UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2549

September Term, 2014

ROY LEE TOLBERT

v.

STATE OF MARYLAND

Woodward,
Friedman,
Wilner, Alan M.
(Retired, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: November 12, 2015

BACKGROUND

In August 1994, appellant was charged in a nine-count indictment filed in the Circuit Court for Prince George's County with various controlled dangerous substance offenses. The nine counts centered around his alleged possession of a substantial amount of phencyclidine (PCP) and cocaine on July 31, 1994. Count Six charged him with conspiracy to possess PCP in a sufficient quantity to reasonably indicate an intent to distribute that substance.

In March 1999, in accordance with a plea agreement, appellant entered a plea of guilty to Count Six pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), which permits a defendant to plead guilty without admitting or contesting guilt but acknowledging that the State has sufficient evidence to sustain a conviction of the offense.[1] Based upon that plea, which the court accepted, the State dismissed the other counts in the indictment and the court sentenced appellant to four years in prison.

Fourteen years later, appellant was indicted in the U.S. District Court for the District of Maryland for interference with commerce by robbery and brandishing a firearm during a crime of violence, to which he pled guilty. Facing a substantially greater penalty for those Federal offenses due to his 1999 State court conviction, he filed a petition for writ of error coram nobis in the Circuit Court for Prince George's County seeking to vacate the 1999 conviction. He claimed that his plea of guilty was neither knowing nor voluntary and

[1] The nearly five-year delay resulted from the court's initially granting appellant's motion to suppress evidence, the reversal of that ruling on an appeal by the State, and appellant's intervening incarceration on a conviction in the District of Columbia. *See State v. Tolbert*, No. 330, Sept. Term 1995, *per curiam* opinion filed August 2, 1999.

that the statement of facts offered by the State in support of the plea failed to show a strong factual basis for the plea, as required by *Alford*. The basis of his claim that the plea was unknowing and involuntary is that neither his attorney nor the court explained to him the nature or the elements of the crime of conspiracy alleged in Count Six.

After a hearing, the court denied his petition. It rejected his claim that the plea was unknowing and involuntary on three grounds. First, the court concluded that conspiracy was "a crime that is readily understandable to probably everyone in the United States of America over the age of ten . . . ." Conspiracy, the court said, "is a word that is used over and over again, and it has the common meaning of a group of people, or more than one person, agreeing or scheming in some way to do something that's not correct." The court also noted that, at an earlier stage of the case, there had been a "motions hearing" and "there is a very substantial factual basis that the Petitioner in this case actually heard. He knew exactly what the evidence was against him."

Finally, with respect to whether the record as a whole contained a sufficient factual basis to support the plea, the court drew an inference from the *Alford* plea itself that there was sufficient evidence to support the plea. The court reasoned:

> "[A]n Alford plea means, to me, that someone is saying, 'I am not guilty, but I agree that if the evidence was presented, the evidence is sufficient to prove me guilty.' That, to me, infers an understanding of what the evidence would be as to the elements of the offense. If it's a guilty plea where there is no Alford plea and someone says, 'Okay, I did something and I am willing to plead guilty to second degree assault,' you really can't infer that there was any great discussion of what second degree assault was. But when a lawyer says that my client is going to say that if the evidence was put up, the State would be

> able to prove the elements of conspiracy with possession with intent to distribute. That, to me, I can infer from that that the elements had to be discussed or the Alford plea would not be tendered."

In this appeal from the denial of his petition, appellant attacks the court's findings and reasoning behind them. We find merit in his complaint that the record fails to show that the plea was a knowing one, and we shall reverse on that ground.

DISCUSSION

The writ of error coram nobis, once somewhat of a backwater in American jurisprudence, found new life in *United States v. Morgan*, 346 U.S. 502 (1954) and, in Maryland, even newer life in *Skok v. State*, 361 Md. 52 (2000). We need not trace the full history of this evolution. It will suffice to note the latest confirmation of it in *State v. Smith*, 443 Md. 572, 598-99 (2015):

> "[T]here 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, and who can legitimately challenge the conviction on constitutional or fundamental grounds. Such person should be able to file a motion for coram nobis relief regardless of whether the alleged infirmity in the conviction is considered an error of fact or an error of law."

It is clear that, under this umbrella, a claim that the petitioner's plea of guilty was unknowing or involuntary may be raised through a petition for writ of error coram nobis. *See Skok, supra, Smith, supra*, and *Holmes v. State*, 401 Md. 429 (2007).

We turn, then, to what occurred when appellant entered his plea of guilty in 1999. The prosecutor submitted for court acceptance an *Alford* plea of guilty to Count Six --

conspiracy to possess PCP with intent to distribute it -- and asked the court to bind itself to a sentence of four years. Defense counsel informed the court that appellant was then under a 20-year sentence in the District of Columbia for assault with intent to kill and asked that the Maryland sentence be made concurrent with that one, to which the court agreed.

The court then elicited from appellant that he was 28 years old, that he understood that the court was going to accept his plea of guilty and sentence him to four years, with credit for 923 days, and that the balance of his sentence would run concurrently with the sentence he was serving in the District. The court advised, and appellant said that he understood, that he was giving up his right to trial by a jury of 12 persons who, in order to convict, would have to be convinced beyond a reasonable doubt that he was guilty "of each and every element of the offenses charged."

At that point, defense counsel interjected that appellant was "pleading guilty to possession with intent to distribute under the Alford plea" and that "[h]e understands the Alford plea." That was an incorrect statement. The plea was to Count Six, which charged *conspiracy* to possess PCP with intent to distribute, not the possession crime itself, which was charged in Count Two. Failing to note that error, the court described an *Alford* plea as one where "I don't believe that I'm really guilty, but I believe they have overwhelming evidence that I can be found guilty, and I'm going to take the plea," which appellant said he understood.

The court further advised, and elicited appellant's response that he understood, that, if he had a trial, he could cross-examine his accusers and call witnesses of his own, and

that he could testify or not. Appellant said that no one had threatened him or promised him anything to enter the plea, and that he was satisfied with his lawyer. Satisfied, the court called upon the prosecutor to read a statement of facts into the record.

The prosecutor stated that, on July 31, 1994, police officers, responding to a complaint that individuals in a vehicle were involved in drug transactions, arrived at 4815 Homer Avenue and observed appellant sitting behind the wheel of a vehicle along with a co-defendant in the case. They were counting large sums of U.S. currency in their laps and then entered a second vehicle. The prosecutor continued:

> "The officers recovered one gallon of liquid P.C.P. The value was 204 thousand eight hundred dollars, the street value . . . And the total amount of money seized was twelve thousand forty-six dollars in United States currency. All events occurred in Prince George's County, and all of the drugs found were tested and in fact found to be positive by the Prince George's drug chemical analysis lab."

At that point, defense counsel clarified that "all of the drugs were recovered in the vehicle not occupied by my client." He said that he had explained that to appellant "but he is accepting an Alford plea" and that he "didn't deny that there was substantial amounts of P.C.P. was in his car." He added that between $3,000 and $4,000 was "with my client" but the larger amount of money was in another vehicle.

It is fundamental, and beyond cavil, that a court may not accept a guilty plea by a defendant in a criminal case unless the court is satisfied that the plea is entered both knowingly and voluntarily, with an understanding by the defendant of the nature of the offense to which the plea relates. That is both a Constitutional requirement, as an element

of due process, and a procedural requirement under Maryland Rule 4-242. Section (c) of the Rule states, in relevant part:

> "The court may not accept a plea of guilty . . . until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea, and (2) there is a factual basis for the plea."

At least since *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), it has been clear that an understanding of the "nature of the offense" includes an understanding of the basic *elements* of the offense – what the State must prove in order to gain a conviction. The Court held that "[w]here a defendant pleads guilty to a crime without having been informed of the crime's elements," the knowing and voluntary standard "is not met and the plea is invalid." *Id.* at 183. The Court of Appeals repeated that requirement in *State v. Daughtry*, 419 Md. 35, 66-69 (2011), and this Court repeated it in *Abrams v. State*, 176 Md. App. 600, 622-23 (2007) and in *Miller v. State*, 185 Md. App. 293 (2009).

Daughtry made clear two things particularly relevant to this case: first, that a finding that the defendant understands the elements of the offense cannot validly arise solely from an inference that, if the defendant is represented by an attorney, the attorney necessarily explained the elements to the him; but second, that there were some relatively simple crimes whose nature can readily be understood from the crime itself – "so simple in meaning that a lay person can be expected to understand it." *Id.*, at 72.

It is clear that, at no time during the on-the-record colloquy between the court and appellant or in the prosecutor's statement of facts, were the elements of the crime of conspiracy even mentioned, much less explained. Nor did appellant's attorney ever state that he had explained those elements to appellant. Indeed, whether the attorney himself was confused or simply misspoke, he mischaracterized the offense at issue as possession with intent to distribute which, of course, has very different elements than the crime of conspiracy.

That deficiency formed the basis of appellant's petition for writ of error coram nobis. Before the coram nobis court was the record of the proceeding on the plea, plus an affidavit from appellant that (1) he had wanted to plead not guilty and stand trial because his co-defendant had been acquitted and was expected to exonerate him, but (2) on the day of trial, his attorney told him that the State was offering a deal whereby, without admitting guilt, he could plead guilty to a misdemeanor. He stated that "I don't remember him specifying exactly what charge I would plead to – just that it was a misdemeanor and that the sentence of four years would run concurrently with the D.C. sentence I was still serving and would be pretty much eaten up by the time I had already served." There was no evidence contradicting that statement; nor did the court disparage its credibility. Indeed, it is buttressed by his attorney's unambiguous misimpression that appellant was pleading guilty to the possession charge, not the conspiracy charge. The import of the uncontroverted affidavit was that appellant did not know which of the nine counts he was pleading guilty to and really didn't care; the important thing to him was that it was a

misdemeanor and, between the huge credit for time served and the concurrent nature of the sentence, he would be serving very little time on it.

As noted, the court rejected appellant's argument for three reasons. First, invoking the *Daughtry* Court's observation that there are some crimes whose elements are self-explanatory, it concluded that conspiracy was such a crime – "readily understandable to probably everyone in the United States of America over the age of ten or longer." Second, relying on what transpired at the hearing on appellant's motion to suppress, the court concluded that appellant "knew exactly what the evidence was against him," presumably inferring that he therefore knew the elements of the crime of conspiracy. Finally, the court seemed to conclude that when the plea is an *Alford* plea, the defendant must have known the elements of the offense because, by offering that plea, he admitted that the evidence available to the State was sufficient to sustain a conviction.

None of those suppositions have merit, least of all the supposed judicial notice that everyone in the United States over the age of ten fully understands the nature and elements of the crime of conspiracy. Conspiracy is not a crime whose elements are readily or popularly understood. The *Daughtry* Court, itself, made that clear. In noting that the nature of some crimes is readily understandable from the crime itself, it cited a comment by Professor Wayne LaFave that "on this basis it has been held, for example, that the elements of a conspiracy charge *should be explained by the judge to the defendant*. By contrast such offenses as escape and altering a check have been deemed sufficiently straightforward that

an element-by-element parsing is unnecessary." *See Daughtry*, 419 Md. at 72, n. 19 (emphasis added).

Conspiracy is a common law crime. As described in *State v. Payne*, 440 Md. 680, 713 (2014), its essence is an unlawful agreement, which need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose or design. In Maryland, though not everywhere else in the country, the crime is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement is required. As further explained in *In re Gary T.*, 222 Md. App. 374, 381-82 (2015), however, a charge of conspiracy must include the objective of the conspiracy: "a person may not be properly charged, or convicted, upon an allegation or proof that he or she entered into an agreement to achieve some undefined unlawful purpose or to achieve a lawful purpose by some undefined means."

The charge against appellant was an agreement to possess PCP in sufficient amount as to indicate an intent to distribute it. None of the elements of that offense were explained to appellant, and we are unwilling to assume, or to countenance the trial court's assuming, that he, much less everyone in the United States over ten years of age, would understand what those elements are.

We reject as well the two other reasons offered by the court. The transcript of the suppression hearing consists of testimony as to what the police officers who responded to the scene found – appellant and a co-defendant counting large sums of money in one car and a substantial amount of drugs, including PCP, cocaine and marijuana, in another car.

As noted, appellant was charged with nine different crimes, and we see nothing in that transcript indicating an awareness by him of the elements of the alleged criminal conspiracy. Knowledge of some of the evidence that the State possessed does not translate into an awareness of what the State must prove to warrant a conviction for the alleged conspiracy. Nor can an awareness of those elements be assumed from the fact that he entered an *Alford* plea to the conspiracy charge. The State cites no authority for the trial court's conclusion to the contrary, confessed at oral argument that it knew of none, and we know of none.

Having concluded that the record fails to demonstrate that the plea to Count Six was knowing and voluntary, we need not address the second issue of whether the prosecutor's statement in support of the plea was sufficient.

JUDGMENT OF CIRCUIT COURT DENYING PETITION FOR WRIT OF ERROR CORAM NOBIS REVERSED; CASE REMANDED FOR ENTRY OF JUDGMENT GRANTING THE WRIT, VACATING THE JUDGMENT OF CONVICTION, STRIKING THE PLEA OF GUILTY, AND FOR SUCH FURTHER PROCEEDINGS AS MAY BE APPROPRIATE; COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.