossed off and the "Lifetime" indication was initialed, further suggesting that Hyman was made aware at that time that he would be required to continue to register after his probation was completed. The State, therefore, argues that Hyman could have raised this issue in his 2006 coram nobis petition, but the 2006 petition presented no arguments with respect to the registration requirement.

The State contends that, because Hyman could have but did not raise this issue in his 2006 coram nobis petition, the rebuttable presumption that the allegation was intentionally and knowingly waived applies and has not been overcome. First, we observe that the 2006 petition was prepared by a "jailhouse lawyer." Hyman acknowledged that he signed the petition, but testified that he did not fully understand its contents. Hyman testified that he "really d[id]n't know about law" and he "assum[ed] [the jailhouse lawyer] kn[ew] more than" he did. Hyman further testified that his 2006 petition was not necessarily an accurate depiction of what Hyman was thinking at the time. Furthermore, we acknowledge that Hyman received contradictory and incorrect information about his registration period through various registration notices. While recognizing the general presumption of intelligent and knowing waiver, under the particular circumstances of this case, we cannot find that Hyman intelligently and knowingly failed to raise the issues relating to the required sex offender registration time period. Accordingly, we will consider the merits of Hyman's appeal.

II. Ineffective Assistance of Counsel

Hyman asserts that his trial attorney rendered ineffective assistance of counsel by failing to advise him of the length of time he would be required to register as a sex offender as a result of his guilty plea. The circuit court rejected Hyman's ineffective assistance of counsel claim, and we agree.

To prevail on a claim of ineffective assistance of counsel, the convicted defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

The deficiency prong of the *Strickland* test is defined by an objective standard and the defendant has the burden of demonstrating "that counsel's representation fell below an objective standard of reasonableness." *Evans v. State*, 396 Md. 256, 274 (2006). The deficiency prong "is satisfied only where, given the facts known at the time, counsel's choice was so patently unreasonable that no competent attorney would have made it." *State v. Borchardt*, 396 Md. 586, 623 (2007). Courts must apply a highly deferential standard "to avoid the post hoc second-guessing of [counsel's] decisions simply because they proved unsuccessful. . . ." *Evans*, *supra*, 396 Md. at 274.

Satisfying the prejudice prong under Strickland requires more than a simple demonstration that counsel's errors "had some conceivable effect on the outcome of the proceeding . . . ." *Evans*, *supra*, 396 Md. at 275. Rather, Petitioner must establish "that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Strickland*, *supra*, 466 U.S. at 694 (emphasis added). In the context of a guilty plea, "the prejudice prong of *Strickland* is established if there is a reasonable probability that, but for counsel's errors, Petitioner would not have pleaded guilty and would have insisted on going to trial." *Denisyuk v. State*, 422 Md. 462, 470 (2011) (internal quotations omitted).

In the present appeal, the circuit court did not address the first prong of *Strickland* because it found that Hyman had failed to establish the second prong. As the Court of Appeals explained in *Oken v. State*, 343 Md. 256, 284 (1996), "in evaluating [a claim of ineffective assistance of counsel], we need not approach the inquiry in any particular order, nor are we required in every instance to address both components of the *Strickland* test." Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 284-85 (quoting *Strickland*, *supra*, 466 U.S. at 697).

In our view, as well as in the view of the circuit court, Hyman has not established that he suffered prejudice as a result of trial counsel's allegedly deficient performance. Hyman presented no evidence, beyond his own *post hoc* testimony, to substantiate his assertion that, but for trial counsel's alleged failure to advise him of the length of time he would be required to register, Hyman would have insisted upon going to trial.

This case is similar to *Yoswick v. State*, 347 Md. 228 (1997). In *Yoswick*, a defendant entered a guilty plea to first-degree murder and kidnapping. In exchange, Yoswick received a life sentence with all but forty years suspended for the first-degree murder conviction and a concurrent thirty-year sentence for the kidnapping conviction. *Id.* at 235. In a petition for post-conviction relief, Yoswick asserted that his trial counsel was ineffective for failing to inform him of the requirements for parole, and, but for counsel's alleged error, he would not have pleaded guilty. *Id.* at 236. Specifically, Yoswick asserted that his attorney had not informed him that (1) he would be required to serve fifteen years before being eligible for parole, and (2) he could not be paroled without obtaining the

Governor's approval. *Id.* at 238. The Court of Appeals rejected Yoswick's assertion, explaining:

> Notwithstanding Yoswick's testimony that he would have proceeded to trial had he known of the parole eligibility consequences of his plea, the trial court simply did not believe him and we cannot say that credibility determination was clearly erroneous. From an objective perspective, we do not believe that a reasonable defendant in Yoswick's shoes would have insisted on going to trial even with the benefit of parole eligibility information. The post conviction court found Yoswick's testimony "self-serving." Likewise, we look askance at his claim that he would have proceeded to trial for the same reasons stated by the post conviction court, and also because Yoswick did not indicate any concern about his parole eligibility until he filed his Amended Petition for Post Conviction Relief on August 15, 1994, almost 2 years after he was sentenced.

Id. at 246.

The circuit court in the instant case similarly did not find Hyman's testimony to be credible. In so finding, the circuit court observed that the statute Hyman was convicted of violating "[i]n essence, is a strict liability statute." *See Walker v. State*, 363 Md. 253, 261 (2001) (holding that "the availability of a defense of reasonable mistake of age cannot be read into carnal knowledge between a fourteen or fifteen year old victim and a defendant who is age twenty-one or older"). The circuit court's credibility determination with respect to Hyman's assertion that he would have insisted upon going to trial with the benefit of the registration information was not clearly erroneous. Hyman at no point presented any legal defense to the third-degree sex offense charge. He was thirty years old, the victim was fourteen years old, and they had vaginal intercourse. The defense asserted by Hyman on multiple occasions was that the victim appeared to be much older than her actual age and

that he reasonably believed she was older. That is not a defense to third-degree sex offense. Given the strict liability nature of the offense, Hyman's likelihood of conviction, and the sentence Hyman actually received -- a fully suspended sentence -- we do not believe a reasonable person in Hyman's position would have elected to go to trial.

Hyman attempts to distinguish *Yoswick*, arguing that, "[u]nlike Mr. Hyman, the defendant in *Yoswick* 'clearly received the benefit of his bargain.'' *Yoswick*, *supra*, 347 Md. at 247. Hyman emphasizes that, in *Yoswick*, the State dropped eighteen charges in exchange for the defendant's plea and successfully petitioned other counties to drop charges as well. To be sure, *Yoswick* presented a different factual scenario for consideration of whether a reasonable person in the defendant's position would have gone to trial. Unlike in *Yoswick*, Hyman faced a maximum of twenty-one years in prison, while Yoswick faced the possibility of a life sentence plus seventy years in Caroll County, as well as "the possibility of additional sentences of approximately one hundred years in Howard and Anne Arundel Counties." *Id.* at 246-47. The specific length of the potential sentence as compared to the bargained-for sentence is not necessarily determinative when evaluating prejudice. Rather, a court must determine whether a reasonable person in the defendant's position would have chosen to go to trial considering the totality of the circumstances. Here, the strict liability nature of the charged offense was a proper consideration for the court, as was the fact that the negotiated sentence was wholly suspended. Based upon the totality of the circumstances, the circuit court's determination that a reasonable person in Hyman's position would not have elected to go to trial rather than take the plea deal. We, therefore, reject Hyman's attempt to distinguish *Yoswick*.

The Supreme Court recently addressed a situation in which a petitioner asserted that he would not have entered a plea of guilty if he had been properly advised of the immigration consequences of his plea. *See Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958 (2017). The petitioner "allege[d] that avoiding deportation was the determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time." *Id.* at 1967. For this reason, the petitioner argued that he "would have rejected any plea leading to deportation -- even if it shaved off prison time -- in favor of throwing a 'Hail Mary[.]'" *Id.* The petitioner put forth evidence through his own testimony, corroborated by the testimony of his trial attorney, demonstrating that immigration consequences of any plea were a particular concern for the petitioner at the time he entered his plea. *Id.* at 1963. The Supreme Court ultimately held that the petitioner had demonstrated prejudice, but emphasized the type of evidence courts should consider when determining whether a petitioner has demonstrated prejudice in the context of a guilty plea:

> Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.

Id. at 1967.

In this case, Hyman presented no contemporaneous evidence to substantiate his contention that he would have elected to go to trial if he knew about the sex offender registration requirements. Indeed, as the circuit court observed, Hyman "did not file his initial petition for writ of error coram nobis, or any pleading for that matter, until three

years after he was made aware that he would have to register for life and five years after he was sentenced." This is a far different situation from *Lee*, in which the petitioner presented evidence demonstrating that he had been concerned about the immigration consequences of his plea from the time the plea was entered. We, therefore, hold that Hyman failed to demonstrate that he suffered prejudice under *Strickland*.

III. Guilty Plea

In addition to arguing that trial counsel rendered ineffective assistance, Hyman asserts that the circuit court erred in denying his coram nobis petition on the basis that his guilty plea was improperly accepted by the circuit court. Hyman contends that his guilty plea was not knowing and voluntary under *State v. Daughtry*, 419 Md. 35 (2011). Hyman asserts that the record does not reflect that he understood the "nature and consequences" of his guilty plea, arguing that "there is no evidence that . . . Hyman understood the elements of third-degree sex offense or the concept of child sex offender, let alone that pleading guilty to third[-]degree sex offense would carry" the consequence of lifetime sex offender registration. We are unpersuaded by Hyman's contentions.

"To be valid, a plea of guilty must be made voluntarily and intelligently . . . with knowledge of the direct consequences of the plea." *Yoswick*, *supra*, 347 Md. at 239 (internal citations omitted). We consider whether a guilty plea was entered knowingly and voluntarily "based on the totality of the circumstances." *State v. Smith*, 443 Md. 572, 650 (2015). When considering this issue "in a coram nobis case such as this one, the only issue is whether the defendant understood the nature of the charges -- regardless of whether the trial court could determine as much." *Id.* at 653. "[M]ost importantly, a coram nobis

proceeding's purpose is not to determine based on the record whether the trial court erred at the time of a guilty plea, but instead to determine whether a petitioner indeed knowingly and voluntarily pled guilty." *Id.* at 654.

Maryland Rule 4-242(c) sets forth the conditions that must be satisfied for a court to accept a 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 above-referenced section refers to Maryland Rule 2-424(f), which provides:

> Before the court accepts a plea of not guilty on an agreed statement of facts or on stipulated evidence, a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere, the court, the State's Attorney, the attorney for the defendant, or any combination thereof shall advise the defendant (1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship, (2) that by entering a plea to the [sexual offenses subject to registration requirements] set out in Code, Criminal Procedure Article, § 11-701, the defendant will have to register with the defendant's supervising authority as defined in Code, Criminal Procedure Article, § 11701 (p), and (3) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea. **The omission of advice concerning the collateral**

> **consequences of a plea does not itself mandate that the plea be declared invalid.**

(Emphasis supplied.)

Before the circuit court, Hyman did not challenge whether he understood the nature of the charges against him or the factual basis for his guilty plea. Accordingly, to the extent Hyman raises these arguments in this appeal, they are not properly preserved for our review. See Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ."). Hyman's argument before the circuit court was based upon his assertion that he was not properly informed of the consequences of his plea. Specifically, Hyman asserts -- as he did in the context of his ineffective assistance of counsel argument -- that he was not properly advised of the specific period of time during which he would be required to register as a sex offender. Hyman contends that this alleged lack of advice rendered his guilty plea invalid.

First, we observe that Hyman was advised multiple times, on the record, of the fact that he would be required to register as a sexual offender as a result of his guilty plea. Indeed, Hyman does not dispute that he was informed that he would be required to register as a sexual offender. Furthermore, "Due Process does not require that a defendant be advised of the indirect or collateral consequences of a guilty plea, even if the consequences are foreseeable." *Yoswick*, *supra*, 347 Md. at 240. "[O]nly when direct consequences of a plea are not explained to a defendant will the plea be rendered involuntary." *In re Nick H.*, 224 Md. App. 668, 709 (2015). Despite Hyman's assertions to the contrary, compliance

with sex offender registration requirements is "a collateral consequence of criminal punishment" under Maryland law. *Rodriguez v. State*, 221 Md. App. 26, 39 (2015).

Hyman asserts that our prior decisions in *Rodriguez* and *Nick H.* were incorrect and that sex offender registration should properly be categorized as a "direct" penal consequence rather than as a "collateral" consequence. Hyman characterizes our decision in *Nick H.* as "an ill-reasoned display of judicial activism." We decline Hyman's invitation to revisit our previous holdings.[4]

Hyman has presented no authority in support of his position that a guilty plea is rendered involuntarily when a defendant is not advised, on the record, of the specific length of the registration requirement. Under Maryland law, the failure to advise a defendant of this collateral consequence does not render a guilty plea involuntary. We, therefore, reject Hyman's assertion that his guilty plea was invalid.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] Hyman focuses on the Court of Appeals' plurality opinion in *Doe v. Department of Public Safety and Correctional Services*, 430 Md. 535 (2013). *Doe* involved the application of a 2009 amendment to the Maryland Sex Offender Registration Act retroactively to individuals already convicted. The Court in *Doe* held that the retroactive application of Maryland's sex offender registration statute violated Article 17 of the Maryland Declaration of Rights, but the divided Court did not reach a holding on what test applied to future ex post facto challenges to the Maryland Sex Offender Registration Act. Hyman urges us to adopt the analysis set forth by the three members of the *Doe* plurality, but we expressly declined to adopt this reasoning in *Nick H.*, *supra*, 224 Md. App. 684-86.