UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2709

September Term, 2014

STATE OF MARYLAND

v.

ROBERT BREEDING

Meredith,
Arthur,
Sharer, J. Frederick
(Senior Judge, SpeciallyAssigned),

JJ.

Opinion by Meredith, J.

Filed: December 8, 2016

After the Circuit Court for Allegany County granted the petition filed by Robert Breeding, appellee, for a writ of error coram nobis, the State, appellant, appealed. The coram nobis court held that Breeding was entitled to a new trial because the trial court erred in accepting his guilty plea in July 2008 without announcing on the record --- as then required by Maryland Rule 4-242(c) --- that the court found the plea to be voluntary.

QUESTION PRESENTED

The State presents a single question: "Did the circuit court improperly grant Breeding's request for coram nobis relief?"

Because we conclude that the coram nobis court did not apply the correct standard for analyzing -whether Breeding's plea was entered knowingly and voluntarily, as clarified in Part II of the Court of Appeals's opinion in *State v. Smith*, 443 Md. 572, 649-56 (2015), we will vacate the judgment of the Circuit Court for Allegany County, and remand the case for further proceedings.

FACTS AND PROCEDURAL HISTORY

On May 16, 2008, appellee was charged with two counts of perjury. The charges were filed by the State's Attorney for Allegany County, and stemmed from false testimony that appellee had given, under oath, in his divorce proceedings. The record reveals that appellee --- who was a retired Maryland State Trooper and an active duty Lieutenant Colonel in the United States Military --- desired to end his first marriage and enter into a second marriage with his paramour. Appellee filed two complaints for divorce, and then dismissed one of the complaints, but, with the intent of deceiving his wife, proceeded on the other complaint. He showed his wife only the complaint that had

been dismissed. Because she did not realize a second complaint had been filed, she took no action to contest the divorce, and, after the court granted appellee a divorce, his wife remained unaware for many months that she was no longer married to appellee. She learned that she was divorced when she saw an announcement in the local newspaper reporting appellee's marriage to another woman.

In order to unilaterally obtain the divorce, appellee had testified under oath that he and his wife had been living separate and apart for over a year, and that there were no unresolved property or custody-related issues. Appellee's testimony on both of these points was false. The divorce was granted, uncontested by appellee's wife, who remained under the impression that appellee's suit for divorce had been dismissed, and that her marriage was intact.

As noted, appellee was charged with two counts of perjury. He appeared before the Circuit Court for Allegany County on July 1, 2008, for the purpose of entering a guilty plea. As amended, effective January 1, 2008, Maryland Rule 4-242(c) provided:

> **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. The court may accept the plea of guilty even though the defendant does not admit guilt. Upon refusal to accept a plea of guilty, the court shall enter a plea of not guilty.

(Emphasis added.)

After the court solicited from appellee some identifying information, the following colloquy occurred:

> [BY THE COURT]: Mr. Breeding it appears you've been charged with two criminal offenses in this case through a statement of charges. In the past you should have been served and provided with your copy of those charges. Did that happen?
>
> [BY APPELLEE]: Yes Your Honor.
>
> Q. Have you had a chance to read the charges and to review the charges with your attorney?
>
> A. Yes Your Honor.
>
> Q. Do you understand these charges?
>
> A. Yes Your Honor.
>
> Q. Have you also had an opportunity to discuss with your attorney any and all possible defenses you might have to these charges?
>
> A. Yes Your Honor.
>
> Q. And finally, have you had an adequate opportunity to discuss the terms of this plea with your attorney?
>
> A. Yes Your Honor.
>
> Q. All right. You hesitated, which is fine, do you have any desire to have any further conversations with your attorney now out of my hearing or presence on any aspect of this case?
>
> A. No Your Honor. The, the hesitation is just to, to review in my mind just to make sure that I checked all the blocks.
>
> Q. Very well. Then sir referring to the two charges, the first reads that on or about June 11, 2007 in the Allegany County Circuit Court did on exam, did on examination as a witness duly swear, sworn to testify in the Circuit Court um, under oath, unlawfully and falsely swore that you had been separated for at least a year, the matter so sworn being material and the testimony being willfully corrupt and

false. That sir in essence is the charges of perjury as a witness in court. Do you plead guilty or not guilty to that charge?

A. Guilty Your Honor.

Q. Now sir there's a second charge that reads also on June 11th . . . now help me with this gentlemen, this is a second piece of testimony offered on the same day? I see . . .

[BY THE STATE]: That's correct Your Honor.

[BY THE COURT]: Okay. So then there was apparently a second occurrence on the same date, June 11th, [20]07 ah, and I'll read that on examination as a witness sworn to testify in this Circuit Court [. . .] an oath was administered that's, you unlawfully and falsely swore that your wife had reached an amicable resolution, I beg your pardon, that he and his wife had reached an amicable resolution and had been concluded . . . and had even concluded custody and property agreements regarding their marital property and children. First sir, do you understand the charge as I read it?

[BY APPELLEE]: Yes Your Honor.

Q. Understanding that charge, do you plead guilty or not guilty, recognizing that apparently is a second and distinct charge of perjury?

A. Guilty Your Honor, yes.

Q. Then these questions for you sir, have you and can you hear me clearly and distinctly?

A. Yes Your Honor.

Q. Are you now under the influence of alcohol, narcotics or medication?

A. No Your Honor.

Q. Ah, you can read and write sir?

A. Yes sir.

Q. You're a citizen of the United States?

A. I am Your Honor.

Q. Are you presently under the care of any type of mental health care provider?

A. No Your Honor.

Q. I would advise you sir it's your absolute right to plead not guilty to both and all of these charges. Should you plead not guilty, it will be the burden of the State to try to prove you're guilty. They must prove that beyond a reasonable doubt. Do you understand?

A. Yes Your Honor.

Q. You are presumed to be innocent of these charges. This presumption will stay with you throughout your trial, cannot be overcome unless the State can prove guilt beyond a reasonable doubt. When and if you plead guilty, you forfeit that presumption. Is that clear sir?

A. Yes Your Honor.

Q. If you pled not guilty, you would have the right to a speedy public trial where you could see, hear, question and confront every witness. You could present witnesses and evidence on your own behalf. You could elect to have your guilt or innocence decided by judge or jury. If you selected jury, 12 persons would be selected at random from this County. You could participate in their selection. They could not convict you of any crime unless unanimous in their belief that your guilt had been established beyond a reasonable doubt. You will lose that presumption of innocence if you plead guilty. Is that clear sir?

A. Yes Your Honor.

Q. If you pled not guilty, no one could force you to testify, no one could assume significance from your silence. If you were having a jury trial, if asked, I would instruct the jury on that point of law. The same point of law would apply if you were having a judge trial. On the other hand, you could take the witness stand, testify in your own defense, if that was your choice. Is that clear sir?

A. Yes Your Honor.

Q. Other consequences of pleading guilty include that your right of appeal to an entity or court known as an appellate court becomes very limited. Also if you're now on parole or probation, this conviction could be a reason to revoke that parole or probation. Is that clear sir?

A. Yes Your Honor.

Q. Now sir my understanding is you're pleading guilty to two separate charges . . . of perjury, perjury as a witness in a court proceeding. Is that what you believe you're doing sir?

A. Yes Your Honor.

Q. I would advise you sir that the penalty associated with each conviction would be up to 10 years in jail. Do you understand?

A. Yes Your Honor.

Q. Um . . . is this classified as a felony or misdemeanor gentlemen? And on the nature of perjury is there any aspect regarding consequences of perjury that your client needs to be reminded of, such as affects on voting, testifying in the future? Perjury is a many headed monster.

[BY APPELLEE'S COUNSEL]: As to, as far as felony or misdemeanor Your Honor, quite frankly I, I'm not sure. **He has been advised he won't be able to vote and he won't be able to testify in any other proceedings, he won't be able to sign anything under Affidavit and there could be repercussions for any future um** . . . .

[BY THE COURT]: All right, then Mr. Breeding . . . .

[BY APPELLEE'S COUNSEL]: . . . time, nexus to the criminal . . .

[BY THE COURT]: I'm sorry I interrupted you.

[BY APPELLEE'S COUNSEL]: I'm sorry. **Any future nexus to the legal system Your Honor**.

[BY THE COURT]: Then Mr. Breeding it appears you have had those conversations with your attorney, **you understand then that those are additional consequences of anyone being found guilty of perjury in this State**?

[BY APPELLEE]: **Yes sir, very severe**.

Q. Very well. Now my understanding of your plea agreement is that it's memorialized in the letter that's been taken as State's Exhibit Number One. I suppose I should first inquire because it's actually an email, have you had a chance to see and read this sir?

A. Yes Your Honor I have.

Q. Does it constitute and set forth what you believe your plea agreement to be?

A. Yes sir it does.

Q. **Has anyone promised you anything else?** That's not set forth in this letter?

A. **No Your Honor**.

Q. I should tell you and do tell you sir that the recommendation regarding sentencing to time served is what's called a non-binding recommendation, meaning that I'm not required to accept that recommendation. Do you understand that?

A. Yes Your Honor.

Q. **Has anyone threatened you in any fashion?**

A. N . . .

Q. **To induce you to force you to plead guilty here?**

A. **No Your Honor.**

Q. **Are you pleading guilty of your own free will?**

A. **Yes Your Honor**. [. . .]

* * *

Q. . . . Back to the sequence of questions, **again, I ask you has anyone threatened you in any fashion to . . . induce you to plead guilty here today?**

A. **No Your Honor**.

Q. **You are pleading guilty of your own free will?**

A. **Yes Your Honor.**

Q. And as I have read these two charges to you, **you're pleading guilty to these charges because you believe you're guilty of these charges?**

A. **Yes Your Honor**.

THE COURT: All right. Thank you gentlemen. Please be seated. Ah, the State will now outline the facts it feels it can prove.

(Emphasis added.)

The State then made a proffer of the facts it would have been able to prove had the matter proceeded to trial:

> [BY THE STATE]: . . . The State would have put on evidence largely coming from ah, Nancy and Alex Breeding ah, wife number one and daughter of the Defendant as well as next door neighbors Linda and John Persons ah, with respect to the material facts that, that were testified to falsely in counts one and two.
>
> Um, Mr. Breeding was involved in an [il]licit affair with a Debbie Welch prior to the events of June 11th. At some point prior to that she gave him an ultimatum to divorce his wife or ah, their affair would be over. At that point Mr. Breeding then um, engaged in a course of conduct that ultimately le[]d to this testimony in front of the Hearing Examiner under oath on June 11th. Ah, he filed two different Complaints for Absolute Divorce, dismissing the first one and proceeding on the second. Ah, he had his, Ms. Breeding, Nancy Breeding would have testified that he had her served with the second Complaint ah, but then showed her the dismissal of the first Complaint and that is why she did not appear and contest the

divorce. She thought it was disposed of. Ah, on June 11th um . . . .Mr. Breeding testified under oath in front of Hearing Examiner Wes McKee, who would have also testified and pointed out Mr. Breeding as the individual that testified to him with respect to these issues. Ah, we also would've submitted a certified transcript of that proceeding ah, and his, and Mr. Breeding's testimony. During that time Mr. Breeding testified that he had been living separate and apart, as required by Maryland law, to obtain a divorce. A very specific period of time. Ah, he also testified under oath that there were, in response to all, Hearing Examiner McKee's direct question are there any issues of property settlement or custody and his response was no, this was amicable and that it had all been worked out between he and Nancy Breeding. Ah, again, we would've submitted the transcript ah, of the ah, of that testimony as well as Wes McKee's testimony. Ah, Nancy and Alex Breeding and Linda and John Persons would have testified that in fact during that one year time period, that Mr. Breeding testified they've been living separate and apart, he was actually living with them as husband and wife, father, daughter ah, two to three days a week. That they would engage in activities that husband and wives engage in including um, marital relations. That they, that he acted as a father to Alex Breeding and that he maintained a residence ah, with Nancy Breeding, which is directly in opposition to what he testified to under oath. Ah, Nancy Breeding would have testified that there was never any discussion of a divorce. There was never any discussion of a separation agreement nor is there ever any discussion of ah . . . child custody as related to this, this divorce complaint. She would have further testified that she was unaware that she was divorced from Mr. Breeding and unaware that Mr. Breeding had married Debbie Welch ah, until a wedding announcement appeared on February 8th, 2008 in the Cumberland Times-News um, and that's what led to this investigation. So there also would have been testimony that after this divorce was ordered ah, the Defendant continued to live as husband and wife and father, daughter with Nancy and Alex Breeding um, up until the time that this um . . . that the divorce and subsequent marriage to Debbie Welch, Debbie Breeding had taken, came to light in February of 2008 ah, so with respect to the material facts in, the material fact in count one as required by Maryland law ah, to be living separate and part. There would have also been testimony from Linda and John Persons that um, they would go out to dinner with Nancy Breeding and Robert Breeding, the Defendant, as couples. Ah, that they had no idea that they were divorced. He was, continued to maintain a residence there. They would see him at the residence a couple of days a week. Ah, with and again, that would have been the issue to count one the material fact.

> In count two, obviously the Court's well aware and can take judicial notice, you can't have a, a uncontested divorce or default judgment if there is any dispute as to property settlement and or custody issues. At that point there would have to be some sort of hearing and order issued. So that would be the ah, these would be the relevant evidence that we would have provided ah, either through testimony and or documents with respect to count[] one and count[ ] two.

The court invited appellee to comment on the State's proffer, and appellee's counsel responded: "[W]e do not agree with the characterization of some of the facts, however, we certainly acknowledge that they could prove the essential elements for the crime he's pleading guilty to."

The court then accepted the guilty pleas, saying: "Very well. Then the plea is accepted to both of the charges in this case. Both of which are perjury. Proceeding to sentencing. . . ." The court announced no further findings on the record regarding the voluntariness of the plea.

The State pointed out the calculated nature of the deception involved here, arguing that appellee — "a retired Maryland State Trooper and an active duty Lieutenant Colonel in the U.S. Military" — should be incarcerated "because of who [appellee] was and is and the nature of this conduct. It's not something that happened in the spur of the moment where somebody makes a mistake and decides to lie on the spot. It's premeditated. It's willful. It's deliberate ah, in order to achieve a goal."

The court advised appellee of his appeal rights, then asked for allocution. Appellee's attorney emphasized appellee's lack of any prior criminal record, his "distinguished career as a State Trooper for 24 years," and his current status as a Lieutenant Colonel in the military. Counsel could offer no explanation for appellee's

behavior that led to the perjury charges, but noted "**I suspect as a result of this he will ah, lose his employment from the military** ah, which is an added punishment frankly ah, as Lieutenant Colonel. It will take away part of his livelihood, all of his livelihood at this point in his life." (Emphasis added.)

The court sentenced appellee to one year of incarceration on each of the two perjury convictions, both sentences to run concurrently, with credit for time served, and the balance of the time suspended in favor of three years' unsupervised probation. Additionally, the court ordered, as a condition of probation, that appellee was to have no contact with Nancy or Alex Breeding.

On July 31, 2008, appellee filed, *pro se*, an application for leave to appeal to this Court, which was denied on March 9, 2010. On August 11, 2008, appellee filed, *pro se*, a motion to modify conditions of sentence. Appellee also filed a motion to revise sentence on September 10, 2008, and a "motion to reconsider motion for modification of sentence" on September 24, 2008. The court held a hearing on October 21, 2008. At the hearing, appellee informed the court that he was seeking "two reliefs today I think": a probation before judgment disposition on his two perjury convictions, and that the no-contact order as to Nancy and Alex Breeding be modified.[1]

In support of the probation before judgment request, appellee's counsel argued that "he's still an active member of the military and ah, this very well could ah, end his career." The State argued in opposition:

[1] Nancy Breeding acquiesced in that request, and the no-contact order was modified. That decision is not at issue on appeal.

> With respect to the probation before judgment ah, you've already denied that Motion to Modify once. Ah, there's been no new evidence presented today from the, Mr. Breeding with respect to why his perjury conviction should be granted probation before judgment. There has been in fact other evidence that the State's been in possession of and in fact was going to use to impeach Mr. Breeding if he testified at a trial. Ah, Mr. Breeding, this is not Mr. Breeding's first issue with deceptive conduct. Ah, and as the State put in its written opposition to probation before judgment, this was an ongoing pattern of deceptive conduct on this Court to further a means to an end. It's not somebody that was caught on the spur of the moment and said and, and lied. It was intentionally deceptive conduct to falsify a divorce, well to obtain a divorce from Nancy Breeding without her knowledge so that he could marry his paramour. That doesn't deserve probation before judgment. It's compounded by the fact that he's a retired State Trooper and an active duty Lieutenant Colonel. We expect more from those types of people. They don't lie to this Court and get a probation before judgment. He knew what he was doing when he started it. He knew that the conduct was criminal and wrong and unethical and there's no reason for this man to get probation before judgment.

In response, appellee argued:

> He already spent 27 days in jail as a result of this. Ah, also I alerted the Court to this previously, it appears ah, he's always been a productive, solid citizen until he came back [from] Iraq. Which we don't want to use as an excuse, but something derailed him at age 47 or 48. Um . . . So frankly um, not to minimize this, but ah, I think the 27 days in jail for somebody that would normally get no jail time ah, and the reason we stated is sufficient to have the Court consider probation before judgment in this matter.

We infer that the request for probation before judgment was denied, although an order of denial does not appear in the docket entries. On March 18, 2010, appellee filed a motion to reconsider and re-open motion for modification of sentence, and on October 4, 2011, appellee filed a "Motion for Revision of Sentence (MD Rule 4-345)," which we likewise infer, in the absence of docket entries, were also both denied.

The proceedings that led to the instant appeal began on June 4, 2014, when appellee filed a petition for writ of error coram nobis, making two arguments: one, that

his guilty pleas were not knowing, intelligent, and voluntary, and were accepted by the court in violation of the announcement requirement of Maryland Rule 4-242(c); and two, that he was denied effective assistance of counsel at the October 21, 2008, hearing on the motion to modify. The court conducted a hearing on December 2, 2014, after which it took the matter under advisement. On January 22, 2015, the coram nobis court issued a memorandum and order granting appellee's petition. The court did not address the ineffective assistance of counsel claim. But it found that appellee's "guilty pleas were invalid because the court failed to announce on the record that they were voluntary, as compelled by Rule 4-242(c)." The circuit court then ruled that, "because the other elements of coram nobis relief are present, the Court must vacate the guilty plea." The coram nobis court vacated appellee's perjury convictions, and granted appellee's request for a new trial on those charges. This appeal by the State followed.

STANDARD OF REVIEW

Citing *Cirincione v. State*, 119 Md. App. 471 (1998), the State argues that the coram nobis court made a ruling on a question of law, and that our review is therefore de novo. Citing *Kusi v. State*, 438 Md. 362 (2014), appellee contends that the court's grant of his petition for coram nobis was a discretionary decision, and we review such decisions for abuse of discretion. We agree with the State. The crux of appellee's argument to the circuit court was the legal argument that he was entitled to relief because the plea court failed to comply with Maryland Rule 4-242(c); he argued that "[t]he failure of the plea court to announce on the record that the plea was knowingly and voluntarily entered was a violation of [his] substantive rights." The coram nobis court seemingly

accepted appellee's argument that a new trial was mandated, as a matter of law, by the Court of Appeals's ruling in *Nalls v. State*, 437 Md. 674 (2014). We review a circuit court's interpretation of rules of procedure de novo.

In *State v. Daughtry*, 419 Md. 35 (2011), the Court of Appeals confronted a case in which a defendant had asserted that the circuit court had failed to comply with Rule 4-242(c) in ensuring that his guilty plea was knowingly and voluntarily entered. The Court's explanation of the appropriate standard of appellant's review in *Daughtry, id*. at 46-47, is equally applicable in this case:

> It is well settled that where a case "involves an interpretation and application of . . . case law, our Court must determine whether the lower court's conclusions are 'legally correct' under a [non-deferential] standard of review." *Schisler v. State*, 394 Md. 519, 535, 907 A.2d 175, 184 (2006); *see Ali v. CIT Tech. Fin. Servs., Inc.*, 416 Md. 249, 257, 6 A.3d 890, 894 (2010). Further, to the extent that the State argues that the Maryland Rules require a result different than that reached by the intermediate appellate court, we note that "[b]ecause our interpretation of . . . the Maryland Rules [is] appropriately classified as [a] question[ ] of law, we review the issues [without deference to the lower courts' decisions] to determine if the trial court was legally correct in its rulings on these matters." *Davis v. Slater*, 383 Md. 599, 604, 861 A.2d 78, 80–81 (2004); *see Owens v. State*, 399 Md. 388, 402–03, 924 A.2d 1072, 1080 (2007).

With respect to the substantive merits of a claim for coram nobis relief on grounds that a guilty plea was not entered into knowingly and voluntarily, the Court of Appeals explained in *State v. Smith*, 443 Md. 572, 650 (2015), "that '[o]ur jurisprudence, in determining the validity of a guilty plea, has focused always on whether the defendant, *based on the totality of the circumstances,* entered the plea knowingly and voluntarily.'" (Quoting *State v. Daughtry*, *supra*, 419 Md. at 69 (emphasis in original)). But the Court also explained in *Smith*, 443 Md. at 653, that, unlike the standard of review in the

Daughtry case, which was before the appellate court on direct appeal, "in a coram nobis case such as this one, the only issue is whether the defendant understood the nature of the charges—**regardless** of whether the trial court could determine as much."

The Court of Appeals reiterated in *Smith*, 443 Md. at 654: "[M]ost importantly**, a coram nobis proceeding's purpose is *not to determine based on the record whether the trial court erred at the time of a guilty plea*, but instead to determine whether a petitioner indeed knowingly and voluntarily pled guilty**." (Emphasis added.)

DISCUSSION

Before this Court, the State makes three arguments. It argues, first, that appellee's claim that his guilty pleas were invalid because the plea court failed to announce its findings on the record as required by Rule 4-242(c) was waived by appellee's failure to object at the plea hearing. Second, it argues that the plea court's failure to strictly comply with Maryland Rule 4-242(c), when considered in light of the totality of the circumstances surrounding the plea, does not vitiate a guilty plea that otherwise bears all the hallmarks of having been entered knowingly and voluntarily. Third, the State argues that the coram nobis court erred when it concluded that appellee had "suddenly" suffered significant collateral consequences as a result of his guilty plea, in light of the fact that the alleged consequences were all acknowledged by appellee at the time he entered the guilty plea.

Appellee responds that the State's waiver argument is itself waived because it was not adequately argued to the coram nobis court; that, even if we conclude that the State's waiver argument was preserved, "there is no case law interpreting [Rule] 4-242(c) to

require a contemporaneous objection" to the plea court's failure to make an announcement on the record; that the plea court's failure "to announce on the record that the plea was knowingly and voluntarily entered was a violation of [appellee's] substantive rights"; and that appellee has indeed suffered significant collateral consequences.

I. Preservation

The State asserts that a defendant who makes a claim that the trial court committed a procedural error in accepting a guilty plea must be able to demonstrate that the right to challenge the error was preserved with an objection.

The coram nobis court accorded no significance to the fact that, on the occasion when appellee pled guilty and the circuit court examined him on the record to assess whether appellee was "pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and . . . [whether] there is a factual basis for the plea," the appellee lodged no objection to the court's failure to "announce[] on the record" the court's determination that the appellee was entering the guilty plea voluntarily and with understanding, as required by Maryland Rule 4-242(c). The State asserts that, because appellee failed to object to the plea court's lack of announcement, appellee is precluded from relying upon that procedural error as a basis for seeking coram nobis relief.

We agree with the State that the coram nobis court erred in failing to consider whether appellee had knowingly waived the right to contest the voluntariness of his plea, and, more important, in concluding that the plea court's error in failing to make the

announcement required by Rule 4-242(c), standing alone, was an error that required the grant of a new trial.

The coram nobis court analogized the determine-and-announce requirement of Rule 4-242(c) to a similar requirement in Maryland Rule 4-246(b), which governs the acceptance of a defendant's waiver of trial by jury. The coram nobis court observed:

> Though Maryland courts have not specifically analyzed the [determine-and-announce] requirements elucidated in Rule 4-242(c), the Court of Appeals has interpreted rules similarly amended to require determination and announcement in the context of waiver of the right to a jury trial (Rule 4-246) and waiver of the right to counsel (Rule 4-215). *See Valonis v. State*, 431 Md. 551 (2013), *abrogated by Nalls v. State*, 437 Md. 674 (2014) (jury trial); *Westray v. State*, 217 Md. App. 429, 449, *cert. granted*, 440 Md. 225 (2014) (counsel). . . . Maryland courts have mandated strict compliance with determination and announcement requirements [of Rules 4-246 and 4-215, as amended effective January 1, 2008]."
>
> . . . "[A]ccordingly, the determination and announcement requirement is an essential component of the Rule. The Rule contemplates full compliance with both steps of the waiver procedure. Failure to comply is grounds for reversal." *Nalls*, 437 Md. at 687.
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> * * *
>
> Here, as in *Nalls*, the Petitioner [*i.e.*, appellee] was questioned to determine the voluntariness of the plea agreement . . . . However, despite making the determination that the Petitioner was pleading voluntarily, the court failed to announce that fact on the record.
>
> As in *Nalls*, **the court failed to explicitly announce on the record the voluntariness of Petitioner's plea** and, in doing so, did not fully comply with the determination and announcement requirement outlined in Rule 4-242(c). . . . **Therefore**, because the other elements of coram nobis relief are present, **the Court must vacate the guilty plea.**

(Emphasis added.)

The coram nobis court nevertheless recognized that the Court of Appeals had stated in *Nalls* that *Valonis* should not be read as holding that a claim for relief based upon non-compliance with the announcement requirement could be pursued without regard to preservation. In Footnote 9, the coram nobis court observed: "*Nalls v. State* only abrogated the decision [in *Valonis*] 'to the extent that *Valonis* could be read to hold that a trial judge's alleged noncompliance . . . is reviewable by the appellate court despite the failure to object at trial.' 437 Md. 674, 693-94 (2014). *As of April 23, 2014, the date of the Nalls decision, counsel must object to preserve the issue for appellate review."* (Emphasis added.)

This footnote indicates that the coram nobis court interpreted *Nalls* as holding that there was no preservation requirement with respect to any claims that a trial court failed to comply with the determine-and-announce requirements of Rules 4-215(b), 4-242(c), and 4-246(b) that may have occurred prior to April 23, 2014. We do not agree with that interpretation of the preservation requirement, and conclude that this erroneous interpretation led the coram nobis court to apply an incorrect standard of review to the question of whether appellee voluntarily entered his plea of guilty.

Soon after the *Valonis* ruling was issued, we observed in *Costen v. State*, 213 Md. App. 361 (2013), *vacated and remanded*, 438 Md. 135 (2014), that Rule 4-246(b), as interpreted by the Court of Appeals in *Valonis*, required trial courts to make an explicit determination on the record that a defendant's waiver of the right to be tried by a jury was both knowing and voluntary. *Costen*, *supra*, 213 Md. App. at 365. Furthermore, we concluded that *Valonis* stood for the proposition that "the absence of any objection to the

circuit court's lack of strict compliance with the announcement requirement of Rule 4-246(b) did 'not preclude appellate review.'" *Id.* at 367 (quoting *Valonis*, *supra*, 431 Md. at 569). But our reading of *Valonis* as excusing preservation with regard to claims of non-compliance with the announcement requirement of Rule 4-246(b) was expressly disavowed by the Court of Appeals in *Nalls*, and our ruling in *Costen* was summarily vacated, 438 Md. 135.

In *Nalls*, the Court of Appeals clarified that its consideration of an unpreserved error in *Valonis* had been an exception to the rule generally requiring an objection to preserve an argument for appeal: "[T]o the extent that *Valonis* could be read to hold that a trial judge's alleged noncompliance with Rule 4-246(b) is reviewable by the appellate courts despite the failure to object at trial, that interpretation is disavowed." 437 Md. at 693-94. Accordingly, *Nalls* did not announce a new preservation rule to be applied prospectively only; the Court of Appeals merely reiterated in *Nalls* that defendants must object to preserve for appellate review issues relative to Rule 4-246(b).

In *Nalls*, the Court of Appeals explained that it had exercised its discretion to address the issue in *Valonis* "pursuant to our authority under Rule 8–131(a), 'to guide the trial court or to avoid the expense and delay of another appeal.'" *Nalls*, *supra*, 437 Md. at 693 (quoting *Valonis, supra*, 431 Md. at 569). The Court of Appeals made plain in *Nalls*, however, that *preservation is required* to raise an appellate challenge to the trial court's ruling regarding a waiver of jury trial. The Court stated: "Going forward, however, the appellate courts will continue to review the issue of a trial judge's compliance with Rule 4-246(b) provided a contemporaneous objection is raised in the

trial court to preserve the issue for appellate review." *Nalls*, *supra*, 437 Md. at 693. Rather than read this statement as providing a blanket waiver of the preservation requirement for all instances in which a trial court had failed to make an announcement prior to the date of the *Nalls* opinion, we interpret the Court's statement as an explanation of the fact that it was exercising its discretion to address an unpreserved issue in *Nalls*, but it would not ordinarily do so. *Cf.* Maryland Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue [other than jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court . . . .").

Subsequently, in *Meredith v. State*, 217 Md. App. 669, *cert. denied*, 440 Md. 226 (2014), Judge Raker explained that, although *Valonis* had not made it clear "whether an appellate court would review a jury trial waiver absent a contemporaneous objection in the trial court," 217 Md. App. at 674, the Court of Appeals "spoke loud and clear" in *Nalls*, and expressly clarified "that a contemporaneous objection in the trial court is a necessary predicate for appellate review." *Meredith*, 217 Md. App. at 674.

In the present case, appellee made no objection to the guilty plea procedure or to the lack of an announcement by the plea court that it had determined that appellee was entering his plea knowingly and voluntarily. Any argument that the plea judge erred in failing to make an announcement could not have been raised on direct appeal.

But, whether an error is waived for purposes of post-conviction relief or coram nobis relief is a different question from whether an issue is preserved for direct appeal. As the Court of Appeals explained in Part I of its opinion in *State v. Smith*, 443 Md. 572, 590: "The coram nobis remedy that exists today was established in *Skok v. State*, 361 Md.

52, 760 A.2d 647 (2000)." In *Skok*, 361 Md. at 79, the Court of Appeals established: "Basic principles of waiver are applicable to issues raised in coram nobis proceedings. *United States v. Morgan*, 346 U.S. at 512, 74 S.Ct. at 253, 98 L.Ed. at 257. . . . [T]he same body of law concerning waiver and final litigation of an issue, which is applicable under the Maryland Post Conviction Procedure Act, Code (1957, 1996 Repl. Vol., 1999 Supp.), Art. 27, § 645A (b) through (d), shall be applicable to a coram nobis proceeding challenging a criminal conviction."

For purposes of coram nobis claims, therefore, the standard for determining whether the petitioner has waived a claim for relief is that described by the Court of Appeals in *State v. Smith*, 443 Md. at 604 (quoting *Curtis v. State*, 284 Md. 132, 140 (1978)):

> The standard of "waiver" for purposes of the [post conviction] Act 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." In *Washington v. Warden* [, 243 Md. 316, 321–22, 220 A.2d 607 (1966)], the Court held that *facts* showing a lack of comprehension by petitioner adequately rebutted the presumption of an intelligent and knowing waiver. Moreover, the *Washington* case makes it clear that under the statute, the concept of a rebuttable presumption that a failure to raise an issue was intelligent and knowing, and the concept of "special circumstances" excusing an intelligent and knowing waiver, are separate and distinct matters.
>
> In sum, with respect to those situations governed by the "waiver" standards of [the post conviction Act] where the petitioner establishes that he did not in fact intelligently and knowingly fail to raise an issue previously, such issue cannot be deemed to have been waived. He need not, in addition, establish "special circumstances." It is only where the petitioner in fact intelligently and knowingly failed to raise an issue, or where he is unable to rebut the presumption of an intelligent and knowing failure, that he must show "special circumstances" in order to excuse his failure.

Even if the appellee can persuade the coram nobis court that he did not waive his right to contest the voluntariness of his guilty plea, the existence of a procedural error in taking the plea does not necessarily support the grant of coram nobis relief. As Judge McDonald explained in his concurring opinion in *State v. Smith*, 443 Md. 572, 656 (2015), in supporting the 4-3 majority favoring the opinion of Judge Watts with respect to Part II of the ruling:

> I join Part II of Judge Watts' opinion (merits of this petition). As both opinions lay out, the writ of *coram nobis* is intended to correct the collateral consequences of a constitutional or fundamental error in an earlier criminal proceeding. But it is not necessarily a remedy for non-compliance with part of a procedural rule on how a guilty plea is taken. Nor, as Judge Watts persuasively sets out, is review limited to the record of the plea proceeding, as it would be in a direct appeal. The petitioner has the burden of showing an error of fundamental, compelling dimensions. *See, e.g., Skok v. State*, 361 Md. 52, 73, 760 A.2d 647 (2000) (*coram nobis* addressed to errors "of the most fundamental character") (citations omitted); *Holmes v. State*, 401 Md. 429, 475–76, 932 A.2d 698 (2007) (Raker, J., dissenting) ("an extraordinary remedy, to be employed only upon compelling circumstances").
>
> In my view, it is because the writ provides relief only as to constitutional or fundamental errors—and not every error that might bring relief in a direct appeal—that the Legislature (in CP § 8–401), and this Court, have adopted a policy to forgive what would otherwise be procedural mis-steps precluding consideration of the merits of a petition. This appears to me quite sensible and not at all "nonsensical."

In our view, Part II of the Court's opinion in *State v. Smith* makes it clear that a trial court's failure to comply with the announcement requirement of Rule 4-242(c) is not, standing alone, conclusive proof that a defendant's plea was not entered knowingly and voluntarily. Because it appears to us that the coram nobis court concluded that it was

obligated to grant relief based on the plea court's lack of strict compliance with the announcement rule, we will remand the case for further proceedings.

As noted above, the correct analysis in a coram nobis proceeding reviewing a claim that a guilty plea was not knowing and voluntary takes into account the totality of the circumstances, and the issue for the coram nobis court to decide is **not "whether the trial court erred at the time of a guilty plea, but instead[, . . .] whether a petitioner indeed knowingly and voluntarily pled guilty."** *Smith, supra,* 443 Md. at 654 (emphasis added). In other words, it is not sufficient for a coram nobis petitioner to demonstrate that the trial court committed a procedural error at the time of accepting a guilty plea. Instead, the petitioner must persuade the coram nobis court, based on the totality of circumstances, that the guilty plea was not made knowingly and voluntarily.

Because the coram nobis court did not have the benefit of the guidance provided by the Court of Appeals's opinion(s) in *State v. Smith*, 443 Md. 572, we have determined that a remand for further proceedings is in order. Upon remand, the court may consider whether there was a knowing and intelligent waiver of the right to challenge the voluntariness of the guilty plea. *Id*. at 604-08 (Chief Judge Barbera's majority opinion as to Part I, Waiver). But, assuming that the appellee can persuade the coram nobis court that appellee meets the *Smith* waiver standard for being able to challenge the voluntariness of his guilty plea in the first instance by way of a petition for coram nobis relief, the court will have to apply the "totality of the circumstances" test to assess whether appellee knowingly and voluntarily entered the guilty plea. *Id*. at 651 (Judge Watts's majority opinion as to Part II, Merits of Voluntariness Claim). As the Court of

Appeals made plain in *Smith*, the coram nobis court is not limited to the transcript of the plea proceedings (as it would be in a direct appeal, *see, e.g., Cuffley v. State*, 416 Md. 568, 582 (2010)), but may consider extrinsic evidence such as testimony of counsel. *Smith*, 443 Md. at 654 ("[W]e hold that a lawyer's testimony at a coram nobis hearing concerning having advised a defendant prior to the guilty plea of the nature of the charges against him or her is admissible. Such testimony may be considered in a coram nobis proceeding in determining whether a defendant pled 'voluntarily, with understanding of the nature of the charge' within the meaning of Maryland Rule 4–242(c)."). And "the burden of proof is on the coram nobis petitioner." *Id*. at 599.

On remand, the court will also have the opportunity to address the State's argument that appellee failed to establish that he is suddenly facing collateral consequences. *See Smith*, 443 Md. at 654 ("coram nobis is an equitable remedy that arises when an individual faces circumstances that did not exist at the guilty plea hearing") (Judge Watts's majority opinion as to Part II, Merits of Voluntariness Claim); *Skok*, 361 Md. at 78 ("there should be a remedy for 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"). The coram nobis court's prior opinion provided no findings on this point, and stated summarily "the other elements of coram nobis relief are present."

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY VACATED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.