Circuit Court for Baltimore County
Case No. 03K10004064

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2475

September Term, 2016

ALVIN LEON HARRIS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: February 27, 2018

On February 22, 2011, Alvin Harris, appellant, pleaded guilty to attempted sexual offense in the first degree in the Circuit Court for Baltimore County. On May 19, 2011, appellant was sentenced to 25 years' incarceration. Years later, appellant filed a petition for post-conviction relief which the circuit court denied after holding a hearing. Appellant sought leave to appeal the post-conviction court's denial of his petition in this Court. We granted leave to appeal, and transferred the case to the regular docket.

QUESTIONS PRESENTED

Appellant presents the following three questions for our consideration:

1. Did the post-conviction court err in concluding that the prosecutor did not breach the plea agreement where the record shows that at the time of sentencing the prosecutor failed to recommend a sentence of between 12 and 20 years of incarceration, as called for by the plea agreement?

2. Did Mr. Harris waive this argument by failing to file an application for leave to appeal following his guilty plea where he was not advised that breach of a plea agreement by the State could be raised in an application for leave to appeal?

3. Did defense counsel's failure to object to the prosecutor's failure to recommend a sentence of between 12 and 20 years, and her subsequent failure to file an application for leave to appeal raising that issue, constitute ineffective assistance of counsel?

For the reasons to be discussed, we affirm the judgment of the post-conviction court.

BACKGROUND

At the outset of the guilty plea proceedings in this case, the State explained that, in exchange for appellant's guilty plea to attempted sexual offense in the first degree, the State agreed to (1) enter a *nolle prosequi* for the other crimes that appellant had been charged with in connection with this case, and (2) recommend, "at the time of disposition[,]

a sentence of between 12 and 20 years of incarceration." Under the plea agreement, appellant was free to argue for any sentence. The circuit court explained to appellant that, as to sentencing, it was not bound by the guilty plea agreement and, therefore, the court could impose any lawful sentence, including, and up to, life imprisonment.

During the guilty plea proceedings, the court was made aware that, because there existed some confusion about appellant's and his twin brother's criminal records, appellant would be fingerprinted so that appellant's criminal record could be made accurate prior to the sentencing proceeding. As a result, appellant was advised that, although the sentencing guidelines had been calculated to be between 12 and 20 years, that range could change "depending on what happens with straightening [his] record out."

Appellant was advised during the plea proceedings that, *inter alia*, by pleading guilty he was waiving his right to take a direct appeal from his guilty plea, and would instead, only have the right to seek leave to appeal on the following four grounds: the guilty plea was not entered voluntarily with a knowing and intelligent waiver of rights; the sentence was illegal; the court lacked jurisdiction; or he was denied the right to effective assistance of counsel.

After finding that appellant had "freely, knowingly, voluntarily and intelligently" waived his rights, after confirming that appellant had no questions, and after finding that there was an adequate factual basis to support appellant's guilty plea, the court found appellant guilty of attempted sexual offense in the first degree.

On May 19, 2011, appellant appeared for sentencing. At the outset of the sentencing hearing, the court explained that the sentencing guidelines had been re-calculated upward

to 15 to 25 years imprisonment. When asked by the court whether the parties took "issue with that[,]" appellant's counsel said: "Your Honor, I have not had the opportunity to see them. I know that the State had calculated them, I believe, to be 12 to 20, and that was the basis of the plea." The State explained that it had learned of an additional out-of-state offense which caused the increase in appellant's sentencing guidelines. The court then said: "Okay. All right. Okay. Well, I've got the universe of both sides' suggestions here. So are we ready to go forward?" To which the parties responded affirmatively.

The State thereafter offered impact testimony from the victim in this case, and offered its own commentary on the facts of the instant offense, appellant's prior criminal history, and appellant's failure to express remorse to the presentence investigation investigator. The State never made any specific sentencing recommendation.

The court sentenced appellant to 25 years imprisonment. Appellant's trial counsel then explained, *inter alia*, appellant's appellate rights as follows: ". . . [Y]ou have 30 days from today's date to file an application for leave to appeal to the Court of Special Appeals. You and I have reviewed the grounds in which you could file that."

Appellant did not thereafter seek leave to appeal. Several years later, however, he filed a petition for post-conviction relief in the circuit court alleging, *inter alia*,[1] (1) that

[1] Appellant also claimed that he was denied effective assistance of counsel when counsel did not file a motion for modification or reduction of sentence pursuant to Md. Rule 4-345. The post-conviction court granted appellant relief on this ground. Appellant also contended that he was denied his right to effective assistance of counsel when counsel failed to file a motion seeking to withdraw the guilty plea. This contention is not raised in appellant's briefs before this Court. Consequently, the contention has been abandoned and we shall not address it.

the State breached the guilty plea agreement by not, at the time of sentencing, recommending a sentence between 12 and 20 years of incarceration, (2) that he did not waive his argument that the State breached the plea agreement, (3) that he was denied his right to effective assistance of counsel when counsel failed to object to the State's alleged breach of the plea agreement, and (4) that he was denied his right to effective assistance of counsel when counsel failed to file an application for leave to appeal from the guilty plea raising the contention that the State breached the plea agreement.

On November 23, 2016, the circuit court held a hearing on appellant's petition for post-conviction relief. At the conclusion of that hearing, the circuit court denied the petition from the bench because, *inter alia*, it did not believe that the State had breached the guilty plea agreement. As noted, appellant sought leave to appeal the post-conviction court's denial of his petition in this Court. We granted leave to appeal,[2] and transferred the case to the regular docket.

DISCUSSION

The State breached the guilty plea agreement.

Appellant argues that when the State made no sentencing recommendation during the sentencing proceeding, the State violated a term of the plea agreement. We agree.

[2] In appellant's application for leave to appeal, he did not raise any contentions dealing with ineffective assistance of counsel. As indicated, however, those claims were presented to, and ruled on, by the circuit court. Moreover, when we granted leave to appeal in this case, we did not limit the issues that could be raised on appeal. As a result, under *Harding v. State*, __ Md. App. __, No. 2472, Sept. Term. 2014 (filed Dec. 21, 2017), the claims of ineffective assistance of counsel are properly before us.

The "core message" of *Cuffley v. State*, 416 Md. 568 (2010), *Baines v. State*, 416 Md. 604 (2010), and *Matthews v. State*, 424 Md. 503 (2012), "is that when a defendant foregoes a trial and enters a guilty plea pursuant to an agreement with the State which is then accepted by the court, the defendant is entitled to have the State and the court honor the terms of that agreement." *Carlini v. State*, 215 Md. App. 415, 443 (2013).

The guilty plea agreement in this case was a contract between appellant and the State. *Smith v. State,* 453 Md. 561, 573 (2017). "Whether a plea agreement has been violated is a question of law which this Court reviews *de novo*." *Hartman v. State*, 452 Md. 279, 28 (2017), quoting *Tweedy v. State*, 380 Md. 475, 482 (2004). "The prime directive for statutory construction, for contract construction, and now for the construction of a plea agreement is simply to read the words themselves that call for construction. If their meaning is clear and distinct and undisputed, the interpretive exercise is over." *Ray v. State*, 230 Md. App. 157, 182-83 (2016), *cert. granted*, 451 Md. 249 (2017), and *aff'd*, 454 Md. 563 (2017).

In the instant case, the State, by its own words at the outset of the guilty plea proceeding became obligated to recommend, "at the time of disposition[,] a sentence of between 12 and 20 years of incarceration" in exchange for appellant's plea of guilt. We think that, because, the meaning of that term of the plea agreement was "clear and distinct and undisputed," that "the interpretive exercise is over." *Ray*, 230 Md. App at 183. There is no question that, during appellant's sentencing hearing, the State was obligated, in no uncertain terms, to recommend to the court a sentence "between 12 and 20 years of

incarceration." That did not happen. As a result, we hold that the State breached the plea agreement.

Appellant waived the argument that the State breached the guilty plea agreement.

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).

We assume, without deciding, that a violation of a term of a plea agreement affects the validity of the guilty plea enough that it involves a fundamental right, and therefore, any waiver of that right must be knowingly and voluntarily made. *State v. Smith*, 443 Md. 572, 608 (2015). There is no question that appellant did not seek application for leave to appeal from his guilty plea. There is no question, therefore, that a rebuttable presumption arose that appellant knowingly and voluntarily failed to raise the allegation that he raised in his petition for post-conviction relief, i.e., that the State breached the plea agreement. CP § 7-106(b)(2). The only question is whether appellant has rebutted that presumption.

Appellant 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. He claims that he was incorrectly not told, during the guilty plea proceeding, that one of the grounds he could raise in an application for leave to appeal from the guilty plea was that the guilty plea agreement had been breached. Instead, he was told that he only had the right to seek leave to appeal on the following four grounds: that the guilty plea was not entered voluntarily with a knowing and intelligent waiver of rights; that the sentence was illegal; that the court

lacked jurisdiction; and that he was denied the right to effective assistance of counsel. At the conclusion of the sentencing proceeding, appellant was told that he had 30 days to seek leave to appeal and was reminded by his attorney that he and his lawyer had "reviewed the grounds in which you could file that." Appellant claims that, had he been correctly advised that the breach of a plea agreement could be raised in an application for leave to appeal from a guilty plea, he would have filed such an application. Therefore, according to appellant, he rebutted the presumption that he waived the contention that the State breached the plea agreement.

Appellant's argument is beside the point. He completely overlooks the effect that not objecting during the sentencing proceeding has on his waiver argument. When he failed to bring to the attention of the circuit court the State's breach, he waived the issue. In *Barnhart v. State*, 34 Md. App. 632, 634 (1977) this Court found that, because there was nothing in the record indicating that the defendant objected to the State's breach of a plea agreement at sentencing, or sought any relief from the judge because of them, the issue was not properly before the appellate court under the predecessor to Md. Rule 8-131 which provides that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." *see also Burroughs v. State*, 30 Md. App. 669, 677 (1976), *Clark v. State*, 57 Md. App. 558, 562 (1984), *Hartman v. State*, 452 Md. 279, 296 (2017).

After appellant failed to bring the breach to the attention of the circuit court, he could not, in fact, raise the contention that the State breached the plea agreement in an

application for leave to appeal from the guilty plea because it was waived.[3] Thus, any allegedly incorrect advice about what grounds could be litigated in such an application was irrelevant. Appellant has not, therefore, rebutted the presumption that he knowingly and intelligently waived the contention.

Appellant was not denied his right to effective assistance of counsel when his trial counsel failed to object to the State's breach of the plea agreement.

Article 21 of the Maryland Declaration of Rights and the Sixth Amendment to the United States Constitution guarantee all criminal defendants effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test established by the Supreme Court. Under *Strickland v. Washington*, 466 U.S. 668 (1984), the defendant must show: (1) that counsel's performance was deficient, i.e., that "counsel's representation fell below an objective standard of reasonableness"; and (2) that the deficient performance prejudiced the defense, i.e., "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 687-88, 694.

Strickland also instructs that courts need not consider the performance prong and the prejudice prong in order, nor do they need to address both prongs in every case. *Id*. at 697; *Oken v. State*, 343 Md. 256, 284 (1996); *Newton v. State*, 455 Md. 341, 35 (2017).

[3] The only way appellant could have raised the issue in an application for leave to appeal would have been to resort to asking this Court to recognize the contention as plain error. While it might not be binding on this Court, the Supreme Court has found such an error not a plain error under federal law. *Puckett v. United States*, 556 U.S. 129, 143 (2009). We have not been asked to review the contention in this case as plain error, but if we had been, we would have declined to do so.

"As the *Strickland* Court explained, 'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" *Newton*, 455 Md. at 341 (quoting *Strickland*, 466 U.S. at 697).

Appellant argues that he has established that his attorney performed deficiently because "[a]ny reasonably competent defense attorney would have objected to the prosecutor's failure to make the promised sentencing recommendation." As for establishing prejudice as a result of the deficient performance, appellant argues that, "[b]ecause sentencing judges routinely rely on sentencing recommendations by prosecutors in fashioning an appropriate sentence, there is a reasonable probability that the sentence imposed on Mr. Harris would have been less than 25 years if counsel had objected and the prosecutor recommended a sentence of between 12 and 20 years."

We find that appellant has failed to demonstrate *Strickland* prejudice. "It is the appellant who bears the burden of proving prejudice, and the appellant's required showing in that regard is substantial." *Schmitt v. State*, 140 Md. App. 1, 43-44 (2001). In *Schmitt* we noted that, "[a]s *Strickland v. Washington* itself observed . . . [i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test and not every error that conceivably could have influenced the outcome undermines the reliability of the proceeding. 466 U.S. at 693." *Schmitt,* 140 Md. App. at 43-44.

Appellant alleges, or more precisely, speculates, and does nothing to *prove*, that the court would have imposed a different sentence had the State not breached the plea agreement. In order to prove prejudice, appellant had the ability to introduce evidence and

to call witnesses during the hearing on his petition for post-conviction relief to establish prejudice. For example, appellant could have, but did not, call as a witness the judge who imposed appellant's sentence. As a result, he has not met his burden to demonstrate a reasonable probability of a different result.

Appellant was not denied his right to effective assistance of counsel when his trial counsel failed to file an application for leave to appeal from the guilty plea.

Our earlier holding, that appellant had not preserved for appeal his contention that the State breached the guilty plea agreement necessarily disposes of appellant's argument that he was denied effective assistance of counsel for not seeking leave to appeal from the guilty plea. As noted above, appellant has presented us with no grounds that could have been raised in an application for leave to appeal. Hence, he has proved neither error nor prejudice within the meaning of *Strickland*.

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