

Circuit Court for Wicomico County
Case No.: K00-0501

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 1190

September Term, 2022

BRIAN WATERS

v.

STATE OF MARYLAND

Berger,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 4, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

*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.

In 2000, Brian Waters, appellant, pleaded guilty to third-degree sex offense and was sentenced to four years’ imprisonment, all suspended, and placed on a two-year term of supervised probation. In 2020, Mr. Waters, representing himself, filed a petition for writ of error coram nobis in which he claimed, for a variety of reasons, that his guilty plea was not entered knowingly and voluntarily. The circuit court denied relief and upon appeal this Court affirmed the judgment. *Waters v. State*, No. 494, September Term, 2020 (filed April 30, 2021) (“*Waters I*”), *cert. denied*, 475 Md. 697 (August 2, 2021).

In 2022, Mr. Waters, again representing himself, filed a second petition for writ of coram nobis in which he again challenged the validity of his 2000 guilty plea. In an Opinion and Order of Court, the circuit court denied relief pursuant to the doctrines of waiver and law of the case. Mr. Waters appeals that ruling. Because we agree with the circuit court that Mr. Waters waived the new allegations by not raising them in his first petition, we shall affirm the judgment.

To be entitled to coram nobis relief, the “petitioner must satisfy five conditions,” one of which is that “the issue must not be waived[.]” *Hyman v. State*, 463 Md. 656, 672 (2019). The Maryland Supreme Court has instructed that “[b]asic principles of waiver are applicable to issues raised in coram nobis proceedings” and “the same body of law concerning waiver . . . 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.”” *State v. Smith*, 443 Md. 572, 599 (2015) (quoting *Skok v State*, 361 Md. 52, 79 (2000)).¹ On appeal, we review the waiver issue de novo. *Hyman*, 463 Md. at 674.

Under the Post Conviction Procedure Act, an allegation of error as to a “fundamental constitutional right” is waived if the petitioner “could have made but intelligently and knowingly failed to make the allegation” in a prior proceeding. Md. Code Ann., Criminal Procedure, § 7-106(b)(1).; *Hyman*, 463 Md. at 672; *Curtis v. State*, 284 Md. 132, 139-40 (1978). “[A]llegations of ineffective assistance of counsel and a plea that was not intelligent and knowing implicate fundamental constitutional rights[.]” *Hyman*, 463 Md. at 673.

“When a petitioner could have made an allegation of error” in an earlier proceeding but did not, “there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation.” Crim. Proc. § 7-106(b)(2). If the presumption is not rebutted, failure to “make an allegation of error shall be excused if special circumstances exist.” Crim. Proc. § 7-106(b)(1)(ii)(1).

As discussed in *Waters I*, in his first petition Mr. Waters claimed that his guilty plea was not entered knowingly and voluntarily because he had not been informed on the record that, by pleading guilty and foregoing a trial, he was waiving this right to call and examine witnesses to testify on his behalf. (He had been advised that he was waiving his right to “confront and cross-examine” the State’s witnesses.) In his second petition, Mr. Waters

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alleged that his guilty plea was invalid because (1) trial counsel rendered ineffective assistance by failing to object to the trial court’s “‘factual basis’ determination”; (2) trial counsel “coerc[ed] [him] into believing that counsel had properly informed [him] of the nature and elements of the charge of third-degree sex offense”; and (3) the trial court “failed to make a proper ‘factual basis’ determination[.]” These allegations—which all relate to the validity of the plea—could have been raised in his previous *coram nobis* petition and Mr. Waters waived them by failing to do so. Moreover, he did not rebut the presumption that he knowingly failed to raise these allegations in the first petition. *See Hyman*, 463 Md. at 674-75 (Maryland’s Supreme Court has “long held that a defendant in a criminal case who chooses to represent himself is subject to the same rules regarding reviewability and waiver of questions not raised at trial as one who is represented by counsel.”) (quotation marks and citation omitted)). Although he discussed waiver in his petition, Mr. Waters did not address why he did not or could not have raised these new allegations in his first petition for *coram nobis* relief.

**JUDGMENT OF THE CIRCUIT COURT
FOR WICOMICO COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**