UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1931

September Term, 2013

ANTWON J. LIMBERRY

v.

STATE OF MARYLAND

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Nazarian, J.

Filed: February 6, 2015

On September 30, 1996, Antwon Limberry was convicted by a jury in the Circuit Court for Baltimore County of various sexual offenses. From 1996 to 2011, Mr. Limberry filed a direct appeal, a petition for post-conviction relief, and a petition to reopen a closed post-conviction proceeding, all of which were unsuccessful. On October 31, 2013, Mr. Limberry, proceeding *pro se*, filed a "Motion for Appropriate Relief" in which he asserted that because he was denied his right to counsel at trial, he is entitled to a new trial. The circuit court denied Mr. Limberry's motion and he appeals. We will construe Mr. Limberry's motion liberally and treat it as a petition to reopen a closed post-conviction proceeding. But that doesn't get him very far: on that posture, he was required to file an application for leave to appeal the circuit court's denial of his motion within thirty days, and he failed to do so. This leaves us with the discretion either to treat his notice of appeal as an application for leave to appeal or dismiss his appeal, and we elect the latter.

I. BACKGROUND

A jury convicted Mr. Limberry, on September 30, 1996, of first-degree rape, second-degree rape, first-degree sex offense, second-degree sex offense, and kidnapping. A panel of this Court affirmed Mr. Limberry's convictions in an unreported, *per curiam* opinion. *Limberry v. State*, No. 1755, Sept. Term 1996 (filed September 3, 1997).

On February 18, 1999, Mr. Limberry filed a petition for post-conviction relief, which he amended on August 16, 1999. After considering Mr. Limberry's petition, the circuit court denied the petition through a memorandum opinion on August 10, 2000. On

September 12, 2000, Mr. Limberry filed a timely application for leave to appeal the circuit court's decision. A panel of this Court denied Mr. Limberry's application on July 13, 2001.

Ten years later, on October 4, 2011, Mr. Limberry filed a "Motion to Reopen a Closed Post-Conviction Proceeding & Supporting Memorandum of Law." The circuit court denied Mr. Limberry's motion on May 14, 2012. Mr. Limberry filed a motion for reconsideration, which the circuit court denied on May 29, 2012. Mr. Limberry filed a timely application for leave to appeal and a panel of this Court denied the application in an unreported, *per curiam* opinion. *Limberry v. State*, No. 1168, Sept. Term 2012 (filed January 25, 2013).

On October 31, 2013, now proceeding *pro se*, Mr. Limberry filed a "Motion for Appropriate Relief." In his motion, Mr. Limberry asserted that he "was denied his Maryland Constitutional and Statutory Rights to counsel and is therefore entitled to reversal of his criminal conviction and be granted a new trial." On November 4, 2013, the circuit court denied Mr. Limberry's motion, holding that he "raise[d] once again contentions that have been rejected in the Court of Special Appeals, in a Post-Conviction proceeding, and in a ruling on a Motion to Reopen Closed Post-Conviction Proceeding [and] [t]hese contentions continue not to be persuasive." Mr. Limberry filed a timely notice of appeal of the circuit court's ruling on November 27, 2013, but did not file an application for leave to appeal.

II. DISCUSSION

The Maryland Rules of Criminal Procedure do not recognize something called a "Motion for Appropriate Relief." That by itself does not end the inquiry—because Mr. Limberry is a *pro se* litigant, we construe his filings liberally, and in that light we interpret the "Motion for Appropriate Relief" as asking the circuit court to reopen a closed post-conviction proceeding. Consequently, after the circuit court denied his motion, Mr. Limberry was required, within thirty days, to file an application for leave to appeal the circuit court's decision. Instead, he filed a notice of appeal, which would have been timely had it been the right filing, but it was not the right filing—Mr. Limberry needed to seek leave to appeal, a step he did not take.[1]

Section 7-102 of the Criminal Procedure Article ("CP") of the Md. Code (2001, 2008 Repl. Vol.) permits a person convicted of a crime to file a petition for post-conviction relief:

> (a) Subject to subsection (b) of this section, §§ 7-103 and 7-104 of this subtitle and Subtitle 2 of this title, a convicted person may begin a proceeding under this title in the circuit court for the county in which the conviction took place at any time if the person claims that:

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[1] Mr. Limberry presents the following questions for our review:

> 1. Did the trial court erroneously conclude that Appellant's present state law claim was raised in prior proceedings?
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> 2. Did the trial court fail to comply with Maryland precedent when it denied Appellant's Motion for Appropriate Relief?

> (1) the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of the State;
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> (2) the court lacked jurisdiction to impose the sentence;
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> (3) the sentence exceeds the maximum allowed by law; or
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> (4) the sentence is otherwise subject to collateral attack on a ground of alleged error that would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy.

(b) A person may begin a proceeding under this title if:

> (1) the person seeks to set aside or correct the judgment or sentence; and
>
> (2) the alleged error has not been previously and finally litigated or waived in the proceeding resulting in the conviction or in any other proceeding that the person has taken to secure relief from the person's conviction.

Id. But there are limits: for each trial or sentence, a convicted person may file only *one* petition for post-conviction relief and, "[u]nless extraordinary cause is shown," may not file the petition more than ten years after the sentence was imposed. CP § 7-103. In the event a petition for post-conviction relief is denied, the post-conviction proceeding is deemed closed. That said, CP § 7-104 does allow a convicted person to file a petition to reopen a post-conviction proceeding, which shall be granted "if the court determines that the action is in the interests of justice." *Id.* There is no limit on the amount of petitions to reopen a post-conviction proceeding a person may file nor is there a limit on their timing, but that was not meant to offer infinite bites at the post-conviction apple. *Id.*; *see also*

Alston v. State, 425 Md. 326, 335 (2012) ("It seems clear that the reopening provision was . . . for the purpose of providing a safeguard for the occasional meritorious case where the convicted person had already filed one post[-]conviction petition . . . [and] was not to authorize a second post[-]conviction petition with all of the requirements applicable to post[-]conviction petitions.").

After exhausting his direct appeal, Mr. Limberry filed a petition for post-conviction relief in 1999. That petition was unsuccessful, and closed out his one post-conviction proceeding. On October 4, 2012, Mr. Limberry filed a petition to reopen his closed post-conviction proceeding. This petition was also unsuccessful. A year later, on October 31, 2013, Mr. Limberry, proceeding *pro se*, filed the "Motion for Appropriate Relief," the denial of which is before us here. In the motion, Mr. Limberry argued that because he was denied his State constitutional and statutory right to counsel, he was entitled to a new trial.

On its face, Mr. Limberry's motion appears to be a petition for post-conviction relief because it seeks to set aside his conviction rather than reopen his post-conviction proceeding. Were this the case, Mr. Limberry's motion would have to be denied because he already filed a petition for post-conviction relief and was convicted more than ten years ago. CP § 7-103. Because, however, Mr. Limberry is an unrepresented inmate, we are willing for present purposes to construe his motion liberally, *Simms v. State*, 409 Md. 722, 731-32 (2009), and treat it as a(nother) petition to reopen a closed post-conviction proceeding.

On that posture, there is no automatic right to appeal. Instead, and as he knew from his first motion to reopen, CP § 7-109 required Mr. Limberry to file an application for leave to appeal within thirty days after the circuit court's decision to deny his new motion:

> (a) Within 30 days after the court passes an order in accordance with this subtitle, a person aggrieved by the order, including the Attorney General and a State's Attorney, may apply to the Court of Special Appeals for leave to appeal the order.
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> (b)(1) The application for leave to appeal shall be in the form set by the Maryland Rules.
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> (2) If the Attorney General or a State's Attorney states an intention to file an application for an appeal under this section, the court may:
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> (i) stay the order; and
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> (ii) set bail for the petitioner.
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> (3) If the application for leave to appeal is granted:
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> (i) the procedure for the appeal shall meet the requirements of the Maryland Rules; and
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> (ii) the Court of Special Appeals may:
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> 1. affirm, reverse, or modify the order appealed from; or
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> 2. remand the case for further proceedings.
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> (4) If the application for leave to appeal is denied, the order sought to be reviewed becomes final.

Id.; *Grandison v. State*, 425 Md. 34, 50 (2012), *cert. denied*, 133 S. Ct. 844 (2013) ("[CP] 7–109(a) . . . requires that an appeal of postconviction proceedings begin with an

application for leave to appeal"); *Arrington v. State*, 411 Md. 524, 564 (2009) ("In a traditional post-conviction case, when an inmate's petition for relief under the Maryland Uniform Post Conviction Procedure Act is denied by a circuit court, he or she must file an Application for Leave to Appeal in the Court of Special Appeals."); *Coleman v. Warden, Md. House of Correction*, 239 Md. 711, 712 (1965) ("[N]o appeal as of right lies from the denial of post conviction relief; review may be sought only by way of an application for leave to appeal.").

Mr. Limberry filed a *notice of appeal* in that timeframe, but did not file an *application for leave to appeal*. Under these circumstances, we have the discretion either to treat Mr. Limberry's notice of appeal as an application for leave to appeal, and thereafter consider whether to grant the application, or to dismiss the appeal as procedurally deficient. *See Grandison*, 425 Md. at 52; *compare Miller v. State*, 185 Md. App. 293, 295 (2009) ("The appellant filed a timely notice of appeal, which this Court treated as an application for leave to appeal[.]") *with Britton v. State*, 201 Md. App. 589, 595 (2011) ("Because appellate review of a guilty plea may only be obtained by an application for leave to appeal and because appellant's notice of appeal lacked sufficient content to be deemed the substantive equivalent of an application for leave to appeal, this Court dismissed his appeal."). In this case, we agree with the State that Mr. Limberry loses either way: either he has raised and lost this claim during his earlier proceedings or, to the extent it is a new claim, it is one he should have raised on direct appeal. Accordingly, we decline to exercise

our discretion to treat Mr. Limberry's notice of appeal as an application for leave to appeal, and dismiss.[2]

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.

[2] Were we to exercise our discretion to treat Mr. Limberry's notice of appeal as an application for leave to appeal, we would nonetheless deny the application.