UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2518

September Term, 2014

STATE OF MARYLAND

v.

ANTHONY LEWIS

Eyler, Deborah S.,
Graeff,
Hotten,

JJ.

Opinion by Graeff, J.

Filed: November 16, 2015

On March 21, 2003, Anthony Lewis, appellee, pleaded guilty to several drug related crimes in three cases in the Circuit Court for Baltimore City. On May 27, 2014, appellee filed a petition for writ of coram nobis on the ground that he faced deportation and banishment, arguing that he received ineffective assistance of counsel and his guilty plea was not knowing and voluntary. On August 4, 2014, the court granted appellee's petition. It rejected appellant's claim that his counsel was ineffective, but it found that his plea was not knowing and voluntary.

On appeal, the State presents the following question for our review:

> Did the circuit court err in granting appellee's petition for a writ of coram nobis where the record established that appellee's guilty plea was knowing and voluntary and where [appellee] failed to satisfy his burden of showing otherwise?

For the reasons set forth below, we answer this question in the affirmative, and we shall reverse the judgment of the circuit court.

PROCEDURAL BACKGROUND

Appellee is a citizen of Trinidad. On February 11, 2003, he was indicted in the Circuit Court for Baltimore City for multiple drug offenses.[1] On March 21, 2003, pursuant to a plea agreement, appellee pleaded guilty to two counts of conspiracy to distribute cocaine and two counts of keeping a common nuisance, one for marijuana and the other for cocaine. Appellee acknowledged at his guilty plea proceeding that he was not a United States citizen and he understood that convictions on the charges to which he pleaded guilty

[1] Case Nos. 103042035, 103042037, and 103042038.

could result in deportation. On April 30, 2004, appellee was sentenced to concurrent terms of three years imprisonment for each conviction, with all but time served suspended in favor of three years probation.[2]

On May 27, 2014, appellee filed a petition for writ of error coram nobis, asserting that he faced deportation and permanent banishment from the United States as a result of his plea. Appellee argued that he was entitled to coram nobis relief because: (1) he received ineffective assistance of counsel; and (2) his guilty plea was not entered knowingly and voluntarily.

On August 4, 2014, the circuit court granted appellee's petition. Although it rejected the argument that appellee's counsel was ineffective, it found that appellee's plea was not knowing and voluntary because: (1) he was not apprised of the nature and elements of the conspiracy offenses; and (2) with respect to the nuisance charges, the court did not announce on the record its determination that appellee was pleading "voluntarily in compliance with constitutional due process and Maryland Rule 4-242(c)." Accordingly, the circuit court granted appellee coram nobis relief.

DISCUSSION

The State contends that the circuit court erred in granting appellee's petition for writ of coram nobis on the ground that his plea was not entered knowingly and voluntarily in

[2] The total amount time suspended (three years less time served) worked out to be two years, nine months, and one day of each term. On September 25, 2006, appellee pleaded guilty to violating his probation and received the same suspended sentences with one year of probation.

compliance with Maryland Rule 4-242(c). In this regard, it makes two arguments: (1) "[u]nder the totality of the circumstances, [appellee] was clearly aware of the nature of his crimes"; and (2) "[t]he coram nobis court misapplied Maryland Rule 4-242(c)." Appellee contends that the court properly granted him coram nobis relief because the record established that his guilty plea was not knowing and voluntary.

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).[3] 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)).

Here, the ground for challenging the conviction was that appellee did not knowingly and voluntarily enter into his plea. Rule 4-242(c) requires that a defendant have an understanding of the nature of the charge to which he is pleading guilty before a court may

[3] This case includes four opinions. Judge Watts wrote the majority opinion on the issue whether Smith's guilty plea was knowing and voluntarily made.

accept his or her guilty plea. The version of that rule in effect at the time of appellee's plea provided, as follows:

> **Plea of guilty.** The court may accept a plea of guilty only after it determines, upon 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, 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 (e) of this Rule.[4] 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.

Md. Rule 4-242(c) (2003).

In *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976), the Supreme Court held that a guilty plea is not "voluntary in the sense that it constituted an intelligent admission that [the defendant] committed the offense unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of

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[4] Subsection (e) of Rule 4-242 provided as follows:

> **Collateral Consequences of a Plea of Guilty or Nolo Contendere**. Before the court accepts a plea of guilty or 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 and (2) 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.

During the plea hearing in this case, appellee's counsel advised appellee on the record of the potential collateral consequence of deportation. *See* Transcript of March 21, 2003 Hearing at 21-22.

due process.'" *Id.* at 645 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). "Real notice" gives a defendant "an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

In *State v. Priet*, 289 Md. 267, 288 (1981), the Court of Appeals held that an understanding of the nature of the offense requires "a basic understanding of its essential substance, rather than of the specific legal components of the offense to which the plea is tendered." The Court explained:

> The nature of some crimes is readily understandable from the crime itself. Necessarily, the required determination can only be made on a case-by-case basis, taking into account the relevant circumstances in their totality as disclosed by the record, including, among other factors, the complexity of the charge, the personal characteristics of the accused, and the factual basis proffered to support the court's acceptance of the plea.

Id. The test "is whether, considering the record as a whole, the trial judge could fairly determine that the defendant understood the nature of the charge to which he pleaded guilty." *Id.* at 291.

Recently, the Court of Appeals in *Smith* reiterated that, "'in determining whether a guilty plea is voluntary under current Rule 4-242(c), [the test] is whether the totality of the circumstances reflects that a defendant knowingly and voluntarily entered into the plea,'" *Smith*, 443 Md. at 651 (quoting *State v. Daughtry*, 419 Md. 35, 71 (2011)). The Court stated that "'the factual basis proffered to support the court's acceptance of the plea may describe the offenses charged in sufficient detail to pass muster under the Rule.'" *Id.* (quoting *Daughtry*, 419 Md. at 73-74).

The Court noted that

> Maryland Rule 4-242(c)'s predecessor "does not require that the precise legal elements comprising the offense be communicated to the defendant[,]" but instead requires simply that a guilty plea not be accepted until the trial court determines "that the accused understands the 'nature' of the charge." We stated that the Rule "contemplates that the court will explain to the accused, in understandable terms, the nature of the offense to afford him a basic understanding of its essential substance, rather than of the specific legal components of the offense to which the plea is tendered."

Id. at 649-50 (quoting *Priet*, 289 Md. at 288).

Here, the record makes clear that appellant discussed the case and his plea with his attorney and the prosecutor. The circuit court found, however, and the record confirms, that neither the State, defense counsel, nor the guilty plea court advised appellee, on the record, of the elements of the offenses to which appellee pled guilty. Thus, we turn to the factors set forth by the Court of Appeals to consider in determining whether the totality of the circumstances show that the defendant had the requisite understanding of the nature and elements of the offense. Those factors include "'the complexity of the charge, the personal characteristics of the accused, and the factual basis proffered to support the court's acceptance of the plea.'" *Daughtry*, 419 Md. at 72 (quoting Priet, 289 Md. at 277).

With respect to the "complexity of the charge," the Court of Appeals has recognized that "[t]he nature of some crimes is readily understandable from the crime itself." *Id.* at 72 (quoting *Priet*, 289 Md. at 288). The Court in *Daughtry* found that first degree murder is not such an offense, given the difficult distinction between first and second degree murder. *Id*. at 73. It noted, however, that offenses such as escape and altering a check are sufficiently self-explanatory charges. *Id.* at 72 n.19.

The State does not argue that the nature of the crimes at issue here, conspiracy and nuisance, are readily understandable from the crime itself. We agree. *See id*. (suggesting that conspiracy may be among those crimes that are not self-explanatory).

Thus, we look to the factual basis proffered to support the plea. The statement of facts provided by the prosecution was that the police were advised that individuals were selling large amounts of cocaine and marijuana at a specific home on South Robinson Street. A detective went to the residence, told appellant that he wanted half an ounce of cocaine, and appellant made some phone calls, including to a person identified as Roger Rosales. The prosecutor continued:

> The detective went on along and talked with [Lewis] in the living room. Lewis stated that the person coming from Laurel was someone he grew up with in Trinidad and that he was crazy and he carried guns. While waiting for Roger Rosales to show up with the cocaine Lewis had his phone number and address book and gave the officer [his] pager number. . . .
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> At approximately 2015 hours [the detective] observed a 2001 Honda . . . pull into the block and a black male later identified as Roger Rosales exit same and go into [] S. Robinson Street . . . . Once inside, Lewis motioned for the detective to go into the rear room of the first floor, in the kitchen. Lewis, the detective, and Rosales walked into the kitchen. Rosales asked you want it [sic], the detective stated that he did. [The detective then gave Rosales $500 for approximately 12.96 grams of suspected cocaine].
>
> Rosales said that he was sure he would like it and that he would want more, the detective would want more. [] Rosales also stated that he could just tell Lewis what he wanted and that he could [get] in touch with him. The detective then left soon after the deal took place. . . . .

The proffer continued that the detective subsequently visited Lewis again to purchase more cocaine.

> He told [Lewis] he was looking to get an ounce of cocaine and that he had $1,100 on him. Lewis then got on the phone, walked out of the room while talking, the conversation was brief. Lewis stated that it would cost all of $1,100. . . . . [Lewis] stated that the man was on his way.
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> At approximately 2030 hours, [the detective] observed the same 2001 Honda [] pull into the 400 block of Robinson Street and park. Roger Rosales exited that same vehicle. Once in side [sic] he greeted the detective and began to talk.

The detective then purchased a quantity of cocaine. "Rosales, Lewis and the detective continued to talk. Rosales mentioned that Lewis was making $300 off the deal that they had just done."

The prosecutor explained that the police subsequently executed a search warrant at Mr. Rosales' home in Bowie, Maryland, and at appellee's home on S. Robinson Street, recovering drugs and paraphernalia at both locations. The prosecutor concluded that appellee was "charged with a common nuisance based on the fact that these undercover buys occurred in his residence . . . on several different occasions, that house was being used for the distribution of marijuana and the storage of same," and that appellee "was acting in concert with Mr. Rosales to distribute the cocaine and the marijuana." Appellee did not object or attempt to correct any of the facts.

In finding that appellee's plea was not knowing and voluntary, the circuit court found that "the factual basis proffered by the State in the court's acceptance of the plea is deficient of any understandable explanation of the nature and elements of the offense of conspiracy to distribute cocaine." It stated that "the words "*acting in concert*" fall short of

giving [appellee] a true understanding of the nature and elements for the offense of conspiracy."

With respect to the nuisance charge, the court found that "the factual basis proffered to support the court's acceptance of the plea did set out, in a straightforward fashion, the required elements of the offense of common nuisance." The circuit court granted the petition for coram nobis, however, finding that the judge taking the plea "did not announce on the record that [appellee] was pleading voluntarily, with an understanding of the nature of the charges and the consequences of the plea" pursuant to Md. Rule 4-242(c).

We agree with the State that the circuit court erred in granting the petition for writ of coram nobis. Initially we disagree with the court's finding that the factual basis proffered for this plea was insufficient to determine that appellee understood the nature of the charge of conspiracy. As noted, all that Rule 4-242(c) requires is that someone "'explain to the accused, in understandable terms, the nature of the offense to afford him a *basic understanding of its essential substance, rather than of the specific legal components* of the offense to which the plea is tendered.'" *Smith*, 443 Md. at 650 (quoting *Priet*, 289 Md. at 288) (emphasis added).

With respect to the conspiracy charge, a criminal conspiracy is defined as

> "the combination of two or more people to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The gist of conspiracy is the unlawful agreement, which need not be spoken or formal so long as there is a meeting of the minds reflecting a unity of purpose and design. The crime is complete when the unlawful agreement is made; no overt act in furtherance of the agreement is necessary."

White v. State, 363 Md. 150, 167 (2001) (quoting *Monoker v. State*, 321 Md. 214, 221 (1990)). Here, the prosecutor specifically stated that appellee was "acting in concert" with Mr. Rosales. This language, along with the facts proffered, made clear that appellee was engaged in a cooperative enterprise with Mr. Rosales to sell cocaine by arranging drug sales for Mr. Rosales in exchange for a cut of the profits. This was sufficient to explain the substance of the offense of conspiracy to which appellee was pleading guilty. *See, e.g., Smith*, 443 Md. at 651 ("'[I]t is possible that the factual basis proffered to support the court's acceptance of the plea may describe the offenses charged in sufficient detail to pass muster under the Rule.'") (quoting *Daughtry*, 419 Md. at 74).[5]

With respect to the two counts of keeping a common nuisance, the circuit court found that,

> although there was a sufficient factual basis proffered by the State that afforded [appellee] a true understanding for the offense of common nuisance[,] the [c]ourt did not announce on the record that [appellee] was pleading voluntarily, with an understanding of the nature of the charges and the consequences of the plea in compliance with constitutional due process and Maryland Rule 4-242(c).

The State argues, and appellee agrees, that the rule in effect at the time of appellee's plea did not contain, as does the current rule, an announcement requirement. Accordingly, the circuit court erred in finding that coram nobis relief was warranted on the nuisance charge

[5] The circuit court determined, and appellee does not dispute, that appellee's "mental capacity is not called into issue, and is not a factor which would tend to negate the determination that his plea was knowingly and voluntarily entered." We agree.

because the court did not announce on the record that appellee was pleading voluntarily, with an understanding of the nature of the charges and the consequences of the plea.

Appellee argues, however, that, "the court was right for the wrong reason because, as with its proffer regarding conspiracy to distribute, the State's proffer concerning common nuisance failed to sufficiently inform Mr. Lewis of the nature and elements of the offense." We disagree.

Rather, we agree with the circuit court that appellee was sufficiently apprised of the nature of the common nuisance charges. Maryland Code § 5-605 (2002) of the Criminal Law Article provides, as follows:

> (a) *"Common nuisance" defined.* — "Common nuisance" means a dwelling, building, vehicle, vessel, aircraft, or other place:
>
> (1) resorted to by individuals for the purpose of administering illegally controlled dangerous substances; or
>
> (2) where controlled dangerous substances or controlled paraphernalia are manufactured, distributed, dispensed, stored, or concealed illegally.
>
> (b) *In general.* — A person may not keep a common nuisance.

During the March 21, 2003, plea hearing, the prosecutor summarized the evidence that the State intended to present against appellee if the case had gone to trial. Regarding the common nuisance charges, the prosecutor stated the following:

> [The police] executed a warrant at the location of [] S. Robinson Street, the location that, the address of the Defendant. . . . .
>
> In plain view in the basement in the rear on the bar was a plastic bag containing seven ziplock bags containing plant-like substance suspected marijuana. The following items were recovered: clear plastic bag containing seven pounds, seven brown pieces of plant material, suspected mushrooms; a piece of foil with crushed brown material.

> Recovered from the basement inside room one, Toledo (phonetic spelling) digital scale with case. Inside the ventilation duct three photos showing Anthony Lewis possessing marijuana; one plastic bag containing numerous new and unused ziplock bags; one clear plastic bag containing numerous white pills; identification cards, et cetera.
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> Your Honor, the items were analyzed pursuant to Department of Health and Mental Hygiene standards and found to contain marijuana from the search and seizure warrant. Your Honor, **the Defendant is charged with common nuisance based on the fact that these undercover buys occurred in his residence, [], on several different occasions, that the house was being used for the distribution of marijuana and the storage of the same.**

(emphasis added).

This proffer made clear that appellee was being charged with keeping a common nuisance because he was using his house to store and distribute marijuana. Accordingly, the circuit court properly found that appellee was adequately apprised of the nature of keeping a common nuisance charges, and therefore, it did not err in denying him relief on this ground. It did err, however, in finding that the plea on the nuisance charge was not knowing and voluntary because the court failed to comply with an announcement requirement that did not exist at the time of appellee's guilty plea.

JUDGMENT GRANTING CORAM NOBIS RELIEF REVERSED. COSTS TO BE PAID BY APPELLEE.