UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1762

September Term, 2015

STATE OF MARYLAND

v.

PAUL WINSTON

Meredith,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: March 22, 2017

In this appeal, the State seeks review of an order entered by the Circuit Court for Montgomery County, granting post-conviction relief to appellee, Paul Winston, in the form of a new sentencing proceeding. For reasons explained below, we reverse the judgment of the circuit court.

BACKGROUND

On July 23, 2001, appellee entered an *Alford* plea[1] to one count of attempted second-degree murder, and one count of use of a handgun in the commission of a crime of violence. Under the plea agreement, the circuit court did not bind itself to impose any particular sentences for those counts, but did bind itself to impose the sentences for the two counts concurrent to each other.

After pleading guilty in Montgomery County, but before being sentenced, appellee pleaded guilty, in the Circuit Court for Prince George's County, to four counts of manslaughter by automobile, reckless driving, and driving without insurance. The court sentenced him to 44 years imprisonment, with 14 years suspended. On November 29, 2001, subsequent to the Prince George's County sentencing proceeding, appellee appeared in Montgomery County for sentencing in the instant case. Aware of the previously imposed sentence by the Circuit Court for Prince George's County, the court imposed the following sentences in the instant case:

> Madam Clerk, the sentence as to Count 4, use of a handgun, and I specifically and intentionally sentence you in that count first, is five years

[1] In an *Alford* plea, the defendant does not admit guilt, but admits that the State's evidence would prove that he or she committed the crime. *North Carolina v Alford*, 400 U.S. 25 (1970).

> at the Department of Corrections, consecutive to any sentence previously imposed.
>
> As to Count 1, attempted second degree murder, the sentence is 15 years, concurrent with any sentence previously imposed.

Appellee did not seek leave to appeal in this Court from the guilty pleas he entered in Montgomery County. Nearly a decade later, however, in 2011, appellee filed a motion to correct an illegal sentence claiming that his sentence was illegal because he was sentenced to "quasi-consecutive" sentences in breach of the plea agreement. After the circuit court denied that motion, appellee took a direct appeal to this Court. We affirmed the denial of the motion to correct an illegal sentence. *Paul Winston v. State of Maryland*, No. 1710, Sept. Term. 2011 (filed, unreported, March 11, 2014). We acknowledged the circuit court had breached the plea agreement by not running the sentences concurrent with each other, but we found no illegality because:

> [T]he sentences imposed did not exceed the sentences contemplated by the plea agreement and, in fact, they were more favorable to [appellee] than that which the court could have given him if it had made the sentence for attempted murder concurrent with the handgun sentence. Accordingly, the sentence imposed was not "inherently illegal" and, therefore, it was not subject to correction under Rule 4-345(a).[2]

While that appeal was pending, and with time running out on the 10-year deadline to seek post-conviction relief imposed by Md. Code (2001, 2008 Repl. Vol., 2015 Supp.), § 7-103 (b) of the Criminal Procedure Article ("CP"), appellee filed a petition for post-

[2] We noted that by structuring the sentences the way it had, the court "effectively reduced by ten years the time [appellee] could have served for the handgun and attempted murder offenses if the court had abided by the terms of the plea agreement" and, therefore, appellee had "received the benefit of his bargain." No. 1710, Sept. Term 2011, Slip op. at 7.

conviction relief alleging that (1) because the circuit court breached the plea agreement by imposing consecutive sentences, appellee was entitled to be resentenced subject to the agreement; and (2) trial counsel had rendered ineffective assistance of counsel (a) for failing to ensure compliance with the plea agreement, and (b) in failing to advise appellee about his right to seek application for leave to appeal in this Court from the guilty plea.

On August 12, 2015, at the conclusion of a hearing on appellee's petition for post-conviction relief, the circuit court granted post-conviction relief, from the bench, in the form of a new sentencing proceeding, but denied relief on all other grounds. Thereafter, on August 24, 2015, the circuit court entered a written order to the same effect.

On September 23, 2015, the State sought leave to appeal the circuit court's decision to grant post-conviction relief. In its application, the State claimed that appellee had waived, within the meaning of CP § 7-106 (b),[3] his contention that the court had

[3] Criminal Procedure Section 7-106(b), *Waiver of allegation of error*, provides:

> (b)(1)(i) Except as provided in subparagraph (ii) of this paragraph, an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation:
>
> 1. before trial;
> 2. at trial;
> 3. on direct appeal, whether or not the petitioner took an appeal;
> 4. in an application for leave to appeal a conviction based on a guilty plea;
> 5. in a habeas corpus or coram nobis proceeding began by the petitioner;
> 6. in a prior petition under this subtitle; or
> 7. in any other proceeding that the petitioner began.
>
> (ii) 1. Failure to make an allegation of error shall be excused if special circumstances exist.

(continued)

breached the plea agreement by not previously raising that claim when he could have done so. We granted the State's application.

On appeal, the State maintains that appellee has not rebutted the statutory presumption that he had knowingly and voluntarily waived his contention that the circuit court breached the plea agreement when he did not raise that contention "(1) at the sentencing hearing; (2) in an application for leave to appeal the judgment of conviction …; or (3) in the motion for modification of sentence that he did in fact file."

Appellee first contends that the State's waiver argument is not properly before this Court because the State did not advance that theory during the hearing on appellee's petition for post-conviction relief, even though the State pleaded the argument in writing in its response to appellee's petition for post-conviction relief. Appellee contends that "by waiting until the appeal to resurrect its waiver argument, the State has sandbagged both Mr. Winston and the circuit court."

Appellee also contends, in the alternative, that even if the State's waiver argument is properly before this Court, he did not knowingly and intelligently waive his claim that the circuit court breached the plea agreement because the record reflects that he received

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> 2. The petitioner has the burden of proving that special circumstances exist.
>
> (2) When a petitioner could have made an allegation of error at a proceeding set forth in paragraph (1)(i) of this subsection but did not make an allegation of error, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation.

"inaccurate and misleading advice regarding his post-plea rights." Additional facts are addressed as they become germane to our discussion.

DISCUSSION

I.

Criminal Procedure Article, §§ 7-101 to 7-301 comprises Maryland's post-conviction procedures. Section 7-102 permits a challenge to a conviction when the post-conviction issue has "not been previously and finally litigated or waived in the proceeding resulting in the conviction or in any other proceeding that the person has taken to secure relief from the person's conviction." CP § 7-102(b)(2). An issue "is waived when a petitioner could have made but intelligently and knowingly" failed to make the allegation: "1. before trial; 2. at trial; 3. on direct appeal, whether or not the petitioner took an appeal; 4. in an application for leave to appeal a conviction based on a guilty plea; 5. in a habeas corpus or coram nobis proceeding began by the petitioner; 6. in a prior petition under this subtitle; or 7. in any other proceeding that the petitioner began." CP § 7-106(b)(1)(i).

When a petitioner could have, but did not, make an allegation of error in one of the proceedings listed above, "there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation." CP § 7-106(b)(2). Section 7-106(b)(1)(ii) states that waiver shall be excused in special circumstances; however, "the petitioner has the burden of proving that special circumstances exist."

In *Curtis v. State*, 284 Md. 132 (1978), the Court of Appeals distinguished the minimum standard for waiver of a fundamental constitutional right from the standard for

waiver of other rights. *Id*. at 148. The Court noted that, under CP § 7-106, fundamental constitutional rights require an affirmative waiver by a defendant, yet, non-fundamental rights may be waived without an affirmative acknowledgment of waiver by the defendant to the court. *Id*. at 147. *Accord McElroy v. State*, 329 Md. 136, 140 (1993). Nevertheless, as noted, even for fundamental rights, a presumption of a knowing and intelligent waiver arises when a petitioner could have made, but does not make, an allegation in a proceeding where the allegation could have been raised. *State v. Gutierrez*, 153 Md. App. 462, 473 (2003).

II.

Appellee contends that the State's waiver argument is not properly before this Court because, despite the fact that the State contended in its written response to appellee's petition for post-conviction relief that the allegation was waived,[4] the State did not raise the issue of waiver during the hearing on appellee's petition. The short answer to this contention is that it was not the State's obligation to raise waiver as a defense to the post-conviction. CP § 7-106(b), Md. Rule 4-402(a)(7). Rather, it was appellee's

[4] In its written response to appellee's petition for post-conviction relief, the State asserted the following with respect to waiver:

> Any allegation of error that could have been raised but which was not made, before Winston's plea; at the time of his plea; in an application for leave to appeal from the judgment of conviction based on the plea; in a habeas corpus or coram nobis proceeding commenced by Winston; in a prior petition under Maryland's Uniform Post Conviction Procedure Act; or in any other proceeding commenced by Winston is waived and should not be excused. See Md. Code Ann., Crirn. Proc. Art. § 7-106(b)...

burden to rebut the presumption of waiver which arose by operation of law when appellee failed to seek application for leave to appeal from his guilty plea. *State v. Gutierrez*, 153 Md. App. 462, 474 (2003), *citing McElroy*, 329 Md. at 147-49; *See* CP § 7-106 (b)(1)(i)(4) & § 7-106(b)(2).

Appellee's only reference to waiver was in his petition for post-conviction relief wherein he stated:

> The record reveals that the Court improperly breached Petitioner's binding plea agreement. This issue was not "intelligently and knowingly" waived. MD Crim. Proc. Code § 7-106. Further, this issue has not been previously litigated. Petitioner will present further evidence at a hearing to rebut any presumption of waiver and/or show that special circumstances exist to excuse the waiver.

During the hearing on appellee's petition for post-conviction relief, he presented no proffer, no evidence, and no argument to "rebut any presumption of waiver and/or show that special circumstances exist to excuse the waiver."

Appellee attempts to distinguish this case from *State v. Gutierrez*, 153 Md. App. 462 (2003), *cert. denied*, 380 Md. 618 (2004), in which, according to appellee, this Court reached the issue of waiver despite the fact that, as here, the State did not raise the issue of waiver during the hearing on the petition. Appellee claims that "[b]ecause the State made that argument in its answer to the petition for post-conviction relief but not at the post-conviction hearing, this Court held that the argument was not preserved for appeal." Appellee misreads our decision in *Gutierrez*. In *Gutierrez*, it is true that the State did not raise the issue of waiver during the hearing on the petition for post-conviction relief despite the fact that it had raised the issue in its written answer to the petition.

Nevertheless, we directed the parties to then brief the issue, which the State did. Gutierrez, however, failed to address the waiver issue in his briefs before this Court. *Gutierrez*, 153 Md. App. at 471. We never held that the State had failed to preserve the argument for appeal; we did, however, address the issue on appeal pursuant to our authority to address issues not "raised in or decided by" the trial court pursuant to Md. Rule 8-131(a). We determined that "post-conviction relief should have been denied because appellee waived his right to post-conviction relief on the stated grounds."[5] *Id*. at 475.

We are persuaded that the issue of waiver is before this Court. Moreover, even if it were not before this Court, we would exercise our discretion under Md. Rule 8-131(a) to address the issue as both parties have fully briefed the issue on appeal even though the issue was not addressed by the circuit court.

III.

There is no question that the voluntariness of a guilty plea is a fundamental right, and therefore, any waiver of that right must be knowingly, voluntarily, and intelligently made. *State v. Smith*, 443 Md. 572, 608 (2015). There is no question that appellee did not seek application for leave to appeal from his guilty plea. There is no question, therefore, that a rebuttable presumption arose that appellee knowingly and intelligently failed to raise the allegation that he raised in his petition for post-conviction relief, *i.e.*, that the

[5] In *Gutierrez*, we also addressed, and rejected, Gutierrez's claim that his guilty plea was not entered knowingly and voluntarily. *Gutierrez*, 153 Md. App. at 475.

court breached the plea agreement. CP § 7-106(b)(2). The only question is whether appellee has rebutted that presumption.[6]

Appellee claims that the presumption of waiver is rebutted because, as in *Gross v. State*, 186 Md. App. 320, *cert. denied*, 410 Md. 560 (2009), he was given "inaccurate and misleading" advice about his ability to seek leave to appeal his guilty plea both during the guilty plea proceeding and during the sentencing proceeding.

During the guilty plea proceeding, appellee contends that the circuit court misinformed appellee about his right to seek leave to appeal from the guilty plea when the court advised appellee only that: "[w]hen you plead not guilty you have an automatic right to appeal, when you plead guilty with an *Alford* plea your appeal rights are severely restricted." While it is true that this advice is incomplete in that it does not explain that the procedure to seek the "restricted" appeal is by application for leave to appeal, and it does not mention that appellee had 30 days from the date of sentencing to seek such leave to appeal, there is nothing incorrect about the advice.

Appellee focuses his attention on the fact that the court next advised him that "when you plead guilty with an *Alford* plea that those rights are given up, they're gone forever[.]" Appellee asserts that "[a] layperson in [appellee's] shoes would interpret these remarks as meaning that he had no right of any kind to challenge his plea after it had been accepted." Appellee's argument in this regard bends the record by shearing the

[6] Appellee makes no allegation that "special circumstances," within the contemplation of CP § 7-106(b)(1)(ii), should excuse any waiver of his allegation; rather, he confines his argument to the position that he has rebutted the presumption of waiver.

court's statements from their contextual roots. First, the court's comment about appellee giving up rights "forever" came on the heels of the court's explanation of a long list of trial rights enjoyed by the criminally accused including, but not limited to, the right to a jury trial, to jury unanimity, to confront accusers, to compulsory process, and to remain silent. All of those rights are, indeed, given up by electing to plead guilty. Second, it is clear from the court's earlier remarks that upon pleading guilty, appellee's "appeal rights [would be] severely restricted," appellee would not be giving up the right to appeal in its entirety. Last, the court confirmed that appellee had discussed the guilty plea and its ramifications with his attorney, and confirmed that he had no questions about it.

Appellee next claims that, when the issue of his appeal rights was revisited during the sentencing proceeding, the advice was "both more accurate and less clear." After pronouncing sentence, the court advised appellee that "I'm required to advise you that you have 30 days to request leave to appeal. You have 30 days to ask that your sentence be reviewed by a three-judge panel. You have 90 days to file a motion asking me to modify or reduce the sentence." Appellee suggests that the court should have explained to appellee what sort of claims could be raised in an application for leave to appeal, and complains that "it did not help matters" that the court immediately explained appellee's post sentencing rights.

We disagree with appellee's assessment of the court's advice regarding his right to seek review of his guilty plea in this Court. First of all, once again, there was nothing inaccurate about the advice the court gave during either the guilty plea or the sentencing proceeding. In addition, whatever deficiency there may have been with the court's

appellate advice during the plea hearing was cured when the court advised appellee during the sentencing hearing. As noted earlier, during the plea hearing, the court mentioned neither that the method for seeking appellate review was by application for leave to appeal, nor the time limit for seeking such leave to appeal. Both of those deficiencies were corrected at sentencing.

In *McElroy*, *supra*, McElroy contended that his plea was entered involuntarily. On the issue of whether he had rebutted the presumption that he had waived that claim, the Court of Appeals said:

> With regard to McElroy's second and third arguments, he asserts, the State concedes, and we agree that his claim that he was convicted on a guilty plea which was not knowingly and intelligently entered is one that asserts the deprivation of a fundamental constitutional right. *Boykin v. Alabama*, 395 U.S. 238, 243-44, 89 S.Ct. 1709, 1712-13, 23 L.Ed.2d 274, 279-80 (1969); *Machibroda v. United States*, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed.2d 473, 478 (1962); *Hersch v. State*, 317 Md. 200, 206, 562 A.2d 1254, 1256 (1989); *State v. Priet*, 289 Md. 267, 275, 424 A.2d 349, 360 (1981). Nevertheless, we are not persuaded that McElroy has rebutted the presumption set forth in Art. 27, § 645A(c)(2) that he "intelligently and knowingly failed to make" the contention he raises in the instant post-conviction proceeding by failing to seek direct review of his conviction and sentence by the Court of Special Appeals. The record of the trial court proceedings show that the trial judge advised McElroy of his right to appellate review of the conviction which would result from the court's acceptance of his guilty plea before that plea was accepted, and McElroy assured the trial judge that he had no questions about that right. At the post-conviction hearing, no evidence was offered to rebut the presumption of intelligent and knowing waiver mandated by Art. 27, § 645A(c)(2).

McElroy v. State, 329 Md. 136, 146–47 (1993). To similar effect is *Gutierrez*, *supra*, where we noted that Guiterrez had not offered any facts to back up his general statement that he had not knowingly and intelligently waived his post-conviction allegations. Rather, in contrast, Guiterrez had been informed of his right to seek leave to

appeal and had been asked by the court if he understood his rights. *State v. Gutierrez*, 153 Md. App. 462, 474-75 (2003). Under the circumstances, we stated that:

> It appears, based on the record, that there is no explanation as to why the issues were not raised on appeal. The statute provides that there is a rebuttable presumption that waiver of a fundamental right was made intelligently and knowingly. The burden is on the petitioner to rebut the presumption. We conclude that appellee has failed to rebut the presumption and his failure to do so is not excused by special circumstances. Therefore, post-conviction relief should have been denied because appellee waived his right to post-conviction relief on the stated grounds.
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> *Id*. at 245.

Appellee seeks to bring his case within the holding of *Gross v. State*, 186 Md. App. 320, *cert. denied*, 410 Md. 560 (2009), where this Court found that Gross had rebutted the presumption that he had knowingly, intelligently and voluntarily waived his contention that his guilty plea was invalid on the basis that the circuit court gave inaccurate advice about the ability to seek leave to appeal in this Court within 30 days of sentencing. *Gross* provides little support for appellee, however. In *Gross*, the circuit court incorrectly told Gross, at sentencing, that his right to seek leave to appeal in this Court was limited to appealing the sentence, and at no point was Gross told he had 30 days to seek leave to appeal. The same cannot be said in the instant case. Appellee was correctly told that he had 30 days to seek leave to appeal in this Court and that by pleading guilty he would be restricting his appellate rights. The court also confirmed that appellee understood those rights and had discussed them with his lawyer. There was nothing remotely misleading about the circuit court's advice. In addition, the post-

conviction court specifically found that appellee had not proved that his trial counsel was ineffective for failing to properly advise appellee about his right to seek leave to appeal.

We hold that appellee has not rebutted the presumption that he "waived his right to post-conviction relief on the stated grounds," *Gutierrez,* 153 Md. App. at 475, that arose by operation of law when he did not seek leave to appeal from his guilty plea. Because the issue was waived, the circuit court erred in addressing it. We therefore vacate the judgment of the circuit court granting appellee post-conviction relief.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED; COSTS TO BE PAID BY APPELLEE.