

Circuit Court for Cecil County
Case No. 07-K-06-001504, 07-K-07-000343

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2419

September Term, 2019

MOHAMED PATEH BAH

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 17, 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.

Mohamed Pateh Bah pleaded guilty in 2007 to two felony counts relating to the possession and distribution of counterfeit compact discs and digital video disks. He has long since served his sentence, but now seeks *coram nobis* relief from those convictions on the ground that he entered the pleas in reliance on constitutionally ineffective advice from his counsel. The Circuit Court for Cecil County denied his petition, and the State has moved to dismiss both appeals. One already has been dismissed because Mr. Bah didn't file his brief on time. We deny the motion to dismiss the other and affirm the denial of *coram nobis* relief in that case.

I. BACKGROUND

In 2006 and 2007, Mr. Bah was caught possessing counterfeit CDs and DVDs. He was charged and convicted in two separate cases, both arising out of traffic stops in Cecil County. In one, which we'll call case 1504, Mr. Bah was stopped by Maryland State Police for speeding. A K-9 unit was called for backup and the dog detected the presence of compact discs in the car, resulting in a vehicle search and discovery of over 1,000 counterfeit DVDs and CDs. In the other, which we'll call case 343, Mr. Bah was stopped by Maryland State Police after he appeared to be driving too closely to another vehicle. Once the K-9 unit arrived, the state trooper found 208 counterfeit DVDs in the vehicle. Representatives of the Motion Picture Industry Association ("MPIA") and the Recording Industry Association of America ("RIAA") confirmed that the CDs and DVDs in both instances were counterfeit.

On August 8, 2007, Mr. Bah entered a guilty plea that covered both cases. He

pleaded guilty to possession with intent to sell counterfeit goods having a value of \$1,000 or more and was sentenced to four years for each case, to run concurrently, with all but eighteen months suspended. In addition, Mr. Bah was ordered to pay restitution in the amount of \$2,000 to the MPIA and \$4,000 to the RIAA.

On April 10, 2019, Mr. Bah filed Petitions for Writ of Error *Coram Nobis* in each case, then amended versions of both petitions on April 30, 2019. The petitions contended that Mr. Bah was entitled to *coram nobis* relief because (1) he has finished his sentence and is not on probation, and thus has no other avenues of relief; (2) he has experienced serious collateral consequences as the result of being a felon, specifically having trouble finding employment and possible deportation; and (3) his counsel was ineffective for failing to warn him of the immigration consequences of his guilty pleas.

The circuit court held a hearing, despite finding the petitions defective for failing to comply with Maryland Rule 15-1202(b)(1)(E),¹ then denied the petition on two grounds. *First*, the court found Mr. Bah had not demonstrated that he received ineffective assistance from counsel because the requirement that counsel advise non-citizens of the immigration consequences of a guilty plea was established after his plea and did not apply retroactively, *see Padilla v. Kentucky*, 559 U.S. 356 (2010); *Chaidez v. United States*, 568 U.S. 342 (2013); and *second*, the transcript of the trial and Mr. Bah’s testimony at the *coram nobis* hearing revealed that he pleaded guilty knowingly and voluntarily.

¹ The petitions didn’t contain any “statement that the allegations of error have not been waived.” Md. Rule 15-1202(b)(1)(E).

Mr. Bah then filed notices of appeal in each case, which we consolidated. The State moved to dismiss both. As we detail below, one of the two appeals already has been dismissed. We also supply additional detail about the procedural progression of the cases in this Court and on the merits.

I. DISCUSSION

Mr. Bah argues on appeal that the trial court erred in denying his petition for *coram nobis* relief.² We review denials of *coram nobis* relief for abuse of discretion. *Franklin v. State*, 470 Md. 154, 175 (2020) (citing *State v. Rich*, 454 Md. 448, 470–71 (2017)). We defer to the *coram nobis* court’s factual findings unless there is clear error, and we review legal conclusions without deference. *Id.*

A. Only Case 343 Is Before Us.

The State has moved to dismiss both appeals in this consolidated case.³ The State

² Mr. Bah phrased the Question Presented in his brief as follows:

1. Did the trial Court clearly err in denying *coram nobis* relief on the uncontroverted record before it that the appellant/defendant had been denied effective assistance of counsel that resulted in two felony guilty pleas?

³ The State also has moved to strike Mr. Bah’s response to the State’s motion to dismiss, which was included in its Brief of Appellee. Maryland Rule 8-502(a)(3) requires a reply brief to be submitted either twenty days after the appellee files their brief or ten days before the scheduled argument. The State filed its appellee brief on November 5, 2020, which means that Mr. Bah should have filed his reply by November 25. Alternatively, considering that argument was set for January 6, 2021, Mr. Bah could have submitted his reply by December 27, 2020. He filed it on January 6, 2021, the day of the scheduled argument, and so it was late by either measure. In light of the stakes to Mr. Bah, but without countenancing the late filing, we will deny the motion to strike and have considered Mr. Bah’s response to the motion to dismiss in deciding this appeal.

contends that there is no active appeal in case 1504 and that the notice of appeal in case 343 was not filed in time. We agree with regard to case 1504, but not as to case 343.

Case 1504 already has been dismissed, by separate order, because Mr. Bah failed to file his brief on time. Maryland Rule 8-502(a)(1) requires appellants to submit their briefs by the date specified by the appellate clerk, and if an appellant doesn't file their brief on time, the appeal can be dismissed. *Id.* (d). Mr. Bah's appeal in case 1504 was dismissed, by order dated May 28, 2020, because he did not submit a brief by the April 20, 2020 deadline. He could have filed a motion for reconsideration within ten days of the dismissal, Md. Rule 8-602(e)(1), but he didn't. That ends the inquiry in that case.

Case 343, however, is reviewable because Mr. Bah's notice of appeal and his brief were both filed on time. Appellants must file a notice of appeal in the circuit court within thirty days after the judgment is entered. Md. Rule 8-202(a). That thirty-day period doesn't begin to run, though, until the judgment is entered on the docket and appears on Case Search. *Won Bok Lee v. Won Sun Lee*, 466 Md. 601, 606 (2020). The circuit court's order denying *coram nobis* relief is dated December 9, 2019, and Mr. Bah filed his notice of appeal in case 343 on February 11, 2020. On its face then, the notice of appeal would seem to be late. But for reasons that we cannot discern—perhaps the circuit court prepared the accompanying memorandum later—there is no indication of the denial on the MDEC docket or on Case Search until January 13, 2020, which is when the Memorandum and Order of Court appears on both. Measured from that date, Mr. Bah's February 11, 2020 notice of appeal in case 343 was timely, as was his merits brief. The motion to dismiss that

case is denied, and we will address the merits.

B. Mr. Bah Is Not Entitled To *Coram Nobis* Relief In Case 343.

A petition for writ *coram nobis* allows a person to ““raise fundamental errors in attempting to show that a criminal conviction was invalid under circumstances where no other remedy is presently available and where there were sound reasons for the failure to seek relief earlier.”” *Franklin*, 470 Md. at 174 (quoting *State v. Smith*, 443 Md. 572, 597 (2015)). *Coram nobis* is an extraordinary remedy reserved for only the most compelling cases. *Id.* To obtain *coram nobis* relief, a petitioner must demonstrate that: (1) the challenge to the conviction is based on a constitutional, jurisdictional, or fundamental ground, (2) the presumption of regularity is rebutted, (3) there are serious collateral consequences of the conviction, (4) the issue as to the alleged error has not been waived or finally litigated in a prior proceeding, and (5) there is no other statutory or common law remedy. *Id.* at 174–75, (citing *Jones v. State*, 445 Md. 324, 338 (2015)). When a petitioner challenges a guilty plea in a *coram nobis* petition, they also must prove that the trial court did not follow the procedural requirements of Maryland Rule 4-242(c) in taking the plea. *State v. Rich*, 454 Md. 448, 463 (2017). This means the petitioner must demonstrate that they did not plead guilty voluntarily, *i.e.*, “with understanding of the nature of the charge and the consequences of the plea.” *Id.*

Mr. Bah appears to have satisfied at least some of the requirements for *coram nobis* review. He no longer is incarcerated or on probation, so other forms of post-conviction relief aren’t available. *See Franklin*, 470 Md. at 175 (explaining that petitioners seeking

coram nobis cannot be incarcerated as that would entitle them to post-conviction relief). And for present purposes, we will assume that he faces potential deportation because of his convictions and that deportation would qualify as a serious collateral consequence. Even so, the circuit court’s denial of his *coram nobis* petition turned on two conclusions: *first*, that his counsel was not ineffective for failing to advise him about the immigration consequences of pleading guilty, and *second*, that his guilty plea was knowing and voluntary. We agree with the circuit court’s analysis.

1. *There is no evidence that Mr. Bah’s counsel was ineffective.*

Mr. Bah contends that his counsel in case 343 was constitutionally ineffective because counsel failed to advise him of the issues in the case, his prospects of succeeding at trial, and the potential immigration consequences he could suffer from the ensuing convictions. In this regard, he does assert a constitutional injury because the Sixth Amendment to the Constitution of the United States affords criminal defendants the right to counsel, U.S. Const. amend. VI, as does Article 21 of the Maryland Declaration of Rights. Md. Dec. of R. Art. 21. To succeed, Mr. Bah must prove not only that counsel’s errors rose to the level of constitutional failure, but also that counsel’s deficient performance prejudiced him. *Franklin*, 470 Md. at 176 (*citing Strickland v. Washington*, 466 U.S. 668, 686 (1984)). To prove constitutionally deficient performance, the defendant needs to prove that counsel’s performance fell outside the range of professionally competent assistance. *Id.* (*citing Strickland*, 466 U.S. at 690). And to establish prejudice, he must demonstrate a reasonable probability that but for the counsel’s errors, the outcome

of the case would have been different. *Id.* (citing *Strickland*, 466 U.S. at 694).

We agree with the circuit court that Mr. Bah didn't meet these burdens. The lead arguments in his brief in this Court—that counsel didn't explain his defenses to him and didn't hire an expert to opine on the value of the counterfeit goods—weren't raised in his petition or amended petition beyond two conclusory sentences at the end of his amended petition. From there, and as we discuss in greater detail in the next section, the record demonstrates that he pleaded guilty knowingly and voluntarily. During the plea hearing, Mr. Bah was walked through the elements of his offenses in detail, and he advised the court that he understood them. Then when the court asked, in so many words, “[a]re you satisfied with the services of [counsel], that he spent time with you, answered your questions, and given you his best advice?”, he answered yes, and affirmed not only that he was aware of the charges against him, but that he was satisfied with counsel's performance. Although it is true that counsel sought to withdraw shortly before trial, Mr. Bah's petition doesn't argue or demonstrate *how* counsel's preparation was deficient or prejudicial or how that undermined his decision to plead guilty beyond just saying so. With one unavailing exception that we address next, he offered no facts or evidence on which the circuit court, or we, could conclude that counsel's performance was constitutionally deficient.

Mr. Bah did contend in his petition, and reiterates here, that counsel was ineffective in failing to advise him fully about the potential immigration consequences of pleading guilty to two felonies. The circuit court rejected that argument on the ground that at the time of his plea, the Supreme Court had not yet recognized counsel's obligation to advise

non-citizen defendants of the immigration implications of their plea decisions. The plea in case 343 was entered on August 8, 2007, nearly three years before the Court decided *Padilla v. Kentucky*, 559 U.S. 356. That decision, as a rule of procedure, doesn't apply retroactively, *see Chaidez*, 568 U.S. 342; *see also Teague v. Lane*, 489 U.S. 288 (1989), and our Court of Appeals has confirmed this principle as well. *See Miller v. State*, 435 Md. 174 (2013). So although someone in Mr. Bah's position might have a viable argument arising from a post-*Padilla* guilty plea, counsel's failure to advise Mr. Bah of the immigration consequences of his guilty plea cannot constitute ineffective assistance of counsel. The circuit court denied *coram nobis* relief on this basis correctly.

2. *Mr. Bah's plea was voluntary under Maryland Rule 4-242(c).*

In any event, Mr. Bah still would need to have proven that his guilty plea wasn't knowing and voluntary at the time he made it. Under Maryland Rule 4-242(c), the court cannot accept a guilty plea until it determines and announces 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.” Md. Rule 4-242(c). He argues in this Court that his counsel failed to advise him “of the issues involved in his plea”—although, as discussed above, he identified none of them in his petition other than the immigration consequences—and that counsel's ineffective representation rendered his plea unknowing and involuntary.

In assessing the voluntariness of a plea and compliance with Rule 4-242(c), we look at the totality of the circumstances. *State v. Daughtry*, 419 Md. 35, 45 (2011); *Pitt v. State*,

144 Md. App. 49, 59 (2002). The mere fact that a defendant was represented by counsel and that counsel discussed a plea with them does not satisfy Maryland Rule 4-242(c) on its own. *Daughtry*, 419 Md. at 71. The question turns on whether the record as a whole reveals that the defendant understood the nature of the charge to which he pleaded guilty. *Id.* at 80. And on this record, we agree with the circuit court that Mr. Bah’s plea was made knowingly and voluntarily. In the course of his plea colloquy, Mr. Bah told the court that he had pleaded guilty to the same offense two years previously and that he knew how the guilty plea process worked. When asked if he had any more questions about his plea, he responded “no.” Again, the court questioned him at length, the prosecutor detailed the elements of the offenses, which he acknowledged that he understood, and the court asked if he was satisfied with his counsel’s services, which he acknowledged that he was. The *coram nobis* court found that he had discussed the case with his counsel and that counsel did explain his possible defenses to him. And his arguments here to the contrary aren’t supported with anything beyond the bare contention that he would not have pleaded guilty if counsel had advised him properly, a contention the circuit court found not to be credible.

**APPEAL IN CASE NO. 07-K-06-001504
DISMISSED. MOTION TO DISMISS
CASE NO. 07-K-07-000343 DENIED
AND JUDGMENT OF THE CIRCUIT
COURT FOR CECIL COUNTY IN
THAT CASE AFFIRMED. APPELLANT
TO PAY COSTS.**