UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0613

September Term, 2013

JOSE NAVARRO, SR.

v.

STATE OF MARYLAND

Krauser, C.J.,
Meredith,
Thieme, Raymond, G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: June 22, 2016

Jose Navarro, Sr., appellant, filed a petition for writ of error coram nobis in the Circuit Court for Baltimore City challenging his 2011 guilty plea to first-degree assault and transporting a handgun in a motor vehicle. That petition was followed, one year later, by a motion he filed seeking recusal of the judge who had been assigned to review his petition. In March 2013, the circuit court denied both his motion to recuse and his petition for writ of error coram nobis, without a hearing. Appellant thereafter filed a motion to revise, alter, or amend the decision to deny his petition, which was ultimately denied; whereupon he noted this appeal, presenting eight questions for our review, which are reducible to two:

1. Did the circuit court err in denying appellant's motion to recuse?
2. Did the circuit err in denying appellant's petition for writ of coram nobis?

For the reasons that follow, we affirm.

BACKGROUND

Following his arrest on April 18, 2009, appellant was indicted, in the Circuit Court for Baltimore City, for attempted first-degree murder; attempted second-degree murder; assault in the first degree; assault in the second degree; reckless endangerment; malicious destruction of property; wearing, carrying, or transporting a handgun; wearing, carrying, or transporting a handgun in a motor vehicle (hereinafter "transporting a handgun"); and use of a handgun in the commission of a felony or crime of violence. On the morning of his trial, the parties informed the trial court that Immigration and Customs Enforcement (ICE) had issued an immigration detainer against appellant, a native and citizen of El Salvador, who had been in custody since his arrest. After hearing a proffer from the State, the trial court noted the strength of the evidence supporting the charge of transporting a

handgun and then observed that appellant would likely be deported even if he were only convicted of that offense. The following exchange between the trial court and counsel then ensued:

THE COURT: And if the ICE detainer means that they're going to take him, then I guess my question to everybody is, why not have him plead to wear, carry, transport and postpone the sentencing until ICE is ready to receive him?

DEFENSE COUNSEL: He might do that.

PROSECUTOR: [Defense counsel] and I have discussed that and I have discussed that with my supervisors because of the facts of the case, that would have to be something that I would have to get permission to do.

THE COURT: Sure

PROSECUTOR: And their position with me was, this Defendant should not receive the benefit of a lesser charge merely because he is not, his immigration status is not what an American citizen's would be on these same facts.

The trial court then inquired about the possibility of a non-binding plea offer to offenses that did not require a mandatory minimum sentence, indicating that if such an agreement was reached, it would likely impose a sentence that "would permit ICE to take the Defendant into custody immediately upon sentencing, but would not result in . . . an appreciable further period of imprisonment [beyond the time appellant had already spent in custody]." After a brief recess, the State agreed to offer appellant a non-binding plea wherein he would plead guilty to first-degree assault and transporting a handgun, with no agreement as to sentencing, and, in exchange, the State would dismiss the remaining charges. When the trial court then asked appellant if he wished to accept that offer, appellant and his trial counsel engaged in an off-the-record discussion. At the conclusion of that discussion, appellant's trial counsel informed the court:

DEFENSE COUNSEL: He could accept Mr. Navarro, you could accept this offer indirectly and you would be permitted to speak to Her Honor before sentencing, but understand that you would be entering a guilty plea to assault in the first degree and wear, carry and transport of a handgun. *Understand additionally, that when you are driving a vehicle in which a handgun is found, there is a presumption that you as the driver and operator of the vehicle have knowledge that the gun is in the vehicle.* Understand that if you elect to plead guilty, you're giving up forever and always your right to contest the evidence, to testify that you never pointed a gun at the car, but you would have an opportunity to address Her Honor about the circumstances related to your situation with the young men. You could tell Her Honor about the incidents that occurred and Judge Rasin would consider those incidents in fashioning an appropriate sentence and based on my conversations with Her Honor and the prosecutor, it is my belief that upon your plea, Judge Rasin will sentence you to the equivalent to time already served - -

THE COURT: Three years.

INTERPRETER: Actually how many years?

THE COURT: Three years.

Defense counsel then advised appellant:

> Three. The judge is going to sentence you to three years. Backdate it to April 19, I am confident that will equate to a time served disposition. You will then have to go to ICE and deal with the issues of deportation. Do you understand? Do you wish to accept the guilty plea off[er]?

(Emphasis added).

Then, following a second off-the-record conversation, defense counsel informed the trial court appellant was willing to accept the State's offer.

The trial court then conducted a lengthy plea colloquy with appellant, the relevant portions of which are set forth in detail later in this opinion. After the trial court determined appellant's guilty plea was "knowingly and intelligently answered and freely and voluntarily made," the prosecutor submitted the following statement of facts:

> [O]n April 18, 2009, sometime before 12:10 in the morning, the victims . . . were in Baltimore City . . . in a green or black Honda when they noticed a green SUV start following them. They heard several pops and believed that somebody in the vehicle was shooting at their car. [One of the victims] who was driving his vehicle tried to elude the SUV and . . . [the other victim] was able to call 911 while they were driving and described to the police what was happening . . . [When one of the victims attempted to get the attention of a police officer] the green SUV pulled in front of the victim's car to try to stop the victims from contacting the police. [One of the victim's] would testify that at that time, [appellant] got out of the driver's side of the vehicle and had a gun in his hand and pointed it back and forth between the two victims. The Baltimore City Police drove toward the cars . . . and [the same victim] then saw [appellant] place the gun back in the vehicle . . . [The officer] detained both [appellant] and his son and recovered a black revolver from the floorboard of the vehicle where both the driver and the passenger could have reached it . . . Additionally, there were four cartridge casings recovered from inside the vehicle that the examiner would testify were fired from the gun that was recovered.

Upon assurance by defense counsel that she had "no additions or corrections to what the State's witnesses . . . would have testified at trial," the trial court found appellant guilty of first-degree assault and transporting a handgun. Appellant was subsequently sentenced to concurrent three year terms of imprisonment with credit for time served. At no time thereafter did appellant move to withdraw his guilty plea or seek leave to appeal.

In 2012, appellee filed a petition for writ of error coram nobis, claiming he faced deportation from the United States as a result of his guilty plea because he was not a citizen of the United States. In his petition, appellant asserted that he received ineffective assistance of counsel because, *inter alia*, his trial counsel incorrectly advised him that (1) he was legally presumed to have knowledge of the gun found in the vehicle because he was the driver and (2) a conviction for any of the counts charged in the indictment would result

in his being deported.[1] With respect to his first claim, appellant stated he would not have pleaded guilty if he had known that no presumption existed regarding his knowledge of the gun and also that his confusion about this issue rendered his guilty plea involuntary. Appellant did not allege, however, that his counsel's advice about the potential immigration issues in his case affected his decision to plead guilty or affected, in any way, the voluntariness of his plea.[2]

Approximately one year later, appellant filed a motion to recuse alleging that the judge assigned to his case was biased against him because she had not scheduled a hearing on his petition, though aware of his pending deportation proceedings. Shortly thereafter, the court denied appellant's motion to recuse and denied his petition for writ of coram nobis without a hearing. Although not raised by the State in its response to appellant's petition, the trial court first ruled that appellant had waived his right to seek coram nobis relief by failing to file an application for leave to appeal after he was convicted.

Then, turning to the merits of the petition, the court found the plea record demonstrated appellant understood the State had the burden of proving his guilt beyond a reasonable doubt as to all charges and that he could not demonstrate prejudice as a result of his counsel's advice as to the transporting a handgun charge because the factual basis for the plea indicated he actually possessed the gun. Accordingly, the court rejected

[1] Appellant also raised other ineffective assistance of counsel claims in his petition, but those claims are not before us on appeal.

[2] Appellant's petition did not specify why this advice was incorrect. He now states on appeal that his trial counsel failed to recognize that a conviction for second-degree assault would not have resulted in his mandatory deportation.

appellant's "post-deal assertion that [he] would not have accepted the three year sentences to be served concurrently." It then concluded that appellant's trial counsel did not provide deficient immigration advice to appellant, nor had he shown any prejudice even if his trial counsel had.

Appellant thereafter filed a motion to revise, alter, or amend the judgment wherein he asserted for the first time that his guilty plea was involuntary because the trial court failed to conduct a sufficient inquiry into whether he pleaded guilty because of threats to him or his family. When the court denied that motion, this appeal followed.

DISCUSSION

I. MOTION TO RECUSE

We first address appellant's argument that the circuit court erred in denying his motion to recuse. In his brief, appellant generally asserts that the court was biased against him because it (1) waited more than one year to resolve his petition and (2) ruled that he waived his right to seek coram nobis relief, even though the State had not raised that issue in its answer. We decline to address this claim, however, because appellant's brief does not cite any legal authority in support of his position. *See Klauenberg v. State*, 355 Md. 528, 551 (1999) (noting "arguments not presented . . . with particularity will not be considered on appeal."); *Anderson v. Litzenberg*, 115 Md.App. 549, 578 (1997) ("It is not our function to seek out the law in support of a party's appellate contentions."). Moreover, even if we were to consider the merits of appellant's argument, nothing in the record persuades us appellant has "overcome the presumption of [the trial court's] impartiality."

Karanikas v. Cartwright, 209 Md.App. 571, 579 (2013). We therefore find no abuse of discretion in the denial of appellant's motion to recuse.

II. DENIAL OF CORAM NOBIS RELIEF

A. Standard of Review

A petition for writ of error coram nobis is an independent civil action by which an individual collaterally challenges his criminal conviction. *Skok v. State,* 361 Md. 52, 65 (2000). It is an equitable remedy, available to "a convicted person who is not incarcerated and not on parole or probation, who is suddenly faced with a significant collateral consequence of his or her conviction, [ ] who can legitimately challenge the conviction on constitutional or fundamental grounds[,]" and who does not have another statutory or common law remedy available to him. *Id.* at 78, 80. Coram nobis relief is an "extraordinary remedy" only available in "compelling circumstances," and requires a petitioner to rebut the "presumption of regularity [that] attaches to the criminal case." *Id.* at 72, 78 (citation omitted). Notably, it is "not a belated direct appeal," and "relief that may have been granted upon direct appeal will not necessarily be obtained through a writ of error coram nobis." *Coleman v. State,* 219 Md.App. 339, 354 (2014), *cert. denied,* 441 Md. 667 (2015). This Court will not "disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Arrington v. State,* 411 Md. 524, 551 (2009) (citation omitted). While reviewing for clear error, we make an "independent determination of relevant law and its application to the facts." *Id.* (citation omitted).

B. Waiver

Appellant first contends the trial court erred in finding he waived his right to seek coram nobis relief by not filing an application for leave to appeal following his guilty plea. The State disagrees. After the parties filed their briefs, the Court of Appeals resolved this issue, holding that Section 8-401 of the Criminal Procedure Article of the Md. Code, which states that "failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error coram nobis," applies retroactively. *See State v. Smith*, 443 Md. 572, 588 (2015). Accordingly, we shall address the circuit court's denial of appellant's coram nobis petition on the merits.

C. The Merits

In challenging the circuit court's denial of his petition for writ of coram nobis on the merits, appellant presents two distinct arguments on appeal.[3] First, he attacks the sufficiency of the trial court's plea colloquy which he contends was insufficient to show that his plea was voluntary. Specifically, he claims that the trial court (1) incorrectly stated he would have to testify if he wanted to explain his case to the jury; (2) misstated the law when advising him on his potential liability as an aider and abettor; (3) failed to inform him that a conviction for second-degree assault would not result in his automatic deportation; and (4) did not conduct a thorough inquiry into whether his guilty plea was induced by threats. Second, he claims his trial counsel was ineffective because she (1)

[3] We note that appellant's brief is somewhat convoluted and that he often raises several issues within the same "argument" section of his brief without clearly setting forth the legal grounds that would support each claim of error.

incorrectly advised him that he was presumed to have knowledge of the gun found in the car because he was the driver and (2) provided deficient immigration advice by not informing him that a conviction for assault in the second degree would not result in his mandatory deportation. He further asserts his counsel's deficient advice regarding the State's burden of proof on the charge transporting a handgun prevented his plea from being voluntarily, knowingly, and intelligently made.

We conclude appellant has not demonstrated sufficient grounds to set aside his guilty plea. Initially, several of the parties' arguments are not properly before this Court. Although appellant now attacks the sufficiency of the trial court's plea colloquy, all his claims of error in that regard were either not raised below or raised for the first time in his motion to correct, alter, or amend the judgment. Accordingly, they are not preserved for our review and we will not consider them on appeal. *See Brown v. Contemporary OB/GYN Associates,* 143 Md.App. 199, 248 (2002) (stating that a "party who does not raise an issue at trial, and later pursues the point in a post-trial motion, is precluded from raising the substantive issue on appeal."); *see also* Md. Rule 8–131(a) (an appellate court ordinarily will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court.").[4] For the same reason, we decline to address the State's argument that appellant failed to establish that his deportation was a direct consequence of his guilty plea. *See Graves v. State,* 215 Md.App. 339, 353 (2013) ("If the State wants to

[4] Appellant does not argue that the circuit court abused its discretion in denying his motion to revise, alter, or amend the judgment.

raise the lack of proof of collateral consequences as a defense to a coram nobis petition, however, it must raise this issue in the circuit court").[5] Accordingly, we limit our review of the merits to appellant's claims of ineffective assistance of counsel.

In evaluating those claims, we apply the two-part test established in *Strickland v. Washington,* 466 U.S. 668 (1984). *See Hill v. Lockhart,* 474 U.S. 52, 58 (1985). To prevail under this test, appellant "must show both (1) that counsel's performance was deficient and (2) that this deficiency prejudiced [his] defense." *Strickland,* 466 U.S. at 687. In order to establish that his attorney's performance was constitutionally deficient, appellant must show that the attorney's performance fell outside "the wide range of competence demanded of attorneys in criminal cases." *Id.* To demonstrate he suffered prejudice as a result of the alleged deficiency, appellant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill,* 474 U.S. at 59. In resolving the prejudice prong, the analysis "should be made objectively, without regard for the 'idiosyncrasies of the particular decision-maker.'" *Id.* at 60 (citation omitted).

As to appellant's first claim, we assume, without deciding, that his trial counsel provided him incorrect legal advice when she stated that, because he was the driver, appellant would be presumed to have knowledge of the gun found in the vehicle. We need

[5] We note that prior to appellant entering his guilty plea, the State informed the trial court that appellant was in the United States legally, either on a work visa or a green card, and that Immigration and Customs Enforcement was detaining appellant based solely on the possibility of his being convicted of a crime of violence in this case.

not address whether this rose to the level of constitutionally deficient representation however, because we find that appellant failed to show he was prejudiced by his counsel's advice. *See Strickland*, 466 U.S. at 697. Although appellant's petition contained a conclusory assertion that he would not have gone to trial had he known no such presumption existed, the trial court simply did not believe him. Based on our review of the record we cannot say the trial court's credibility determination was clearly erroneous.

First, during appellant's plea colloquy, he specifically indicated that he understood he was presumed innocent and the State had the burden of proof on all charges:

> THE COURT: Okay. Now, you had the right to plead not guilty and go to trial . . . If you had chosen to go to trial, it would have been on all the charges starting with attempted first degree murder all the way down to wear, carry, transport of a handgun. You would have been presumed innocent of all those charges in a trial. That presumption of innocence would remain with you throughout the trial. It could only be overcome if the State satisfied its burden of proving you guilty beyond a reasonable doubt. Do you understand these concepts of presumption of innocence and proof beyond a reasonable doubt?
>
> DEFENDANT: Si.
>
> INTERPRETER: Yes.

Later in the plea colloquy, the trial court further clarified what the State was required to prove in order to convict him of transporting a handgun:

> THE COURT: All right, sir. If you are guilty, if you in fact drove a car *and it became apparent to you that there was a gun in your car and you continued to transport, transport the gun in your car, knowing that [you were] transporting a gun in your car*, you are guilty of transporting a gun in your car and that carries three years . . . You understand all of that?
>
> DEFENDANT: Yeah.

(Emphasis added).

More importantly, nothing indicates appellant based his decision to plead guilty on defense counsel's isolated statement. Here, appellant glosses over the fact that he also pleaded guilty to the offense of first-degree assault. The trial court informed appellant that to be found guilty of that offense, the State would have to prove that he either "directly or by aiding, encouraging or inciting another person placed another person in fear with a handgun" and appellant verbally acknowledged his understanding. Further, appellant did not object to the State's factual basis which indicated the victim, who was available to testify, saw appellant exit the car with the gun in his hand and then return the gun to the car. Additionally, a search of the car not only uncovered a gun in an area that was accessible to appellant, but also four shell casings that had been fired from that gun. In short, the record demonstrates appellant was fully aware that to establish his guilt, the State did not need to rely upon a legal presumption that he would have been aware of the existence of the gun in the vehicle because he was the driver.

We also do not believe that a reasonable defendant in appellant's shoes would have insisted on going to trial had he known that no legal presumption existed regarding his knowledge of the handgun. Based on the State's proffer, the evidence that appellant transported a handgun was strong, and a conviction for that offense alone would have triggered deportation proceedings. *See Yoswick v. State*, 347 Md. 228, 247 (1997) ("The potential strength of the State's case is also relevant in determining whether a defendant would have insisted on going to trial"). Additionally, even if, as appellant suggests, the evidence supporting the remaining charges was less than overwhelming, he risked receiving a significantly higher sentence if he went to trial and was convicted, including a

mandatory five year term of imprisonment if he was convicted of using a handgun during a crime of violence. These potential risks were discussed at length between the parties and it was clear that unless appellant was acquitted of all charges but second-degree assault, he would receive a substantial benefit by pleading guilty. Accordingly, the circuit court did not err in finding that appellant's acceptance of the plea offer was guided by his desire to minimize his sentencing exposure and not as he now claims, because of his counsel's incorrect legal advice regarding any presumption on the transporting a handgun charge.

For the same reasons, we find no merit in appellant's related claim that his plea was unknowing and involuntary because of his counsel's allegedly erroneous advice. As previously set forth, the record reflects appellant was aware of the State's burden of proof and the nature of the offenses to which he was pleading guilty. *See generally Smith v. State*, 443 Md. 572, 649–50 (2015) (noting that while a defendant must understand the nature of the charge to which he is pleading guilty, all that is required is that someone "explain to [him], in understandable terms, the nature of the offense to afford him a basic understanding of its essential substance, rather than of the specific legal components [.]").

Finally, appellant did not allege in his petition for writ of coram nobis that, had he been advised that a conviction for second degree assault would not result in his mandatory deportation, he would have pleaded not guilty and insisted on going to trial. Accordingly, he failed to raise a colorable claim of prejudice that would support a finding of ineffective assistance of counsel with respect to his counsel's allegedly deficient immigration advice. *See Hill*, 474 U.S. at 60 (holding that the appellant's allegations were insufficient to establish prejudice as a result of his trial counsel's incorrect advice regarding parole

eligibility where he did not allege in his habeas petition that, had counsel correctly advised him he would have pleaded not guilty and insisted on going to trial).[6] Also, because appellant has never claimed that his trial counsel provided incorrect advice regarding the immigration consequences of the guilty plea he actually entered, his reliance on *Padilla v. Kentucky*, 559 U.S 356 (2010), is misplaced.

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

[6] On appeal, appellant now asserts that because his trial counsel was unfamiliar with immigration law, she did not endeavor to seek a plea to second-degree assault which would have prevented him from facing mandatory immigration consequences. Even if this claim were properly before us, appellant cannot establish prejudice as nothing indicates the State would have been willing to offer appellant such a plea arrangement.