

Circuit Court for Baltimore County
Case No.: 03-C-17-006383

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1858

September Term, 2017

JOSHUA SABISCH

v.

STEPHEN T. MOYER, *et al.*

Fader, C.J.,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Nazarian, J.

Filed: January 2, 2019

* 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.

Joshua Sabisch appeals from the Circuit Court for Baltimore County’s denial of his petition for a writ of *habeas corpus*. He seeks to raise a number of Constitutional challenges to the proceedings in the district court that led to a finding that he was guilty of a sex offense and an offer, that he accepted, of probation before judgment. In addition to disputing his claims on the merits, the State moved to dismiss the appeal on the ground that we lack jurisdiction to hear it. The State is right. We grant the motion to dismiss, although we recognize that Mr. Sabisch may yet have another opportunity to raise his claims.

I. BACKGROUND

On October 26, 2016, Mr. Sabisch appeared, in response to a summons, in the District Court of Maryland for Baltimore County. He was advised at this appearance for the first time that he was being charged with fourth-degree sex offense. The court explained the charge carried a “maximum penalty [of] one year of incarceration and/or a \$1,000 fine,” then asked “[w]hen are you going to go about getting an attorney?” He responded that he hadn’t thought about it, and the court advised him to start:

MR. SAB[ISC]H: Um, I don’t know, I haven’t thought about it.

THE COURT: All right. Well, you need to think about it. You need to either hire private counsel, pay them, and have them enter their appearance on your behalf, or make application to the Office of the Public Defender if you can not afford private counsel. That’s their information, sir. You need to see them at that location in person that’s listed there in Towson immediately. Don’t wait. This week or next week. You would not want to come back without an attorney and attempt to represent yourself, it would not be in your interest. Do you understand that, sir?

MR. SAB[IS]CH: Yes.

The district court also reminded him of advisements it had given *en masse* at the outset of the docket, then granted Mr. Sabisch's request for postponement.

The new trial date was December 8, 2016, and Mr. Sabisch appeared again in the district court without counsel. He indicated at first that he wanted to enter a guilty plea, and the court gave him the following advisements:

THE COURT: Sir, the maximum possible penalty of this charge is one year in jail. The State is deferring to me. That[] mean[s] they're saying, Judge, it's up to you. I want you to understand I could still impose that maximum sentence. Do you understand that?

MR. SAB[IS]CH: Yes.

THE COURT: Now, I want you to understand that you certainly don't have to plead guilty. You are entitled to either a judge or a jury trial. In either instance, what would happen is, the State would call in witnesses that they had. They would testify in the witness chair like this one to my left. You could question any witnesses that are called against you. You could call witnesses on your own behalf. You could call yourself as a witness. Or you could say, you choose a judge trial, which you didn't want to testify. If you did that, I would not draw any inference from your silence. If this case was called for a jury trial and a jury trial was provided, you could tell the judge presiding at that jury trial that you did not want to testify. And the judge would tell those jurors they could draw no inference from your silence.

Now for a trial like that, a judge or a jury, it would be up to the State to prove beyond a reasonable doubt respectively to the fact finder, be that a judge or a jury, that you were guilty of the charge. Now, if it was a jury trial, the jury's verdict would have to be unanimous. That means all 12 jurors would have to agree. By proceeding like this, pleading guilty, you're waiving your right to have a judge and a jury trial. Do you understand that?

MR. SAB[IS]CH: Yes.

But as the court finalized the plea, Mr. Sabisch said that he wanted to call a witness:

THE COURT: Sir, the offense you're pleading guilty to is that you engaged in intercourse with a person 14-years-old, you being at least four years old[er] than the victim. Are you admitting . . . it is correct that you did that?

MR. SAB[IS]CH: Yes.

THE COURT: Is it your final decision to plead guilty?

MR. SAB[IS]CH: I'd like to have the witness come forward.

The court then stopped and examined Mr. Sabisch further:

THE COURT: All right. So do you want to plead guilty or do you want to have a trial?

MR. SAB[IS]CH: What happens if I -- I don't quite understand if I have a trial.

THE COURT: So if you had a trial, what's going to happen is, as I explained to you, witnesses will testify. And you question those witnesses, you could call witnesses on your own behalf. You could testify yourself if you want to or you can remain silent, as I explained to you. It will be up to the State to prove beyond a reasonable doubt that you're guilty of the charge. You have the right to have your case tried. You also certainly have the right to accept the plea. In either instance, you're going to be able to address me in the terms of the case. If you plead guilty, however, you're not going to be able, effectively, to stand up and say; well, I want to tell you this didn't happen. If you want to give me what's called mitigation through yourself or through someone else in terms of an explanation as to why this happened, you can do that. But again, you have the right to have a trial. Nobody's trying to talk about out of that. Most importantly, I'm not trying to talk you out of that.

So you are in a situation right now where you have the right to either have a trial before me and a trial before a jury or proceed by way of a guilty plea the State told me that you guys agreed to. Do you understand the three options you have?

MR. SAB[IS]CH: I want a trial.

THE COURT: Do you want to have your case tried before me or do you want to have it tried before a jury?

MR. SAB[IS]CH: Before you.

Although he had said he wanted a bench trial, Mr. Sabisch continued to tell the judge that he would like to plead guilty. At that point, the judge recognized that Mr. Sabisch did not understand the legal consequence of a guilty plea:

THE COURT: Okay. Now, I'm not going to continue to go back and forth. Not because I don't want to, but effectively unless someone is entering what's called a knowing and voluntary guilty plea, I'm just going to enter a not guilty plea on your behalf and call the case for a trial. If you enter a guilty plea, all that's going to happen is, the State's Attorney is going to tell me what happened here. After I've heard that, you're going to have the opportunity to address me and tell me why it happened and anything else you want to tell me. As I told you, if you plead guilty, the one thing you can't do is, you can't then stand up and say, Judge, it didn't happen. Because you're admitting if you plead guilty.

If you want to plead not guilty, there's going to be live testimony. The State's going to call witnesses.

MR. SAB[IS]CH: I plead not guilty.

THE COURT: You want to plead guilty?

MR. SAB[IS]CH: Not guilty.

The court took a brief recess, then asked Mr. Sabisch for his final decision, and he requested a postponement “[t]o get a Public Defender.” The court asked Mr. Sabisch what he had done since October to find a lawyer to represent him and he responded that he had been limited by finances and homelessness:

MR. SAB[IS]CH: I've been trying to get, because I'm on SSI, and I've been trying to get the money to save out, but I've also, because I've been homeless, trying to get an apartment and transportation, it's very hard for me. But I'm aware of these charges and I will work even harder if you give me a postponement to get an attorney. I can even go down today to fill out and get a Public Defender.

The court took another brief recess to allow Mr. Sabisch to confer with an assistant public defender who was in the courtroom and offered to speak with him, then took up, and denied, the motion for postponement:

THE COURT: I'm going to have to deny your postponement request, Mr. Sab[is]ch, under the circumstances. Now, you have the right to have your case tried before a jury or a judge. A few minutes ago you indicated to me you wanted to have your case tried before a judge and you're waiving your right to a jury trial, is that correct?

MR. SAB[IS]CH: I honestly don't understand, but I'd like to plead guilty. I mean, I don't understand any of this, because I've never really done this before.

THE COURT: All right. I've explained to you a couple of times about the difference between a guilty plea and a not guilty plea. And I'm candidly not convinced that you understand what a guilty plea is. And I can only accept the guilty plea if I'm convinced that it's a knowingly and a voluntary plea, and it's an intelligent plea. And it's that third element that I'm struggling with and I'm not convinced you understand what it is. Because you told me you have a witness here.

The bench trial proceeded that afternoon. The State put the victim on the stand and Mr. Sabisch cross-examined her, then Mr. Sabisch put the victim's mother on the stand and the State cross-examined her. When asked whether he would like to testify or remain silent, Mr. Sabisch replied "I want a jury trial." The court explained that a jury trial was no longer an option, and asked again whether Mr. Sabisch wanted to testify or remain silent. Mr. Sabisch asked for a chance to speak with the same lawyer he talked to earlier, and after consulting, responded "I'd like to remain silent."

The court found Mr. Sabisch guilty, but stayed the entry of judgment and offered him probation before judgment. The court explained that probation would be supervised

for twelve months and would require him to comply with other standard probation conditions, including no contact with the victim, a substance abuse evaluation, registration with law enforcement, and waiver of the right to appeal. Mr. Sabisch told the court he did not understand probation before judgment, so the court explained it again:

THE COURT: So there's a guilty finding that I made, but I struck it in favor of probation before judgment. Now, if you want to accept it, you are waiving your right to an appeal, because there's no guilty finding to appeal to. If you violate my probation, there's 12 months incarceration that is hanging over your head, if you will. And if you violate my probation, I will put you in jail. But hopefully that will not come to pass.

Having said all of this, do you now understand what probation before judgment is?

MR. SAB[IS]CH: Yes, I do.

THE COURT: Do you want to accept it and waive your right to an appeal?

MR. SAB[IS]CH: I do.

A week later, Mr. Sabisch filed a motion for modification or reduction of his sentence under Maryland Rule 4-345(e). Mr. Sabisch expressed willingness to undergo psychiatric evaluation. The district court held the motion *sub curia*.

Exactly two months after his sentencing, Mr. Sabisch was before the court again, this time for violating his probation. Mr. Sabisch pled not guilty and stated he was “not competent to stand trial.” The court ordered a competency evaluation, and the results indicated Mr. Sabisch was competent because he demonstrated an understanding of “the nature and object of the proceedings and . . . [an ability to] assist in his defense.” On his own, Mr. Sabisch submitted to another psychological evaluation on March 3, 2017. The

results of that test revealed symptoms of bipolar disorder, borderline personality disorder, and a low-functioning cognitive ability with an I.Q. score of 59.

On April 10, 2017, Mr. Sabisch filed a writ of error *coram nobis*. The petition was denied eight days later on the ground that he was still on probation, and thus ineligible for *coram nobis* relief. Mr. Sabisch appealed the decision to the Circuit Court for Baltimore County. The court dismissed the appeal on June 16, 2017 on the same grounds, *i.e.*, that under Maryland Rule 15-201, the writ of error *coram nobis* was not available to Mr. Sabisch while he was still on probation. *See Bereska v. State*, 194 Md. App. 664, 683 (2010) (“To succeed on a *coram nobis* petition, a petitioner must not be incarcerated or on parole or probation . . .”).

On May 3, 2017, after a hearing at which Mr. Sabisch was represented by counsel, the district court found that Mr. Sabisch had violated his probation by contacting the victim. Mr. Sabisch asked the court to modify his sentence to allow him to move back to Michigan, where he lived before he met the victim on the internet. The court declined to lift the probation, but agreed to modify his conditions to accommodate his desire to move out of the state. The court imposed an eighteen-month “unsupervised” probation that permitted Mr. Sabisch to leave Maryland, but required him, among other things, to check in with his probation officer every 30 days via phone, to provide his current address, and to register as a Tier One Sex Offender. After returning to Michigan, though, Mr. Sabisch learned that Michigan law does not distinguish among tiers of sex offenders and that he would be required by Michigan law to register as a sex offender for life.

Mr. Sabisch initiated this proceeding by filing a petition for a writ of *habeas corpus* on July 3, 2017. He alleged that the terms of his probation caused an “unlawful restraint on his liberty,” that he had not knowingly and intelligently waived his right to counsel, his right to a jury trial, or his right to appeal, and that the district court erred in failing to inquire about his competence to represent himself. He asked the court to vacate his conviction and order a new trial.

The State opposed the petition, both on jurisdictional and substantive grounds. *First*, the State argued that the court lacked jurisdiction because an individual seeking habeas relief must “be restrained from lawful liberty *within* the State” and Mr. Sabisch filed his petition while in Michigan. *Second*, the State contended that he had failed to pursue alternative avenues of relief, such as a motion for a new trial under Maryland Rule 4-331 or a notice of appeal under Maryland Rule 7-104. Md. Code (1973, 2013 Repl. Vol.), § 3-702(a) of the Courts and Judicial Proceedings Article (“CJP”). *Third*, moving to the merits, the State argued that Mr. Sabisch had knowingly and intelligently waived his right to a jury trial when—after multiple advisements from the judge—he requested a bench trial. *Fourth*, by accepting probation before judgment on two occasions, the State argued that Mr. Sabisch waived his right to appeal. *Fifth*, with regard to waiver of counsel, the State asserted that the “adequacy of counsel is not reviewable under a writ of *habeas corpus*.” *Bowers v. Warden, House of Correction*, 215 Md. 634, 637 (1958). And *finally*, as to his competency stand trial, the State contended that the district court was not required to evaluate Mr. Sabisch because he demonstrate[d] an ability to understand the nature and

object of the proceedings by “weighing aloud the merits of accepting a guilty plea.” Moreover, Mr. Sabisch’s “desire to present a witness to the Court demonstrated an ability to assist counsel in constructing a defense.”

The circuit court held a hearing on October 17, 2017. In a written order, the court denied the *habeas corpus* petition for the reasons argued by the State. The court specifically noted that “[t]here was no evidence presented at that hearing” demonstrating that Mr. Sabisch was not competent. The court found that Mr. Sabisch was in Maryland for the purpose of CJP § 3-702(a) because his probation required regular phone calls with a probation officer in Maryland, but that Mr. Sabisch had knowingly and intelligently waived his right to appeal. Mr. Sabisch filed a timely notice of appeal.

II. DISCUSSION

A. This Court Lacks Subject Matter Jurisdiction.

Mr. Sabisch has raised claims that, if properly postured, could raise serious questions about the viability of his waivers of counsel, a jury trial, and appeal, among other things. But before we can consider the merits of those claims, we must first consider whether we have jurisdiction at all. The State identifies two reasons why we don’t, both rooted in the language of CJP § 3-702(a), which limits *habeas* relief to persons:

committed, detained, confined, or restrained from his lawful liberty *within the State* for any alleged offense or under any color or pretense or any person in his behalf, may petition for the writ of habeas corpus to the end that the cause of the commitment, detainer, confinement, or restraint may be inquired into.

(Emphasis added.)

The State argues that because Mr. Sabisch was on probation and not in physical custody when he filed his *habeas corpus* petition, he is not eligible for *habeas* relief. Moreover, even if he were, he must be “committed, detained, confined, or restrained” physically “within the State,” which he has not been ever since he relocated to Michigan before filing this petition. CJP § 3-702(a).

Mr. Sabisch counters that there is no specific requirement for physical restraint in CJP § 3-702(a), nor is there a requirement that, as a petitioner, he must be physically in Maryland. We disagree. Although the language of the statute itself does not use the word “physical,” Maryland case law does. *See, e.g., Hendershott v. Young*, 209 Md. 257, 262 (1956) (“Unless there be an actual or physical restraint of a person, the writ of *habeas corpus* may not issue . . .”). Maryland courts have held consistently that the writ of *habeas corpus* is not available to bailees or parolees because they are not in “actual, involuntary, illegal restraint.” *Id.* at 261; *see also McGloin v. Warden of Md. House of Correction*, 215 Md. 630, 631 (1958). Yes, there are more recent federal cases that define restraint more in terms of liberty restrictions than physical restrictions, and it’s also true that some Maryland cases interpreting the Uniform Postconviction Procedure Act (“UPPA”) have as well. But the federal cases don’t work—the UPPA occupies most of the field that the federal *habeas corpus* statute covers in the federal system, and the General Assembly has left a much narrower range of potential relief for *habeas* to provide. In the more limited context of *habeas corpus* in Maryland, Mr. Sabisch’s probation before judgment status places him in the same position as parolees and people out on bail—his liberty was fettered, to be sure,

but he was not committed, detained, confined, or restrained, and we don't have jurisdiction to consider *habeas corpus* relief for him.

Similarly, Mr. Sabisch was not in Maryland when he filed his petition, and we lack jurisdiction to provide *habeas corpus* relief to him in Michigan. While he was on unsupervised probation, his ongoing requirement to check in with a probation officer fell short of creating a presence in Maryland that could justify common law *habeas corpus* relief here. Mr. Sabisch isn't wrong that federal cases interpreting the federal counterpart writ, *e.g.*, *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 494–95 (1973), focus more on the physical location of the custodian than the petitioner. But again, the federal version of the writ has a different scope, and unlike federal courts, Maryland courts can't compel production of a body¹ that's outside of our borders. *See, e.g.*, *In re Guardianship of Zealand W.*, 220 Md. App. 66, 87–88 and n.6 (2014).

Accordingly, we grant the State's motion to dismiss the appeal. And because this appeal failed at the jurisdictional threshold, we need not, and do not, consider whether probation before judgment qualifies as a conviction for purposes of CP§ 7-107(b)(2)(ii) (exempting from the usual bar against *habeas* appeals those “in which a writ of habeas corpus is sought for a purpose other than to challenge the legality of a conviction of a crime or sentence of imprisonment for the conviction of the crime”)² or whether Mr. Sabisch

¹ The Latin translation of “*habeas corpus*” is “you should have the body.” *Habeas corpus*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2003).

² *Compare Gakaba v. State*, 84 Md. App. 154, 156 (1990) (probation before judgment does not qualify as a “conviction” for purposes of the Uniform Postconviction Procedure

waived his rights to appeal by consenting to probation before judgment, nor do we offer any decisions on the merits of his substantive arguments.

This may not mean, however, that Mr. Sabisch is out of options. As both sides acknowledged at oral argument, he has now completed his probation, and thus no longer is barred by that obligation from seeking a writ of *coram nobis*. Whether he is entitled to relief remains to be seen.

**APPEAL DISMISSED. COSTS TO BE PAID
BY APPELLANT.**

Act (UPPA)) *with Abrams v. State*, 176 Md. App. 600 (2007) (probation before judgment is considered a conviction in the context of *coram nobis* proceedings).