Circuit Court for Baltimore City
Case Nos. 112290034-35

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2000

September Term, 2018

BENJAMIN HERBERT

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Eyler, Deborah S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 17, 2019

In the Circuit Court for Baltimore City, Benjamin Herbert, the appellant, pleaded guilty to second-degree rape and was sentenced to 20 years in prison, all but five years suspended, followed by three years of supervised probation. Later he filed a petition for post-conviction relief, which the circuit court denied after a hearing. From that judgment, he filed a timely application for leave to appeal, which was granted, and his case was moved to the direct appeal docket.

Mr. Herbert poses several questions on appeal, which we have combined, reordered, and reworded:

I. Did the post-conviction court err by finding that his guilty plea was knowing and voluntary?

II. Did the post-conviction court err by denying his claim that defense counsel was ineffective for a) giving incorrect advice about the sex offender registration consequences of his plea? and b) failing to assist him in perfecting his post-trial rights?

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

FACTS AND PROCEEDINGS

On October 16, 2012, in the Circuit Court for Baltimore City, Mr. Herbert was indicted in two cases based on the same allegations of fact. In Case No. 11229034 ("Case 34"), he was charged with first-degree rape, second-degree rape, third-degree sexual offense, fourth-degree sexual offense, and second-degree assault. In Case No. 11229035 ("Case 35"), he was charged with those same crimes except first-degree rape. Herbert was

jailed until the May 22, 2014 trial date. That day, instead of going to trial, he pleaded guilty to second-degree rape in Case 35, in an agreement with the State.

Guilty Plea Hearing

At the outset of the guilty plea hearing, after Edward Smith, Jr., Mr. Herbert's counsel, engaged in a colloquy with Mr. Herbert about the elements of the charged crimes, the following took place:

> MR. SMITH: All right. Now, there have been plea negotiations in this case, and I've come downstairs [to the lock-up] and I told you what those plea negotiations are. You understand that you're facing, on the first count [first-degree rape in Case 34], a life sentence - -
>
> THE DEFENDANT: Uh-huh.
>
> MR. SMITH: - - in this particular case. And, if convicted, His Honor could, in fact, sentence you to life in the Department of Corrections. You understand that, correct?
>
> THE DEFENDANT: Yes.
>
> MR. SMITH: All right. I told you that the plea in this case will be a 20-year sentence, all suspended but five years of active incarceration, which they'll allow you a credit for the time which you have already served. Do you understand that?
>
> THE DEFENDANT: I do.
>
> MR. SMITH: And I've also advised you that the Court will impose three years of supervised probation on top of that. Do you understand that?
>
> THE DEFENDANT: Yes, I do.
>
> MR. SMITH: I've also told you that there are certain consequences as a result of the sex offense in this case, and we've been over those. **And one of the things that was - - you were reluctant about was whether or not that would have any effect on your being around children or your**

> **grandchildren or any of that kind of thing and the reporting requirements.**
>
> **This Court has also indicated that if there is any problem with any of that, you'll have to do the ordinary condition for second degree sex offense[1], but you will be appraised as to whether or not you are dangerous and you are a predator, that kind of thing. And then they will make an assessment. But this involves what is really a one one [sic] one kind of situation with you and the victim in this case. And it's very unlikely that there will be those dire consequences that you are concerned about. And we've talked about that, haven't we?**
>
> THE DEFENDANT: **Yes.**
>
> MR. SMITH: **And His Honor has indicated that there may be a situation where if that were the case, then there would be a modification . . . .[2]**

(Emphasis added).

Mr. Smith proceeded to advise Mr. Herbert of the rights he was waiving by entering into the plea agreement, which Mr. Herbert said he understood, and that under the plea agreement the maximum he could be sentenced to was 20 years, which Mr. Herbert said they had discussed and he understood. The following ensued:

> MR. SMITH: All right. Now, let me also say to you that - - ask you if you could complain that your attorney did not represent you competently, that I did something you didn't want me to do, I did - - I didn't do something you wanted me to do. **Are you satisfied with my services?**

[1] Up to this point in the colloquy, Mr. Smith seemed to be advising Mr. Herbert as if Mr. Herbert were pleading guilty to second-degree sex offense, a crime he was not charged with in either indictment. The prosecutor interjected during the colloquy to clarify that the plea was to second-degree rape.

[2] On the record, the judge taking the guilty plea did not speak about the terms of the plea agreement before Mr. Smith began this colloquy; and there is nothing in the transcript of the guilty plea hearing about the court agreeing to a modification of sentence in some circumstances, as defense counsel was recounting.

THE DEFENDANT: **Yes.**

MR. SMITH: **All right. Do you have any comments, any - - anything that you want to say that I did that you didn't like?**

THE DEFENDANT: **No. I still just got a concern about the - -**

MR. SMITH: I understand that.

THE DEFENDANT: **- - registry. Right.**

MR. SMITH: **And you - - and we've already put that on the record. His Honor understands that. And His Honor is a man of his word. When he says he's going [sic] do something - -**

THE DEFENDANT: **Uh-huh.**

MR. SMITH: - - **he will do it.**

THE DEFENDANT: **Well, I'm - -**

MR. SMITH: **If he can legally do it. So let me just say that to you.**

THE DEFENDANT: **Okay.**

MR. SMITH: **Okay?**

THE DEFENDANT: **All right.**

(Emphasis added).

Mr. Smith questioned Mr. Herbert about the voluntariness of the plea and Mr. Herbert said he was pleading guilty voluntarily. This colloquy followed:

MR. SMITH: You still wish to plead guilty to these charges, correct?

THE DEFENDANT: **I still - - I'm trying to get - - my concern is the registry afterwards. After.**

MR. SMITH: **I understand what the - - your concern is.**

THE DEFENDANT: **Right.**

MR. SMITH: **And His Honor has already addressed that by indicating to you that** there **will be a [sic] opportunity to file a modification. I will file a modification just in case and ask him to hold it sub curia.**

THE DEFENDANT: **Yes.**

MR. SMITH: **Do you understand that?**

THE DEFENDANT: **Yes, I understand.**

MR. SMITH: **Okay.**

THE DEFENDANT: **Well, it - - what I'm not understanding is what will it consist of.**

MR. SMITH: **It will consist of any problems involving your grandchildren or** children **that you will be allowed to be around if there is a problem with this plea. You have to be assessed. That's what comes with - - that's what comes with the landscape.**

THE DEFENDANT: **Uh-huh.**

MR. SMITH: **All right? And that is necessary under this plea. But His Honor can modify a sentence based on a timely 90 day motion under Rule 4-345. Do you understand that?**

THE DEFENDANT: **Yeah.**

MR. SMITH: Which I will do today, but will send to His Honor and ask him to hold it in case there is a problem. We don't believe there will be, because you still have a little bit more time to do before you're eligible for parole.

THE DEFENDANT: Right.

MR. SMITH: You understand that.

THE DEFENDANT: Uh-huh.

> MR. SMITH: So that time has to be done. But I want you to understand that what I said to you before is exactly what I said. And the State's Attorney is doing everything that he can do to resolve this case as well. But he has an obligation to the public to make sure that things are done correctly, as does His Honor, as do I as an officer of the court. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> MR. SMITH: So the deal is sometimes when you get something, you have to give something up, you understand?
>
> THE DEFENDANT: Yeah, I understand.

(Emphasis added).

The judge also advised Mr. Herbert of the elements of the crimes he was charged with and determined that the plea was knowing and voluntary. The prosecutor then recited the following facts in support of the guilty plea to second-degree rape. During the Labor Day weekend in 2012, when Mr. Herbert was in the process of moving his ex-girlfriend into an apartment in Baltimore City, they got into an argument.[3] Mr. Herbert pushed the victim onto the bed, climbed on top of her, pinned her arms down with his legs, and covered her mouth with duct tape. He then forced her to remove her pajamas and raped her. At the end of the weekend, the victim contacted the police, filed charges against Mr. Herbert, and was taken to Mercy Medical Center, where she underwent a sexual assault forensic examination ("SAFE"). The examination revealed injuries consistent with vaginal

[3] At the post-conviction hearing, Mr. Herbert testified that he was married at the time of these events, but the victim had been his girlfriend. About a week before the events, he and the victim argued over Mr. Herbert's plan to take a cruise with his wife. Because of the argument, the victim decided to move to another house. It is unclear whether Mr. Herbert had been living with the victim prior to the move. Mr. Herbert was 45 years old at the time of the events underlying the charges.

penetration and assault. Vaginal swabs taken from the victim returned a DNA mixture of Mr. Herbert and the victim.

The court sentenced Mr. Herbert to 20 years, suspending all but five, with three years' probation. He was ordered to have no contact with the victim and to participate in "sex offender screening and treatment." The judge told Mr. Herbert that "[r]egistration is required and DNA is required by law." There was no mention of tier classification for the sex offender registry or of the duration of the registration requirement. The remaining charges in Case 35 were "closed" and all the charges in Case 34 were dismissed.

The Commitment Record and the Probation/Supervision Order were signed the same day. The Commitment Record bears a check next to the box: "Defendant to be registered as a: TIER I SEX OFFENDER." Another box, for "LIFETIME SEXUAL OFFENDER AND BE SUBJECT TO LIFETIME SEXUAL OFFENDER SUPERVISION," is not checked. The Probation/Supervision Order requires Mr. Herbert to register as "A Tier I Sex Offender" and to "participate in the Comet program."[4] The Probation/Supervision Order was signed by Mr. Herbert and by the judge.

Events Following Guilty Plea

Three weeks later, on June 12, 2014, Mr. Herbert filed a *pro se* motion to withdraw his guilty plea. He asserted that he had not wanted to take the plea and had told Mr. Smith that, but Mr. Smith had insisted that he take the plea because his family wanted him to do

[4] The COMET (Collaborative Offender Management Enforcement Treatment) program supervises sexual offenders following their release from prison. *See Russell v. State*, 221 Md. App. 518, 522-24 (2015).

so. He alleged, "Attorney through misrepresentation, fraud, false tense or inadequately informed client about registered offender."

On June 16, 2014, Mr. Smith, on Mr. Herbert's behalf, filed a "Motion for Modification, Reduction of Sentence," asserting that the "purpose of the request is to allow the court to review any possible negative consequences to the movant's familia [sic] and job situation, which might arise in the future[,]" that "all parties were made aware of this request and fully understood the concerns of the defendant, counsel and the court's representation to the parties," and that the "movant appreciates the court's promise to legally remedy the problem, if it arises." That motion, which Mr. Smith asked to be held *sub curia,* was copied to the judge who presided over the guilty plea hearing ("presiding judge").

On July 1, 2014, the court entered an order denying Mr. Herbert's *pro se* motion to withdraw guilty plea on the ground that it was not timely filed.

Also on July 1, 2014, Mr. Herbert filed a *pro se* application for leave to appeal. Among other things, he alleged that Mr. Smith had incorrectly advised him that the presiding judge "could modify registry upon completion of Conet [sic] program[.]" The court issued an order directing Mr. Herbert to show cause why the application for leave to appeal should not be stricken as untimely, as it was filed more than 30 days after judgment was entered. Mr. Herbert did not file a response to the show cause order but mailed a letter to the presiding judge explaining that he had met the deadline for filing the application for leave to appeal because he had delivered it to the prison mail room within the 30-day

period. On September 16, 2014, the court entered an order striking Mr. Herbert's application for leave to appeal as untimely.[5]

As we shall explain in greater detail below, the Criminal Procedure Article of the Maryland Code provides that a person found guilty of second-degree rape, whether by trial or by guilty plea, is automatically a tier III sex offender, who must register for life (barring an operative legislative change). Upon receiving the Commitment Record and Probation/Supervision Order in this case, the Department of Public Safety and Correctional Services ("DPSCS") classified Mr. Herbert as a tier III sex offender in accordance with the law.

In August 2015, Mr. Herbert was released from prison. He commenced his three-year probationary period and started following the requirements for in-person sex offender registration. On May 9, 2016, after receiving a violation of probation notice for failing to abide by some of the special circumstances for a tier III sex offender, Mr. Herbert filed a *pro se* motion to modify his sentence, complaining that he was experiencing adverse consequences the court had promised to assist him with at the time of the guilty plea hearing, if they were to arise.

[5] Mr. Herbert filed a motion for reconsideration of that order, with a copy to the presiding judge, and the presiding judge entered an order denying that motion. Mr. Herbert unsuccessfully appealed from that order. *See Herbert v. State*, No. 2135, September Term, 2014 (filed June 23, 2016).

(continued)

On August 30, 2016, the presiding judge held a hearing on the motion to modify.[6] Mr. Smith, appearing on Mr. Herbert's behalf, stated that, at the guilty plea hearing, there had been a determination on the record that Mr. Herbert would be classified as a tier I sex offender. (As noted, the transcript of the guilty plea hearing does not reflect such a determination. The Commitment Order and the Probation/Supervision Order signed the same day do categorize Mr. Herbert as a tier I sex offender, however.) The prosecutor informed the court that the State opposed any change in Mr. Herbert's tier III classification.[7] The court granted the request for a change in registration status from tier III to tier I. In an order issued on September 8, 2016, it stated that the DPSCS "ha[d] misclassified [Mr. Herbert] as a Tier III Sex Offender" and directed the DPSCS to "classify [Mr. Herbert] as a Tier I sex offender; . . ."

Despite the September 8, 2016 order, the DPSCS refused to reclassify Mr. Herbert as a tier I sex offender, as by law he is a tier III sex offender. He remains a tier III sex offender subject to lifetime registration.

Post-Conviction Proceedings

Meanwhile, on June 2, 2015, before he was released from prison, Mr. Herbert filed a *pro se* petition for post-conviction relief. His present counsel supplemented it on

[6] Both the original motion to modify filed by Mr. Smith and the *pro se* motion to modify filed by Mr. Herbert were taken up.

[7] The prosecutor who had handled the guilty plea hearing could not attend; another prosecutor attended in his place.

December 18, 2017. All told, fifteen issues were raised, only three of which are pertinent to this appeal. On December 21, 2017, the court held a post-conviction hearing.

Mr. Herbert testified that he was in the lock-up on May 22, 2014, awaiting trial, when Mr. Smith presented him with a plea offer. Mr. Smith said the offer was a "sweet deal," that "[t]he judge has agreed to cap the sentence," and "mention[ed] something about a tier and three years[']] probation." Later in his testimony, Mr. Herbert said that Mr. Smith had told him he "was going to have to register as a tier one and not a tier three." Mr. Herbert claimed to have understood from what Mr. Smith said that a tier I sex offender registers for ten years and a tier III registers for life,[8] and that a tier III offender is a threat to society or a predator.

Mr. Herbert went on to testify that, after he was released from prison, he "looked it up" and, not understanding it, "went to the people that I registered with [the police] and I asked them about it and they told me, No, that's wrong." The police explained that his sex offender tier was determined by the crime he was convicted of, and "the judge has nothing to do with that." He learned from them that because his conviction was for second-degree rape, he automatically was a tier III sex offender. After the presiding judge issued the September 8, 2016 order directing the DPSCS to reclassify him as a tier I sex offender, he took it to the "people I register with" and they said the judge "didn't have the right to do that."

[8] As we shall explain, by statute a tier I sex offender must register for 15 years, but in certain circumstances, after ten years, is entitled to have his registration period decreased to ten years.

With respect to sex offender registration, Mr. Herbert complained that Mr. Smith's representation was deficient in two ways. First, before the guilty plea hearing, Mr. Smith misinformed him that he would be a tier I sex offender who would have to register for ten years, not that he would be a tier III sex offender who would have to register for life. Second, during the guilty plea hearing, Mr. Smith told him that he (Mr. Smith) would file a motion for modification so if something went wrong with his sex offender classification, they could return to the presiding judge and he would straighten it out. In fact, it was not possible for the judge to do that.

Mr. Herbert further testified that he filed his motion to withdraw guilty plea because by then he had come to realize that Mr. Smith's advice about the duration of registration was incorrect. (He did not say how he learned that). He testified that he sent Mr. Smith a letter about that but received no response. He claimed he did not receive a ruling from the court on his motion to withdraw guilty plea and that is why he then filed an application for leave to appeal. He testified that he sent the application for leave to appeal in a timely manner, from prison, and complained that he wrote to Mr. Smith about that filing as well but heard nothing from him.

According to Mr. Herbert, if he had known when the plea offer was made that pleading guilty to second-degree rape would mean he would be required to register as a sex offender for life, he would not have accepted the plea offer. He explained, "it entails too much and I wouldn't want to drag my family along the line of registering for the rest of my life, 60, 70, 80 years, however long I might live. That would seem ridiculous to me."

He testified that he would have gone to trial instead, which was his "whole plan." When asked why, he said the events did not happen the way the State alleged they did and he wanted to tell his side of the story.

Mr. Herbert also complained in his testimony that Mr. Smith had failed to assist him in filing his motion to withdraw guilty plea and his application for leave to appeal. He stated that he wrote to Mr. Smith about these matters but received no response.

Mr. Herbert did not call Mr. Smith or any other witness. He moved into evidence the police report about the rape and the medical report from the victim's triage at Mercy Medical Center. He did not move into evidence the September 8, 2016 order directing the DPSCS to classify him as a tier I sex offender or a transcript of the August 30, 2016 hearing that resulted in that order.

The State did not call any witnesses. It introduced into evidence the transcript of the guilty plea hearing.

In closing, Mr. Herbert's counsel argued that being a tier I sex offender was part of the guilty plea agreement, and that for some reason, both Mr. Smith and the presiding judge thought, incorrectly, that that could be accomplished and that the presiding judge could modify Mr. Herbert's registration status to a tier I if he were not classified as such.

The post-conviction court issued an opinion denying all of Mr. Herbert's claims for relief. As pertinent, it found that the court acted properly in accepting Mr. Herbert's guilty plea by informing him that he would be required to register as a sex offender without specifying the duration of the registration period. The post-conviction court reasoned that

sex offender registration is a collateral consequence of a guilty plea; therefore, for the plea to be valid, it was not necessary for the guilty plea court to inform Mr. Herbert of the length of registration.

With respect to ineffective assistance of counsel, the post-conviction court was unpersuaded by Mr. Herbert's testimony that Mr. Smith had told him that under the plea agreement he only would be required to register as a sex offender for ten years. On that score, the court pointed out that Mr. Herbert had not called Mr. Smith as a witness to corroborate his testimony and Mr. Herbert had told the guilty plea court that he was satisfied with Mr. Smith's representation. Alternatively, the court determined that Mr. Smith did not perform deficiently by not informing Mr. Herbert of the duration of registration, again because registration is a collateral consequence.

Finally, the post-conviction court found that Mr. Herbert's claim that he had written to Mr. Smith requesting assistance with post-trial motions but had received no response or help was merely a bald conclusory allegation that was not supported by other evidence.

PERTINENT MARYLAND SEX OFFENDER REGISTRATION LAW

In Maryland, a "sex offender" is someone who has been convicted of an offense that requires registration as a tier I, II, or III sex offender. Md. Code (2001, 2008 Repl. Vol.), section 11-701(l)(1) of the Criminal Procedure Article ("CP"). A person who has been convicted of second-degree rape, as prohibited by Md. Code (2002, 2012 Repl. Vol.), section 3-304 of the Criminal Law Article ("CL"), is a tier III sex offender. CP § 11-701 (q)(1)(ii). Thus, as noted, by pleading guilty to second-degree rape, Mr. Herbert

automatically became a tier III sex offender.[9] Certain offenses, including second-degree rape, are "sexually violent offenses." *Id*. at (j)(1). If a person is convicted of a sexually violent offense, then before sentencing the prosecutor may ask the court to determine whether he is a sexually violent predator; and if the prosecutor does so, the court must make that determination before or at sentencing. CP §§ 11-703(a)(1) and (a)(2). In this case, the prosecutor did not ask the court to determine whether Mr. Herbert was a sexually violent predator and therefore no such determination was made.

A person who is a tier I, II, or III sex offender must register with his supervising authority beginning at the time specified by law. CP § 11-704(a). Mr. Herbert had to begin registering in person within three days after his release from incarceration, in 2015. CP § 11-705(c)(1). As a tier III sex offender, he must register in person every 3 months for life. *Id*. (a)(2)(i) and (a)(4)(iii). A tier I sex offender must register every 6 months for 15 years. *Id.* at (a)(1)(i) and (a)(4)(i). If, after ten years, a tier I sex offender has satisfied the requirements spelled out by statute, his registration period shall be reduced to ten years. *Id*. at (c).[10] With certain exceptions, including obtaining prior permission, any registrant,

[9] The other sex offense charges he had been facing also carried a tier III classification upon conviction, except for fourth-degree sex offense, which carried a tier I designation. Assault in the second degree is not a sex offense and therefore does not require registration. *See* CP § 11-701 (o)1 and (q)(1); *See also* CL § 3-203.

[10] A person who has been determined to be a sexually violent predator must register every 3 months for the term provided for his tier, CP § 11-707 (a)(3)(i), and also is subject to lifetime sexual offender supervision. CP § 11-723(a)(1).

no matter what tier, may not knowingly enter onto real property used for an elementary or secondary school or as a licensed day care or child care institution. CP § 11-722.

A sentence for a person who has been convicted of a sexually violent crime, including second-degree rape, "shall include a term of lifetime sexual offender supervision." CP §§ 11-723(a)(1) and (2). "For a sentence that includes a term of lifetime sexual offender supervision, the sentencing court . . . shall impose special conditions of lifetime sexual offender supervision on the person at the time of sentencing . . . and advise the person of the length, conditions, and consecutive nature of that supervision." CP § 11-723(d)(1). Before imposing special conditions, the sentencing court must order a presentence investigation. *Id*. at (d)(2)(i). CP section 11-723(d)(3) lists conditions of lifetime sexual offender supervision the court may impose, including participation in a sexual offender treatment program and prohibition from contacting specific individuals or categories of individuals. CP § 11-723(d)(3).

DISCUSSION

I.

Validity of Guilty Plea

The test for the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Whether a guilty plea was entered knowingly and voluntarily must be assessed "based on the totality of the circumstances." *State v. Smith*, 443 Md. 572, 650 (2015).

Maryland Rule 4-242 is designed to protect the federal constitutional due process right to a guilty plea that is knowing and voluntary. Section (c) of that Rule provides, in relevant part:

> The court may not accept a plea of guilty. . . until after 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, the court determines and announces on the record 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 (f) of this Rule . . .

Under subsection (f), in relevant part, before the court accepts a guilty plea, the court, the prosecutor, defense counsel, or any combination thereof

> shall advise the defendant . . . (2) that by entering a plea to the [sexual offenses requiring registration] the defendant will have to register with the defendant's supervising authority as defined in Code, Criminal Procedure Article, § 11-701 (p) . . .

That subsection goes on to state that "[t]he omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid."

In *Yoswick v. State*, 347 Md. 228, 239 (1997), the Court of Appeals held that, "[t]o be valid, a plea of guilty must be made voluntarily and intelligently . . . with knowledge of the direct consequences of the plea." (internal citations omitted). As "[d]ue process does not require that a defendant be advised of the indirect or collateral consequences of a guilty plea, even if the consequences are foreseeable[,]" therefore "under Maryland Rule 4-242, the consequences of the plea include only direct consequences, not collateral or indirect consequences." *Id.* at 240.

Under the Maryland Uniform Postconviction Procedure Act ("UPPA"), except when there are "special circumstances" proven by the petitioner, "an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation . . . in an application for leave to appeal a conviction based on a guilty plea" or "in any other proceeding that the petitioner began." CP § 7-106(b)(1)(i); *Hyman v. State*, 463 Md. 656, 672 (2019). "The standard of 'waiver' [under the UPPA] is whether 'the petitioner himself 'intelligently and knowingly' failed to raise the issue' or, stated another way, whether he was previously 'aware of and understood the possible defense.'" *Curtis v. State*, 284 Md. 132, 140 (1978). *See also State v. Smith*, 443 Md. 572, 603 (2015).[11] In other words, the mere failure to raise an issue, either by counsel or by a petitioner who does not know of the issue, does not meet the waiver standard.

[11] In *Smith*, the Court of Appeals re-affirmed the concept explained in *Curtis* that the "applicability of the post-conviction statute's waiver provision depends upon the nature of the right alleged to have been violated and the surrounding circumstances":

> [T]he Legislature, when it spoke of "waiver" in subsection (c) of Art. 27, § 645A, was using the term in a narrow sense. It intended that subsection (c), with its "intelligent and knowing" standard, be applicable only in those circumstances where the waiver concept of *Johnson v. Zerbst* and *Fay v. Noia* was applicable. Other situations are beyond the scope of subsection (c), to be governed by case law or any pertinent statutes or rules. Tactical decisions, when made by an authorized competent attorney, as well as legitimate procedural requirements, will normally bind a criminal defendant."

State v. Smith, 443 Md. 572, 605 (2015) (quoting *Curtis*, 284 Md. at 149-50). In the instant case, the distinction between waiver of fundamental and non-fundamental rights is immaterial given that Mr. Herbert contends that his guilty plea was not knowingly and voluntarily entered which "implicates a fundamental right subject to the *Johnson v. Zerbst* waiver standard." *Smith*, 443 Md. at 606.

There is a "rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation" at a prior proceeding. CP § 7-106(b)(2). The petitioner bears the burden to rebut the presumption that he waived a fundamental constitutional right by not raising it in an application for leave to appeal from a guilty plea. *McElroy v. State*, 329 Md. 136 (1993). A lack of comprehension by the petitioner can rebut the presumption. *Curtis*, *supra*, at 140.

As discussed above, Mr. Herbert filed a *pro se* motion to set aside the guilty plea followed about two weeks later by a *pro se* application for leave to appeal. (Both were denied as untimely). The State maintains that Mr. Herbert waived his post-conviction argument about the validity of his guilty plea by failing to raise it in his application for leave to appeal; and that he did not present evidence to rebut the presumption that his waiver was intelligent and knowing or make any showing of special circumstances.

Mr. Herbert counters that the presumption of waiver was rebutted by his testimony that he filed his motion to withdraw his guilty plea as soon as he realized he was required to register for life and that he did not receive any response from Mr. Smith about his request for help with filing an application for leave to appeal. He asserts that the fact that Maryland later adopted the prison mailbox rule, *see Hackney v. State*, 459 Md. 108 (2018), militates in his favor. He also argues that because the State did not make this specific waiver argument below, this Court cannot consider it. The State acknowledges that it did not raise this specific waiver argument below but argues that this Court can affirm the decision of the post-conviction court on any ground, including waiver.

During the pendency of this appeal, the Court of Appeals issued its decision in *Hyman v. State*, 463 Md. 656 (2019), and Mr. Herbert and the State filed supplemental briefs addressing the effect, if any, of that decision on this appeal, including on the issue of waiver. In that case, Mr. Hyman pleaded guilty to a sex offense against a minor that required lifetime registration. At the guilty plea hearing, the court advised him that he would have to register as a child sex offender. Nothing was said by the court (or defense counsel) about the duration of registration. *Id.* at 659-61. Several months after the hearing, Mr. Hyman signed a sex offender registration form that stated, incorrectly, that he would have to register for ten years. *Id*. at 661. One year later he signed a second such form, which included the same error. *Id*. A year after that, he signed a third form, on which "ten years" was crossed through and the box for "lifetime" was checked. He initialed that. *Id*. at 661-62.

Later, Mr. Hyman was convicted of a federal crime. While in prison for that crime, he filed a *pro se* petition for *coram nobis* relief complaining that his status as a convicted sex offender had rendered him ineligible for early release. He asserted that he had received ineffective assistance of counsel during his guilty plea and sentencing hearing and that his guilty plea was involuntary. He did not "directly complain about the duration of his sex offender registration period[,]" however. *Id*. at 662. The court denied the *coram nobis* petition and Mr. Hyman's attempts at appellate review were fruitless. *Id*. at 662-63. Upon release from federal prison he was given notice that he was required to register every six months for life. Two years later, due to amendments to the Maryland Sex Offender

Registration Act, his registration period was reduced from life to twenty-five years. *Id*. at 663-64.

Mr. Hyman filed a second petition for *coram nobis* relief, which was the operative petition in the appeal. He argued that his guilty plea was not knowing and intelligent, and therefore was not voluntary, because he was advised only that he would have to register as a child sex offender and not for how long. *Id*. at 665. The circuit court rejected that claim.[12] *Id*. at 667-68.

Ultimately, the Court of Appeals held that Mr. Hyman had waived his *coram nobis* claims by not including them in his first, *pro se*, petition for *coram nobis* relief. (This Court had affirmed but had rejected the waiver argument. *See Hyman v. State*, No. 2416, Sept. Term 2016, slip op. at 3 (unreported opinion) (filed Feb. 15, 2018)). The Court of Appeals stated that "[i]f a petitioner advances even a fundamental constitutional claim 'but fail[s] to assert all grounds upon which the claim is made,'" the petitioner has waived any allegation that could have been made respecting that claim but was not made. *Hyman*, 463 Md. at 673-74 (quoting *State v. Syed*, 463 Md. 60, 104 (2019)).

The Court concluded that Mr. Hyman's failure to include the duration of registration period argument in his first *coram nobis* petition operated as a waiver of that claim, even though the first petition was filed *pro se*. "'[W]e have long held that a defendant in a criminal case who chooses to represent himself is subject to the same rules regarding

[12] Mr. Hyman also raised an ineffective assistance of counsel claim, which the circuit court also rejected.

reviewability and waiver of questions not raised at trial as one who is represented by counsel.'" *Hyman*, at 675. (quoting *Grandison v. State*, 341 Md. 175, 195 (1995)). The Court observed that although Mr. Hyman may not have chosen to proceed without counsel in pursuing his first *coram nobis* petition, "construing his petition liberally does not require reading content into it." *Id*. And the Court noted that even if Mr. Hyman had received "'contradictory and incorrect information'" about the duration of registration, and "[e]ven if he had been lead to believe ten years was the correct duration" - - from the first two registration orders that he was presented - - he was on notice by the time he filed his first *coram nobis* petition that the ten year period might not be accurate. *Id*.

In the case at bar, we agree with the State that by not alleging in his July 1, 2014 *pro se* application for leave to appeal that his guilty plea was invalid because the court did not inform him about the length of time he would have to register, Mr. Herbert waived that allegation for purposes of his post-conviction case.

At the post-conviction hearing, Mr. Herbert testified that he filed a *pro se* motion to withdraw guilty plea on June 12, 2014 because he realized that the advice he contends Mr. Smith gave him on May 22, 2014 - - that he would be a tier I sex offender, which carried a ten-year registration period - - was wrong. He further testified that when he did not receive a response to that motion, he filed his application for leave to appeal. It is clear, therefore, that when Mr. Herbert filed his application for leave to appeal on July 1, 2014, he already knew that the advice he contends Mr. Smith had given him about the duration of registration was wrong and that he would not be a tier I sex offender subject only to a ten-

year registration period. By his own testimony, he had the knowledge of the alleged error necessary to include it in his July 1, 2014 application for leave to appeal but did not do so. (In that application, he alleged that Mr. Smith incorrectly told him that the court "could modify registry upon completion of Conet [sic] program," which is not the same allegation of error that he was not informed of the duration of the registration period.) Accordingly, under the UPPA, Mr. Herbert waived the issue whether his guilty plea was invalid. The change in the prison mailbox rule, which concerned only timing, not substance, is not evidence to rebut that his waiver was a knowing and voluntary waiver, or proof of a special circumstance.

Finally, as the *Hyman* Court explained, whether there has been a waiver within the meaning of the UPPA is a question of statutory construction that is a pure question of law. *Hyman*, *463 Md.* at 674. Although this precise waiver argument was not pursued below, we have discretion to address it on appeal, under Rule 8-131(a), and are not hampered in doing so given that the underlying facts regarding waiver are either uncontested or come from Mr. Herbert's own testimony.

II.

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel under the Sixth Amendment, the claimant must prove that his defense counsel's performance was deficient and caused him to suffer prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether a lawyer's performance was deficient is decided based on "an objective standard

of reasonableness." *Syed v. State*, 463 Md. 60, 75 (2019). "In light of that objective standard, 'judicial scrutiny of counsel's performance is highly deferential, and there is a strong (but rebuttable) presumption that counsel rendered reasonable assistance.'" *Id.* (quoting *In re Parris W.*, 363 Md. 717, 725 (2001)).

In the context of a guilty plea, to prove prejudice, the claimant "must show that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Yoswick v. State*, 347 Md. 228, 245 (1997) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). "[T]he [court's prejudice] analysis 'should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Yoswick, supra,* at 245 (citing *Hill, supra,* at 60)(cleaned up)).

In deciding an ineffective assistance of counsel claim, a post-conviction court makes mixed findings of law and fact. *Syed*, 463 Md. at 73. On appeal from a post-conviction court's judgment, we review the court's factual findings for clear error and its legal conclusions *de novo*. *Newton v. State*, 455 Md. 341, 351-52 (2017). We engage in our "'own independent analysis' as to the reasonableness, and prejudice therein, of counsel's conduct." *Syed*, 463 Md. at 73 (quoting *Oken v. State*, 343 Md. 256, 285 (1996)). In reviewing the post-conviction court's determination of prejudice, we "'must consider the totality of the evidence before the judge or jury.'" *Syed*, 463 Md. at 87 (quoting *Strickland*, at 695)).

Mr. Herbert advances two contentions regarding the post-conviction court's adverse rulings on his ineffective assistance of counsel claims, one pertaining to the guilty plea and one pertaining to the post-judgment phase of his case.[13]

A. Ineffective Assistance of Counsel in Guilty Plea Representation

As noted, the post-conviction court found that defense counsel did not perform deficiently in representing Mr. Herbert with respect to the guilty plea, for two reasons. First, the requirement to register as a sex offender is but a collateral consequence of pleading guilty, so defense counsel was not obligated to advise Mr. Herbert of the length of time he would have to register. Second, and alternatively, considering that Mr. Herbert did not call defense counsel as a witness at the post-conviction hearing, that Mr. Herbert acknowledged his satisfaction with defense counsel's representation at the guilty plea hearing, and that Mr. Herbert had had ample opportunity to confer with defense counsel during the nearly two years between his arrest and the guilty plea hearing, Mr. Herbert did not rebut the strong presumption that defense counsel's performance was objectively reasonable.

Having found against Mr. Herbert on the deficiency prong of the *Strickland* test, the post-conviction court did not address the prejudice prong of that test.

[13] The State does not take the position that Mr. Herbert waived his ineffective assistance of counsel claims by not including them in his *pro se* application for leave to appeal.

On appeal, relying upon *Padilla v. Kentucky*, 559 U.S. 356 (2010), Mr. Herbert argues that the distinction between direct and collateral consequences of a guilty plea is not relevant to whether a lawyer's performance in giving or failing to give advice to the defendant about the consequences of a guilty plea is deficient, under *Strickland*. Alternatively, citing *Yoswick*, *supra*, at 240, he argues that even if the direct/collateral distinction is relevant, having to register as a sex offender for life should be considered a direct consequence of a guilty plea because it has a "definite, immediate, and largely automatic effect on the range of the defendant's punishment." As a second alternative, citing *Williams v. State*, 326 Md. 367 (1992), Mr. Herbert argues that even if having to register as a sex offender for life is a collateral consequence of the plea, a lawyer who undertakes to give advice about a collateral consequence must do so correctly, and performs deficiently by doing so incorrectly.

With respect to the post-conviction court's alternative, factual ruling, Mr. Herbert argues that it incorrectly assessed deficiency by counting against him the fact that he did not call defense counsel as a witness when it is plain from the transcript of the plea hearing that defense counsel gave him legally incorrect advice about sex offender registration. According to Mr. Herbert, the incorrect advice was evident from the record, without any consideration of his own testimony about what defense counsel told him about the registration consequences of accepting the plea offer.

The State acknowledges that a person convicted of second-degree rape automatically is a tier III sex offender, subject to lifetime registration (barring operative

legislative change). The State does not argue in support of the post-conviction court's legal ruling that sex offender registration is a collateral consequence of a guilty plea and therefore failure to advise, or to properly advise, about it cannot be deficient performance under *Strickland*.

The State *does* argue in support of the post-conviction court's alternative, factual deficiency ruling, however. It maintains that a fair reading of the court's opinion reveals that it denied Mr. Herbert's claim because it discredited his testimony about what defense counsel had told him about registration. The State asserts that if the post-conviction court had found Mr. Herbert to be credible, it would not have emphasized the absence of any corroborating evidence in its opinion. It points out that Mr. Herbert's testimony at the post-conviction hearing was contrary to his acknowledgement at the guilty plea hearing that he was satisfied with defense counsel's representation. It asserts that this Court should extend great deference to the post-conviction court's implicit credibility finding.

Finally, the State asserts that because it is clear from the relevant statutes that pleading guilty to second-degree rape would have the automatic consequence of making Mr. Herbert a tier III sex offender, required to register for life, it was logical for the post-conviction court to conclude, in the absence of testimony it deemed credible from Mr. Herbert, that defense counsel, as an experienced criminal defense lawyer, would have advised him of that consequence in the almost two year period that he was representing him, up to the time of the guilty plea.

In *Hyman*, the Court of Appeals acknowledged that in *Padilla v. Kentucky* the Supreme Court "'taught that the 'unique nature' of the consequence - - but not the 'distinction between direct and collateral consequences' - - is the question that must be considered to decide whether an attorney rendered reasonable professional assistance.'" *Hyman*, 463 Md. at 677 (quoting *Padilla*, 559 U.S. at 365). It pointed out, however, that Rule 4-242(e) only gives defendants a due process right to be advised of the *direct* consequences of a plea, as the rule specifies that failure to advise about the *collateral* consequences of a plea does not itself mandate that the plea be declared invalid. The Court concluded that even if that rule "demands categorizing consequences of a conviction as either direct or collateral to determine whether an intelligent and knowing analysis is necessary," it was not necessary to do so in that case, because in either event, the issue had been waived. *Hyman*, 463 Md. at 678. (As noted, waiver is not an issue here.) The *Hyman* Court observed, however, that because the legislature is free to amend the sex offender registry laws at any time, "it defies the powers of any court or practitioner to give a defendant the precise, permanent duration of his registration with certainty." *Id*. Therefore, outside the context of retroactive application of those laws, it was sufficient to satisfy Rule 4-242(f) that Mr. Hyman was advised that he was subject to registration as a sex offender, without specifying the duration of registration.

We conclude that in the case at bar, it also is not necessary for us to assess the accuracy of the post-conviction court's ruling that lifetime registration is a collateral consequence of a guilty plea that a defense lawyer need not inform his client about. We

can affirm the post-conviction court's ruling against Mr. Herbert on his ineffective assistance claim with respect to the guilty plea on the court's alternative ground.

We disagree with Mr. Herbert's assertion that the record of the guilty plea alone, with no consideration of his testimony at the post-conviction hearing, established that Mr. Smith incorrectly advised him about the registration consequences of pleading guilty, with respect to duration. In his post-conviction claim, Mr. Herbert argued, specifically, that Mr. Smith performed deficiently by telling him that by entering into the guilty plea, he would be classified as a tier I sex offender subject to no more than ten years of registration. This claim - - focusing on the length of time he would have to register - - was what was before the post-conviction court in assessing deficient performance by Mr. Smith.

In the transcript of the guilty plea hearing, there is nothing said by Mr. Smith about the duration of registration. Moreover, the questions Mr. Herbert asked during that hearing did not concern the length of time he would have to register as a sex offender. They concerned whether there would be a restriction on his being around children, including his grandchildren. We agree that Mr. Smith did not accurately advise Mr. Herbert about that question, in that he told him he would have to undergo an assessment for whether he was a predator for that to be decided. In fact, Mr. Herbert was not subject to such an assessment and, without any additional restrictions by the court, which there were none, he only was subject to the same restrictions about entering on school grounds that apply to all sex offenders, under CP § 11-722. Mr. Smith also incorrectly advised Mr. Herbert that if there

were a problem with that issue, he could return to the court for a modification. None of that pertained to the length of the registration period, however.

Without anything on the record of the guilty plea hearing to show that Mr. Smith was deficient in his representation by giving incorrect advice about the duration of sex offender registration for Mr. Herbert, the only evidence on that issue was Mr. Herbert's testimony. (Nothing else that was admitted into evidence concerned that topic.[14]) Accordingly, whether the court found Mr. Herbert's testimony credible is critical. We agree with the State that, from the post-conviction judge's comments in her opinion, one only can reasonably conclude that she did not believe Mr. Herbert. If the judge had credited his testimony, she would not have placed importance on the absence of corroborating testimony from Mr. Smith. In other words, the absence of corroborating testimony from Mr. Smith only would have mattered to the judge if she did not believe Mr. Herbert. Nor would the judge have pointed out that Mr. Herbert had acknowledged that he was satisfied with Mr. Smith's representation at the guilty plea hearing if she had found Mr. Herbert's testimony at the post-conviction hearing credible.

To be sure, Mr. Smith's advice about many aspects of the sex offender laws was incorrect. But he did not give advice on the record about the duration of registration for Mr. Herbert and the post-conviction court was not persuaded by Mr. Herbert's testimony

[14] On appeal, Mr. Herbert moved to add to the record the transcript of the August 30, 2016 hearing and the September 8, 2016 order in which the presiding judge attempted to change his tier. Of course, those items were not before the post-conviction judge; and they also do not establish that Mr. Smith gave incorrect advice about the duration of the registration period.

about what Mr. Smith told him. Accordingly, the court did not err in concluding that Mr. Herbert did not prove the deficiency prong of his ineffective assistance of counsel claim regarding duration of registration.

B. Post-Judgment Representation

Finally, Mr. Herbert contends the post-conviction court erred by ruling that defense counsel was not deficient in his representation with respect to his post-judgment motions and application for leave to appeal.

As recounted above, at the post-conviction hearing, Mr. Herbert testified that soon after the guilty plea hearing he learned that it was not correct that he would be a tier I sex offender and decided to file a motion to withdraw his guilty plea for that reason. He further testified that he wrote to Mr. Smith about this but did not receive any response and that he decided to file an application for leave to appeal when he did not receive a ruling on his motion. He acknowledged that he had been advised at the guilty plea hearing about his right to do so. He testified that he wrote to Mr. Smith about the application for leave to appeal as well but got no response.

The post-conviction court ruled that because Mr. Herbert did not call defense counsel as a witness on any of these facts, the only evidence before it was his own testimony, which, under *Cirincione v. State*, 119 Md. App. 471, 504 (1998), was merely a "bald allegation" that, in the post-conviction court's view of that case, did not warrant consideration. Accordingly, Herbert did not "meet his heavy burden" to prove deficient performance and also did not meet his burden to show that the deficiency "had an adverse

effect on the defense." For the same reasons we have explained above, it is clear that the post-conviction judge did not credit Mr. Herbert's testimony given that it could have been corroborated but was not. Accordingly, the post-conviction court did not err in its conclusion on this aspect of the deficiency prong of ineffective assistance of counsel either.

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