LEONARD SHELLY	*	IN THE
Petitioner	*	CIRCUIT COURT
v.	*	FOR
STATE OF MARYLAND	*	BALTIMORE COUNTY
Respondent	*	Case No. K-08-2538

* *

ORDER

Having read and considered Leonard Shelley's Petition for Writ of Error Coram Nobis (Paper No. 19000) and the State's Answer and Request to Dismiss (Paper No. 20001), and having considered the arguments of counsel at the January 22, 2016, hearing, it is this 2nd day of February, 2016, hereby ORDERED that the Petition for Writ of Error Coram Nobis be, and hereby is, GRANTED and it is further ORDERED that Petitioner's May 11, 2009, conviction on the first count of the indictment, charging conspiracy to possess with intent to distribute cocaine, be, and hereby is, VACATED.

JUDITH C. ENSOR, Judge

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* *

MEMORANDUM OPINION

Currently pending before the Court is Leonard Shelley's Petition for Writ of Error Coram Nobis, which was filed on August 18, 2015 (Paper No. 19000). The State filed its Answer and Request to Dismiss on October 16, 2015 (Paper No. 20001). The matter was heard on January 22, 2016. At that time, Mr. Shelley waived his right to be present. *See* Hearing Exhibit #1. Indeed, no testimony was provided. Counsel for the parties simply argued their respective positions. Having read and considered the entire court file, including the pleadings submitted, as well as the arguments presented during the hearing and the relevant law, this Court finds that Petitioner is entitled to the relief he seeks. A separate order to that effect follows this opinion.

PROCEDURAL HISTORY

Leonard Shelley[1] (sometimes "Mr. Shelley" or "Petitioner") was charged via indictment (signed on June 18, 2008, and filed on June 23, 2008) with Conspiracy to Possess with Intent to Distribute Cocaine (First Count), Conspiracy to Distribute Cocaine (Second Count), and Conspiracy to Possess a Controlled Dangerous Substance (Third Count). On May 11, 2009, the morning on which Mr. Shelley was scheduled for trial, Assistant State's Attorney Frank Meyer

[1] Notwithstanding the case caption, the correct spelling of Petitioner's last name is Shelley.

and counsel for Mr. Shelley, Richard Karceski, informed The Honorable John O. Hennegan that the parties had engaged in plea negotiations. The Court was informed that Mr. Shelley intended to plead guilty to "the first count . . . Conspiracy to Possess CDS from a period of time between November of 2007 to January of 2008." Transcript of May 11, 2009, proceedings ("TR.") at p. 2. Mr. Shelley then was placed under oath and questioned by Judge Hennegan.

At the time of his plea, Mr. Shelley indicated that he was 23 years old, could read, write, and understand the English language, and had obtained his GED. TR. at pp. 3–4. Mr. Shelley confirmed that he was not under the influence of any alcohol, drug, or prescription medication. He further confirmed that he had never been in a mental institution and was not under the care of a psychiatrist. TR. at p. 4. Mr. Shelley made clear that, in his estimation, he was not "suffering from a mental condition that would affect [his] ability to understand the nature of [the] proceedings." *Id.*

Having satisfied himself that Mr. Shelley was of a clear mind, Judge Hennegan continued his inquiry as follows:

> THE COURT: Do you understand the charge of Possession with Intent to Distribute Narcotics?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand the elements of that charge?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you discussed those elements with counsel?
>
> THE DEFENDANT: Yes, sir.

TR. at p. 5.

Later on in their discussion, Mr. Shelley confirmed that he was "pleading guilty of [his] own free will without condition." TR. at p. 9. When specifically asked by Judge Hennegan,

Petitioner denied that he had been mistreated, threatened, coerced, or intimidated into pleading guilty. TR. at pp. 9–10. In addition, Mr. Shelley made clear that he was pleading guilty because he was, in fact, guilty. TR. at p. 9.

Before accepting Mr. Shelley's plea, Judge Hennegan again asked whether Petitioner and his attorney had discussed thoroughly the plea agreement, to which Mr. Shelley responded in the affirmative. TR. at p. 10. More specifically, the conversation went as follows:

> THE COURT: You've indicated that you've just discussed this plea with him thoroughly?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And the law and facts of this case?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And the elements of this crime, correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. Do you have any questions so far about anything I've advised you of?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Knowing you're waiving all of the rights that I've advised you of, do you still wish to enter a plea of guilty?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: That's your final decision?
>
> THE DEFENDANT: Yes.

TR. at pp. 10–11.

Following this discussion, Judge Hennegan found that Mr. Shelley "made a knowing, intelligent, voluntarily plea of guilty to Count 1 . . . subject to a basis of fact being established for it." TR. at p. 11.

The State provided the following facts in support of Mr. Shelley's plea, to which Petitioner offered no additions or corrections:

> On November 19th, the Honorable Thomas Bollinger signed an ex-parte court order for electronic interception on telephone number (443) 226-4045, which was at that time owned and operated by Anton Williams.
>
> Between November 19th and January 22nd, there were 20 pertinent or drug-related calls intercepted over that line between Anton Williams and the Defendant, Leonard Shelley.
>
> Specifically, on December 14th of 2007 at about 2 o'clock in the afternoon there was a conversation from Anton Williams to Leonard Shelley. During this conversation, Anton asked Shelley are you ready? Shelley said, nope, because I can't get into the house. Anton replied, but for the most part, you ready though? Shelley advised, yeah, I'm ready though, I just can't get over there, she got the keys. Anton continued and advised, once I touch down, I'll just bring it right to you.
>
> Through training, knowledge and experience, when Anton asked the male subject believed to be Leonard Shelley – or actually is Leonard Shelley if he is ready, that he is asking Shelley if he needs a supply of drugs.
>
> Also through training, knowledge and experience, the response, nope, because I can't get into the house, he's telling Anton he's unable to get into his house to get the money needed for the keys (sic).
>
> And when Anton further states, once I touch down, I'll just bring it right to you, that he is advising Shelley once he gets a supply of drugs that he will bring it to him.
>
> On the following day – no, no, I'm sorry. On the 22nd of December at about 1:30 in the afternoon, once again Anton Williams contacts Leonard Shelley. During this conversation Anton advised Shelley, we getting ready to be good? Shelley advised Anton, bump into me now. I'm about to be down my mother's house. Through training, knowledge and experience, when Anton advised Shelley, we were getting ready, that Anton is advising Shelley he's good to get a supply of drugs.
>
> Shelley proceeds to tell Anton, meet him by his mother's house at 3510 West Saratoga Street.
>
> On the 26th of 2007, at about 4:30 in the afternoon, a call from Leonard Shelley to Anton Williams. During this conversation Shelley asked Anton, where you at? Anton replies, Edmondson Avenue. Shelley continued and

advised, if you ready, yo, you can go right there and just give it to fat girl. I will get it from her when I get down there.

Anton responded, I ain't even, what you call it, I was trying to see what you was talking about.

Shelley continued to advise, same thing I got from you last night. Through training, knowledge, experience, Shelly advised Anton, if you ready, yo, you can go down there, give it to fat girl, that Shelley is telling Anton he can give the supply of drugs to an unknown female who is at his house on Edmondson Avenue, that Shelley will get it from her.

Earlier the Affiants also know that Anton responded, I ain't even, what you call it, I was trying to see what you was talking about, that he is telling Shelley that he hasn't got a supply of drugs yet, that he was waiting to see what quantity that Shelley wanted.

The affiants know that when Shelley advised, same thing I got from you last time, he's telling Anton he wants the same amount of drugs that he had purchased from Anton on a previous occasion.

Later on that same day, about 6:30 in the afternoon, Leonard Shelley once again contacts Anton Williams. During that conversation, Shelley asks Williams, where you at? Anton replies, by your mother's shit. Shelley states that he will be there in five minutes, and asks Anton, you already got with Yo? Anton replies, yeah, I got with him. Shelley then states, you can basically go straight to Edmondson for real, but hold up, I've got to run in there and grab some money real fast, just hold tight, all right.

The affiants know that based on this phone call and other intercepted phone calls, when Anton says, by his mother's shit, that he is advising Shelley he is by 3410 Saratoga Street. Affiants know when he says, already got with yo, he is asking Anton if Anton had obtained a supply of drugs from his source. Also note, when Shelley says, you can go straight to Edmondson for real, hold up, I've just got to run there, grab some money real fast, just told him that he's advising Anton to stay on Saratoga first because he has to get some money out, then he can go to the Edmondson Avenue house.

Lastly, on that same day, there's a conversation from Anton Williams to Leonard Shelley. During that conversation, Anton asked Shelley, yo, you want me to stay right here or go to Edmondson? Shelley states, I'm about to pull up now, but you might as well go ahead straight down Edmondson Avenue, I've got to run this, this there, grab some bread or something else, then I'll be right there to holler at you. Anton replied, all right, so tell little porky pig to have the door open for me.

> Affiants know through training, knowledge, experience and familiarity with this case, Anton asked Shelley, yo, do you want me to stay here or go to Edmondson, he's asking Shelley where he wants to meet him at, Saratoga or Edmondson Avenue to consummate the cocaine transaction.
>
> When Shelley states, I've got to run in there, grab some bread or something else, I'll be there to holler at you, he is telling Anton he's going to the house on Saratoga to get some money then meet to finalize the transaction.
>
> They would be the conversations, Your Honor, that all took place in Baltimore County. That would be the statement of facts.
>
> THE COURT: Any additions or corrections?
>
> MR. KARCESKI: No, Your Honor, we have none.

TR. at pp. 12–16.

Judge Hennegan found that the facts supported Mr. Shelley's plea of guilty to Count 1, and "enter[ed] a verdict of guilty to Count 1." TR. at pp. 16–17. After considering the arguments of counsel,[2] Judge Hennegan sentenced Petitioner to 3 years incarceration to be served concurrently with any other sentence "presently outstanding and serving." TR. at p. 18. Mr. Shelley then was informed fully of his post trial rights. TR. at p. 19. He chose not to exercise any of them.

On February 10, 2015, Petitioner was charged via a federal indictment with possession of a firearm by a felon, in violation of 18 U.S.C. §922(g)(1). Mr. Shelley claims that, as a result of the conviction before Judge Hennegan, he now faces significant collateral consequences. More specifically, he claims that, if the Armed Career Criminal Act applies at his federal sentencing, he "will be subject to a mandatory minimum of 15 years in federal prison, and his recommended sentence under the United States Sentencing Guidelines would be either between 210 and 262 months or between 168 and 210 months." *See* Affidavit of Brendan Hurson at paragraph 3,

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[2] Mr. Shelley declined to address the Court. TR. at p. 18.

attached to Mr. Shelley's Petition for Writ of Error Coram Nobis as Exhibit 3 and introduced at the hearing as Exhibit 2. Mr. Shelley claims that, absent the May 11, 2009, conviction, the Armed Career Criminal Act would not apply and his "Guidelines sentence would be dramatically reduced, likely to a range of between 77 to 96 months." Hurson Affidavit at paragraph 4. Moreover, according to Mr. Shelley, if the Armed Career Criminal Act does not apply, he "will no longer be subject to the 15-year mandatory minimum. In fact, Mr. Shelley would be subject to a maximum penalty of 10 years in custody, and thus could receive a sentence at or below the Guidelines' recommendation, but, in any event, no higher than 10 years." *Id.* at paragraph 4.

DISCUSSION

Mr. Shelley claims that he did not knowingly and voluntarily plead guilty to Conspiracy to Possess with Intent to Distribute Cocaine. He points out that, while before Judge Hennegan on May 11, 2009, Mr. Karceski indicated that his client intended to plead guilty to the First Count (Conspiracy to Possess with Intent to Distribute Cocaine), yet immediately followed that statement by telling Mr. Shelley that, in the First Count, he was "charged with a Conspiracy to Possess CDS from a period of time between November of 2007 to January of 2008."[3] TR. at p. 2. Mr. Karceski went on to explain that Petitioner, along with others, was charged with possessing a "controlled substance in sufficient quantity to indicate under all of the circumstances an intent to distribute." *Id.* Mr. Shelley notes that the May 11, 2009, transcript, however, is devoid of any explanation whatsoever regarding conspiracy and the elements of conspiracy. He claims that, as a result, his conviction must be vacated because, according to Mr. Shelley, he pled guilty, notwithstanding the fact that "the trial court failed to ensure that he

[3] The Third Count of the indictment charged Mr. Shelley with conspiracy to possess a controlled dangerous substance.

understood the nature of the charge." Petition for Writ of Error Coram Nobis at p. 1. More specifically, according to Mr. Shelley, he pled "guilty to one offense, conspiracy, but he was advised as to another offense, possession with intent to distribute cocaine. *Id.*

For its part, the State claims that Mr. Shelley "had numerous out of court conversations with trial counsel, and . . . that they had fully discussed the elements of Conspiracy to Possess with the Intent to Distribute." State's Answer at p. 4. In a nutshell, it is the State's position that the on-the-record error is *de minimis* and simply does not rise to the level of warranting coram nobis relief.

"The coram nobis remedy that exists today was established in *Skok v. State*, 361 Md. 52, 760, A.2d 647 (2000)." *State v. Smith*, 443 Md. 572, 590 (2015). Indeed, with *Skok*, the Court of Appeals

> expanded the scope of the common law writ of error coram nobis to serve not merely as a remedy of errors of fact, but also as "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."

Smith, 443 Md. at 590–591 (quoting *Skok*, 361 Md. at 78). Mr. Shelley is not incarcerated or on parole or probation as a result of his conviction before Judge Hennegan. In addition, it is clear, and the State concedes, that Petitioner is facing significant collateral consequences in the form of enhanced penalties pursuant to the Armed Career Criminal Act.

"The courts have consistently held that the scope of a coram nobis proceeding encompasses issues concerning the voluntariness of a guilty . . . plea, and whether the record shows that such plea was understandingly and voluntarily made" pursuant to the principles of *Boykin v. Alabama*, 395 U.S. 238 (1969). *Skok,* 361 Md. at 80–81. "Moreover, the courts have regularly held that violations of rules similar to Maryland Rule 4-242, which are designed to

insure that guilty . . . pleas are voluntary, constitute a basis for coram nobis relief." *Id.* at 81. Petitioner's allegation that his 2009 guilty plea was not knowing and voluntary clearly implicates a fundamental right.

Pursuant to Rule 4-242(c) of the Maryland Rules, a 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, 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." *Smith*, 443 Md. at 610. The Rule "lays out in plain and unequivocal terms what is demanded of a valid guilty plea." *Id.* at 618. Strict adherence to the explicit dictates of the Rule is required. *Id.*

With respect to Mr. Shelley's plea, defense counsel informed Judge Hennegan that his client intended to plead guilty to the First Count, which, in fact, charged conspiracy to possess with intent to distribute cocaine. Defense counsel went on to indicate, erroneously, that the First Count charged conspiracy to possess a controlled dangerous substance which, in fact, was charged in the Third Count. The problem was compounded when the trial court asked Mr. Shelley if he understood the charge of possession with intent to distribute narcotics and, further, asked whether Mr. Shelley understood the elements of *that* charge, inquiring as to whether Mr. Shelley understood the elements of possession with intent to distribute narcotics. The trial court also asked Mr. Shelley if he had discussed *those* elements with counsel, again referring to the elements of possession with intent to distribute narcotics.

Later on in their discussion, the trial court asked Mr. Shelley if he had "*just*" discussed this plea with defense counsel thoroughly, to which Mr. Shelley answered in the affirmative.[4] Judge Hennegan followed up by asking Mr. Shelley whether he and his attorney had discussed "the law and facts of this case . . . [a]nd the elements of *this crime* . . .?" Tr. at pp. 10–11 (emphasis added). There is simply no telling what Judge Hennegan was referring to when he asked about "this crime." As far as the record is concerned, the only crime that had been discussed was possession with intent to distribute. As already mentioned, nowhere in the transcript is there any mention, let alone a discussion, regarding conspiracy.

The State points out that Mr. Karceski is an experienced attorney and certainly would have discussed the elements of conspiracy with his client. According to the State, Mr. Shelley and his attorney "had numerous out of court conversations." This statement appears to be based on counsel's knowledge of Mr. Karceski's reputation as a fine defense attorney. The State appears to rely on the presumption that "'defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.'" *Daughtry*, 419 Md. at 70 (citations omitted).

As an initial matter, and not to put too fine a point on it, Judge Hennegan asked Mr. Shelley if he had "just discussed this plea" with Mr. Karceski "thoroughly." The word "just" indicates a very recent discussion, perhaps one that took place that very morning. From the language employed, it seems as though Judge Hennegan was asking Mr. Shelley whether he had had adequate time that morning to discuss the plea with his attorney. In other words, Judge Hennegan asked if Mr. Shelley and Mr. Karceski had recently thoroughly discussed the plea. There is nothing in the record to suggest that Mr. Shelley and his attorney had numerous out of

[4] If may be that, in answering in the affirmative, Mr. Shelley meant to convey that he "understood merely the terms of the plea, but not the nature of the charges to which he plead guilty." *State v. Daughtry*, 419 Md. 35, 75 (2011).

court conversations regarding the nature of the offenses charged or the plea itself. In addition, there is "nothing in the prosecutor's proffer of the factual basis for the plea [that] even intimated at either the elements or essential nature of the crime of conspiracy," that is, an "'agreement between two or more people to achieve some unlawful purpose or to employ unlawful means in achieving a lawful purpose.'" *Smith*, 443 Md. at 620 (quoting *State v. Payne*, 440 Md. 680, 712 (2014)).

The real question is "whether the totality of the circumstances reflects that [Mr. Shelley] knowingly and voluntarily entered into the plea." *Daughtry*, 419 Md. at 71. Indeed, "'the required determination can only be made on a case-by-case basis, taking into account . . . among other factors, *the complexity of the charge, the personal characteristics of the accused, and the factual basis proffered to support the court's acceptance of the plea.*'" *Id.* at 72 (quoting *State v. Priet*, 289 Md. 267, 277 (1981) (emphasis added)). Thus, one factor is the complexity of the charge. As was mentioned in *Priet*, "the nature of some crimes is readily understandable from the crime itself." *Daughtry*, 419 Md. at 53 (quoting *Priet*, 289 Md. at 288). While the *Daughtry* Court chose not to delineate precisely which crimes fall into which category, it cited Professor LaFave for the proposition that courts "have also taken into account whether or not the charge is a self-explanatory legal term or so simple in meaning that it can be expected or assumed that a lay person understands it." *Daughtry*, 419 Md. at 72 n. 19. The Court of Appeals counts conspiracy among those crimes that are not "readily understandable from the label of the crime itself." *Smith*, 443 Md. at 619. Accordingly, the Court of Appeals suggests that "'the elements of a conspiracy charge should be explained by the judge to the defendant.'" *Smith*, 443 Md. at 619–620 (citations omitted).

Neither the trial judge, the state's attorney, nor defense counsel explained to Mr. Shelley at the time of the plea the elements of conspiracy. Moreover, the facts offered in support of Mr. Shelley's plea fail to define adequately the charge of conspiracy.

To be sure, Mr. Shelly's conviction is presumed to result from proper proceedings. The burden is on Petitioner to prove otherwise. *Skok*, 361 Md. at 78. The "essential nature of the writ of coram nobis is that it is an 'extraordinary remedy' justified 'only under circumstances compelling such action to achieve justice.'" *Smith*, 443 Md. at 597 (quoting *Skok*, 361 Md. at 72).

It simply cannot fairly be concluded, after examination of the totality of the circumstances, that Mr. Shelley understood the essential nature of the conspiracy charge to which he plead guilty.[5] Mr. Karceski did not testify in Mr. Shelley's coram nobis hearing. This fact stands in stark contrast to the *Smith* case where counsel for Kerryann Smith testified that he "'[a]bsolutely' reviewed the statement of charges and indictment with Smith, and that he did not have any concerns that Smith did not understand the nature of the charges against her." *Smith,* 443 Md. at 654. Indeed, counsel for Smith testified that he discussed with Smith . . . the definition of conspiracy . . . ." *Id.*

CONCLUSION

Mr. Shelley has met his burden of proof and shown that he is entitled to the relief he seeks. He plead guilty unknowingly and involuntarily, after the trial court failed to ensure that

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[5] In *State v. Smith*, 443 Md. 572 (2015), a case strikingly similar to the pending matter, defense counsel from the plea hearing was called as a witness and testified that he told the defendant about the nature of the charges before the plea hearing. The Court of Appeals held "that a lawyer's testimony at a coram nobis hearing concerning having advised the defendant prior to the guilty plea of the nature of the charges against him . . . is admissible." *Smith*, 443 Md. at 654. That Court specifically held that "[s]uch testimony may be considered in a coram nobis proceeding in determining whether a defendant plead 'voluntarily, with understanding the nature of the charge' within the meaning of Md. Rule 4-242(c)." *Id.* This Court cannot speculate as to why the State chose not to call Mr. Karceski as a witness at the coram nobis hearing.

he understood the nature of the charge – conspiracy to possess with intent to distribute cocaine. Therefore, Mr. Shelley's May 11, 2009, conviction must be vacated.

2.2.16

JUDITH C. ENSOR, Judge