UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1525

September Term, 2013

MARCUS PRESTON

v.

STATE OF MARYLAND

Krauser, C.J.,
Wright,
Hotten

JJ.

Opinion by Hotten J.

Filed: January 12, 2015

Appellant, Marcus Preston, was indicted on April 21, 2004 and charged with distribution of cocaine, possession with intent to distribute cocaine, and possession of cocaine in the Circuit Court for Baltimore City. On December 3, 2004, appellant pled guilty to distribution of cocaine (*State of Maryland v. Marcus Preston*, Case No. 104112019). He was sentenced to three years of incarceration with two years, eleven months, and eighteen days suspended followed by three years probation. Appellant did not appeal his sentence, nor did he file an application for post-conviction relief. In 2006, appellant violated his probation and was ordered to serve eighteen months of his previously suspended sentence. Following his release, he was convicted of unrelated federal charges and remained in federal custody. Appellant claims his federal sentence was increased under federal sentencing guidelines because of his 2004 Maryland conviction. On March 9, 2012, appellant filed a petition for writ of error coram nobis which the circuit court denied without a hearing in a written order filed August 21, 2013. It is from this denial that appellant appeals. He presents one question, which we have rephrased:[1]

> Did the circuit court err in denying appellant's petition for writ of error coram nobis where appellant asserted that his 2004 plea did not comport with Maryland Rule 4-242(c)?

For the reasons outlined below, we shall affirm the judgment of the circuit court.

---

[1] Appellant's original question presented is "[d]id the [t]rial err in concluding that the [a]ppellant's plea of guilty was [k]nowingly and [v]oluntarily made in accordance with Maryland Rule 4-242(c)?"

FACTUAL AND PROCEDURAL BACKGROUND

Appellant appeared in the circuit court with two other defendants, whose cases were unrelated, for a guilty plea hearing. His plea colloquy began with appellant's trial counsel explaining to him that he had the right to a jury or a bench trial, and then described both types of trials. Trial counsel then explained the rights appellant would have at trial. Appellant indicated that he did not desire either a jury or bench trial. The colloquy continued:

> [TRIAL COUNSEL]: Now, if you had [sic] trial, whether it was a judge trial or jury trial and you were found guilty, you could appeal on lots of different grounds. Now, because you're entering into a guilty plea here, you're limiting your grounds to four specific grounds. You would have to ask leave to appeal to the Court of Special Appeals on those four grounds. Now, the first one is the legality of the sentence. All that means is that this has to be a legal sentence under the statutes of the State of Maryland. Now, do you understand . . . that this is a legal sentence because you're being given three years probation. Do you understand that's a lot less than a 20 year penalty?
>
> [APPELLANT]: Yes, sir.
>
> [TRIAL COUNSEL]: All right, so you understand it's a legal sentence?
>
> [APELLANT]: Yes.
>
> * * *
>
> THE COURT: All right. So . . . you have to understand that if you asked for leave to appeal on that specific ground, legality of the sentence, you'd probably be unsuccessful. Now, the second one would just be jurisdiction. All that means it had to occur in Baltimore City, State of Maryland, and you had to be above the age of 18. Is that true . . . ?
>
> [APPELLANT]: Yes, sir.
>
> * * *

[TRIAL COUNSEL]: All right. You probably would not be successful on that ground either because of your answer. Now, the third ground would be ineffective assistance of counsel. All that means is you haven't been happy with [sic] job that your lawyer did, asked him to do stuff that he didn't do, asked him not to do things and he did it anyways. Have you been happy with my representation . . . ?

[APPELLANT]: Yes, sir.

* * *

[TRIAL COUNSEL]: All right. Because the answers you've given, you probably wouldn't be too successful on that ground either. Now, the fourth and final ground is just whether this is a free and voluntary plea, in other words, this what you want to do. . . . [H]ow old are you?

[APPELLANT]: 20 years old.

[TRIAL COUNSEL]: How far did you go in school?

[APPELLANT]: Last year.

[TRIAL COUNSEL]: All right. Can you read and write?

[APPELLANT]: Yes.

[TRIAL COUNSEL]: **Do you understand what's going on here today?**

[APPELLANT]: **Yes, sir.**

[TRIAL COUNSEL]: Are you under the influence of any alcohol or drugs?

[APPELLANT]: No, sir.

[TRIAL COUNSEL]: Under the supervision of a psychologist or psychiatrist?

[APPELLANT]: No, sir.

[TRIAL COUNSEL]: Now, besides the three year suspended, three years probation, anybody offer you anything else to proceed in this matter?

[APPELLANT]: No, sir.

[TRIAL COUNSEL]: Anybody forcing you to do this?

[APPELLANT]: No, sir.

[TRIAL COUNSEL]: You're doing this freely and voluntarily?

[APPELLANT]: Yes, sir.

* * *

[TRIAL COUNSEL]: All right. Because the answers you've given . . . , you're probably not going to be too successful, if you ask for leave to appeal to the Court of Special Appeals. Do you understand . . . ?

[APPELLANT]: Yes, sir.

* * *

[TRIAL COUNSEL]: And you have to understand, . . . that if you were on probation at the time of these alleged crimes, that this would be a violation of that probation and Judge Noel has nothing to do with that. Were you on probation at the time of this incident . . . ?

[APPELLANT]: No, sir.[2]

[TRIAL COUNSEL]: You understand if you were mistaken, this would be a violation?

[APPELLANT]: Yes, sir.

* * *

[2] Although appellant here responds "no," we note that later in the proceeding, the court noted "[y]ou've got two probations going for you."

[TRIAL COUNSEL]: All right. And understanding that, this is how you want to proceed . . . ?

[APPELLANT]: Yes, sir.

(emphasis added). The colloquy ended:

[TRIAL COUNSEL]: Now, does anyone have any questions of either the Judge or myself before we begin . . . ?

[APPELLANT]: No, Sir.

The court then accepted the plea as knowing and voluntary and the State gave a factual predicate for the plea. The State proffered:

The facts in support of the plea for [appellant] are as follows: On April 1st, 2004 at approximately 12:00 p.m. in the 2000 block of (unintelligible) which is located in the City of Baltimore, Undercover Officer 1759 entered the block for the purpose of making a narcotics purchase. And he met with [appellant] in this case . . . and he bought eight green Ziploc bags of suspected cocaine in exchange for (unintelligible).

The undercover officer then left the area. An arrest team responded and they recovered from [appellant] (unintelligible) recorded buy money and an additional $20 in US Currency. The drugs that were purchased were submitted to the Evidence Control Unit where they did test positive for cocaine, a Schedule II narcotic. Let the record reflect that I'm showing [appellant's counsel] now. The State would admit that as State's Exhibit No. 1.

* * *

If the undercover officer was here, he would identify [appellant] as to [sic] one who distributed cocaine on that day. All events occurred in Baltimore City, State of Maryland.

DISCUSSION

There are five requirements for securing a writ of error coram nobis:

> (1) [T]he 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) [T]he coram nobis petitioner must be suffering or facing significant collateral consequences from the conviction.
>
> (4) Basic principles of waiver are applicable to issues raised in coram nobis proceedings.
>
> (5) [O]ne is not entitled to challenge a criminal conviction by a coram nobis proceeding if another statutory or common law remedy is then available.

State v. Hicks, 139 Md. App. 1, 10 (2001) (citation and quotation omitted). In addition, a petition for writ of error coram nobis also must include "the facts that would have resulted in the entry of a different judgment and the allegations of error upon which the petition is based[.]" Maryland Rule 15-1202(b)(1)(D). Petitions for writs of error coram nobis are "equitable action[s] originating in common law," and are not belated direct appeals. *Moguel v. State*, 184 Md. App. 465, 471 (2009). We recently echoed the United States Court of Appeals for the First Circuit in observing:

> The further a case progresses through the remedial steps available to a criminal defendant, the stiffer the requirements for vacating a final judgment. Thus, direct review is more defendant-friendly than post-judgment review and an initial habeas petition is easier for a criminal defendant to litigate than a successive one. The writ of error coram nobis lies at the far end of this continuum. Logically, then, when a defendant seeks to vacate a guilty plea by way of coram nobis, red flags accompany that request.

* * *

> Each request for a writ of error coram nobis must be judged on its own facts. Even if we assume for argument's sake that the petitioner has satisfied the [requirements for relief], we know of no binding authority that would compel us, when making an essentially equitable determination regarding the appropriateness of extraordinary relief, to grant coram nobis. When all is said and done, issuing or denying a writ of error coram nobis must hinge on what is most compatible with the interests of justice, and our discretion must be guided by that inquiry.

Coleman v. State, 219 Md. App. 339, 354-55 (2014) (quoting *United States v. George*, 676 F.3d 249, 258-59 (1st Cir. 2012)).

The State contends that appellant has waived his right to seek coram nobis relief because he did not file an application for leave to appeal his case with this Court following his conviction. We disagree. Pursuant to Md. Code (2001 Repl. Vol. 2008), § 8-401 of the Criminal Procedure Article ("Crim. Proc.") "[t]he 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." In *Graves v. State*, 215 Md. App. 339, 352 (2013), *vacated, State of Maryland v. Gregory Graves*, No. 36 (Dec. 5 2014), we addressed a similar issue, and concluded that Crim. Proc. § 8-401 should be given retroactive application. The Court of Appeals granted *certorari* in April 2014, 437 Md. 637. On December 5, 2014, the Court of Appeals issued an order indicating that it "considered the motion to dismiss the appeal as moot[,] granted the motion, and vacated our decision on that ground. We observed that *Graves* quoted a letter in the bill file for Crim. Proc. § 8-401, which asserted that the "pernicious decision in *Holmes [v. State*, 401 Md. 429 (2007)] must be undone[,]" which supports our conclusion that a failure to file

an application for leave to appeal a conviction and sentence, does not constitute a waiver of the right to coram nobis relief. *Id*. at 350. Accordingly, we conclude that appellant did not waive his right to seek coram nobis relief in failing to file an application for leave to appeal with this Court following his conviction.

Further, State contends that appellant was not facing significant collateral consequences as a result of his plea, thus precluding the grant of a writ of error coram nobis. In its March 30, 2012, memorandum in support of its answer to appellant's petition, the State alleged that appellant was not facing significant collateral consequences as a result of his conviction. The State, however, devoted one single sentence to this allegation, and did not expound on this issue in any way in its subsequent memorandum in support of its answer to the petition filed a month later. The circuit court did not address this argument in its written opinion and order. Rather, the court ruled on the above waiver issue, and then on the appellant's substantive claim. As this issue was not adequately raised, argued, or decided below, we hold that the State has waived any opportunity to advance this argument before us. *Bert v. Comptroller of the Treasury*, 215 Md. App. 244, 269 n.15 (2013) (holding that arguments not presented with particularity shall not be considered on appeal); *Gross v. State*, 186 Md. App. 320, 332-33 (2009) (indicating that if the State fails to raise an argument in trial court it has waived its appellate argument alleging defendant was not entitled to coram nobis relief because of the failure to prove incurring substantial collateral consequences as a result of the guilty plea).

We turn now to appellant's substantive claim. Appellant asserts that the circuit court erred in accepting his plea which, he alleges, was neither knowing nor voluntary, in violation of Maryland Rule 4-242(c). The State contends that analysis of the totality of the circumstances surrounding appellant's plea reveals that he was adequately advised of the nature of the charge to which he pled guilty, satisfying Maryland Rule 4-242(c).

In 2004, at the time of appellant's plea, Maryland Rule 4-242(c) provided:

> **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. 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 source of this information is immaterial, as it may be from the defendant, the defendant's attorney, or the trial court itself. *State v. Daughtry*, 419 Md. 35, 74-75 (2011). The rule "does not impose any ritualistic or fixed procedure to guide the trial judge in determining whether a guilty plea is voluntarily and intelligently entered." *Abrams v. State*, 176 Md. App. 600, 620 (2007) (citation omitted). In *Daughtry*, the Court of Appeals reiterated that the test for determining the voluntariness of a plea under Md. Rule 4-242(c) is "whether the totality of the circumstances reflects that a defendant knowingly and voluntarily entered into a plea." *Id.* at 71. Among the factors which courts may use to determine whether defendant's pleas should be accepted are the following: the complexity

of the charge, the personal characteristics of the defendant, and the factual basis proffered to support the court's acceptance of the plea.[3] *Id.* at 72 (citation and quotation omitted).

We begin with the complexity of the charge to which appellant pled. The first issue we face is that the charge to which appellant pled, distribution of cocaine, was not explicitly stated on the record. We do, however, note that the factual basis State proffered did include the charge: "If the undercover officer was here, he would identify **[appellant] as to [sic] one who distributed cocaine on that day**." (emphasis added). The charge of distribution of cocaine is extremely straight-forward in its description of the criminal act. *Gross*, 186 Md. App. at 342 (noting that the crime of possession with intent to distribute CDS is "straight forward and simple."). In relevant part, Md. Code (2002, Repl. Vol. 2012), § 5-602 of the Criminal Law Article indicates, "[e]xcept as otherwise provided in this title, a person may not: (1) distribute or dispense a controlled dangerous substance[.]" Each element of the crime of distribution of CDS is included in the name of the charge. Accordingly, the complexity of the charge weighs heavily in State's favor.

Moving on to appellant's personal characteristics, we note that appellant was twenty years old, was in his last year of school, and was on probation for two separate cases at the time of his plea. In his "traverse" filed in the circuit court on June 18, 2012, appellant

---

[3] While we will utilize the *Daughtry* factors and confine our analysis of the transcript, we are mindful of our recent holding in *Coleman v. State, supra.* where we held that our review of coram nobis claims made under Maryland Rule 4-242(c) was not limited to the four corners of the transcript. Rather, because circuit courts are impliedly permitted to look beyond the transcript by Maryland Rule 15-1206, we are also permitted to do so, when necessary.

asserted that he suffers from Attention Deficit Disorder (ADD) and a low IQ. Appellant, however, offered no evidence to support this assertion. Moreover, he indicated on the record that he understood what he was doing at the time. Since appellant was finishing his last year of school, and was familiar with the judicial system, this factor weighs in the State's favor, or, if appellant is to be believed, is neutral.

We move to examine the factual basis proffered for the plea. State's proffer listed the date, time, and location of the incident which gave rise to the case. Also, it explained exactly what happened: appellant sold eight bags of cocaine to an undercover officer. Further, it describes the charge to which appellant pled, "he would identify [appellant] as to [sic] one who distributed cocaine on that day." This factor weighs in State's favor because of its thoroughness. It is highly unlikely, given the above proffer, that appellant did not know the crime to which he was pleading guilty.

Examining the totality of the circumstances utilizing the *Daughtry* factors, we are persuaded that appellant did understand the nature of the charges, and their factual basis, comporting with Maryland Rule 4-242(c). As the record satisfied Maryland Rule 4-242(c), appellant's claim of ineffective assistance of counsel, which he made before the circuit court, cannot succeed. Accordingly, we shall affirm.

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