

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

State of Maryland :

v. : Case No.: 02-K-12000415

John Leopold
 Defendant/Petitioner :

MEMORANDUM OPINION

This matter came before the Court regarding the Petition for Writ of Error Coram Nobis and Request for Hearing ("Petition") filed on behalf of Defendant/Petitioner John Leopold ("Petitioner"). For the reasons set forth herein, the Petition is denied without a hearing, pursuant to Rule 15-1206(a).

Procedural Background

An Indictment was filed against Petitioner by The Office of the State Prosecutor charging Petitioner with the following:

1. Count One: Misconduct in Office – Misfeasance – Misuse of Executive Protection Officers for Political and Campaign Activities.
2. Count Two: Misconduct in Office – Malfeasance – Theft of Joanna Conti's Campaign Signs
3. Count Three: Misconduct in Office – Misfeasance – Misuse of County Employees for Personal Purposes
4. Count Four: Misconduct in Office – Malfeasance – Misuse of County Monies for Personal Benefit
5. Count Five: Fraudulent Misappropriation by Fiduciary – Misuse of Monies for Personal Benefit

After a bench trial before The Honorable Dennis M. Sweeney (Ret.), Petitioner was convicted of Counts One and Three. On March 14, 2013, Petitioner was sentenced to two (2) years' incarceration with all but sixty (60) days suspended. The first thirty (30) days of the sentence were served at the

Anne Arundel County Detention Center without any release and the second thirty (30) days of the sentence were served on house arrest through the Anne Arundel County Detention Center. Petitioner was placed on five (5) years supervised probation with general and special conditions, including payment of restitution and community service hours.

Standard of Review for Coram Nobis Proceedings

In *Skok v. State*, 361 Md. 52 (2000), the Court of Appeals outlined five (5) requirements for obtaining coram nobis relief. The first is that "the grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character. *Id.* at 78 (citing *U.S. v. Morgan*, 346 U.S. 502, 512 (1954)). The second requirement is that "a presumption of regularity attached to the criminal case, and the burden of proof is on the coram nobis petitioner." *Id.*, citing *Morgan*, 346 U.S. at 512. Third, "the coram nobis petitioner must be suffering or facing significant collateral challenges from the conviction." *Id.* at 79. The fourth requirement is that "[b]asic principles of waiver are applicable to issues raised in coram nobis proceedings. Similarly, where an issue has been finally litigated in a prior proceeding, and there are no intervening changes in the applicable law or controlling case law, the issue may not be relitigated in a coram nobis action." *Id.* (citation omitted) (citing *Morgan*, 346 U.S. at 512). Finally, "one is not entitled to challenge a criminal conviction by a coram nobis proceeding if another statutory or common law remedy is then available." *Id.* at 80.

A writ of error coram nobis is an extraordinary remedy justified "only under circumstances compelling such action to achieve justice." *State v. Rich*, 454 Md. 448, 461 (citing *State v. Smith*, 443 Md. 572, 597 (quoting *Skok* at 72 (2000)). "[C]oram nobis should be available to raise fundamental errors in attempting to show that a criminal conviction was invalid under circumstances where no other remedy is presently available and where there were sound reasons for the failure to seek relief earlier." *Id.* (quoting *Skok*, 361 Md. at 72-73).

Allegations of Error

Petitioner makes the following allegations of error: (i) ineffective assistance of counsel in that counsel's representation fell below an objective standard of reasonableness as to Counts One and Three of the criminal Indictment; (ii) ineffective assistance of counsel in that counsel's representation fell below an objective standard of reasonableness as to a conflict of interest; and (iii) violation of Petitioner's right to have a neutral, unbiased and impartial judge as a finder of fact.

Addressing each allegation, the Court finds the following.

A. Ineffective Assistance of Counsel

Petitioner contends that he was convicted due to ineffective assistance of counsel in violation of his Sixth Amendment right to counsel. He specifically alleges the following: (i) that he was not advised of the law accurately by his counsel; and (ii) that his counsel did not cross-examine a key witness.

Petitioner has a high burden under *U.S. v. Strickland*, 466 U.S. 668 (1984) to show that his counsel undermined his access to a just result. Under *Strickland*, a petitioner must prove that his counsel's performance was deficient, and that the deficient performance prejudiced the Petitioner. *Id.* at 686 (stating, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

To sustain his burden to show that counsel's performance was deficient, the Petitioner must identify "acts or omissions" of counsel that "were outside the wide range of professionally competent assistance." *Id.* at 690. The Petitioner must also show that he was prejudiced by counsel's deficient performance; *i.e.*, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Maryland law establishes that "a defendant must show that, but for counsel's errors, there is a 'substantial possibility' that the results of the proceeding would have been different." *State v. Borchardt*, 396 Md. 586, 602-03 (2007).

Petitioner's contention that his counsel advised him that his actions did not rise to the level of misconduct throughout the trial does not amount to ineffective assistance of counsel. This advice was successful in that the arguments made by counsel resulted in not guilty findings as to two (2) misconduct charges in the indictment – Count Two and Count Four. The fact that Petitioner's counsel lost a legal argument as to some allegations and not to others does not rise to the level of things that are "outside the range of competent counsel." See *Strickland, supra*.

Petitioner also claims that his counsel was ineffective because he failed to cross-examine Patty Medlin, who he characterizes as a key witness in the case. The *Strickland* court identified certain basic duties of counsel's representation of a criminal defendant to include a duty of loyalty, a duty to avoid conflicts of interest and a duty to advocate the defendant's cause. *Id.* at 688. The failure to cross-examine a witness is a matter of trial tactics and not *per se* sufficient to show that counsel was incompetent. *Booth v. Warden, Md. House of Correction*, 3 Md. App. 480, 483 (1968) (citing *Hines v. Warden*, 236 Md. 406; *Norris v. Warden*, 1 Md. App. 69 (1967)).

A review of the record supports counsel's trial strategy and decision to not cross-examine Ms. Medlin. Petitioner's counsel was successful in his objections to prevent Ms. Medlin from testifying as to certain information the State was seeking to get before the Court and a cross-examination could likely have opened the door to that evidence. For example, to demonstrate that there was an atmosphere of fear and intimidation in the offices of the County Executive, the State repeatedly and unsuccessfully tried to elicit testimony from Ms. Medlin concerning several individuals who had "crossed" Petitioner and were subsequently fired. During a bench conference concerning one of the objections made by Petitioner's counsel, the trial judge suggested that it was unwilling to allow this testimony but that the State may be able to get that information before the Court if made relevant by Ms. Medlin's cross-examination. Applying a heavy measure of deference to Petitioner's counsel's trial strategy – as it must – this Court finds that counsel's decision to not to cross-examine Ms. Medlin did not

rise to the level of deficient performance but was instead a matter of trial strategy and judgment.

This Court finds and concludes that Petitioner's claims of ineffective assistance of counsel do not provide a basis for coram nobis relief.

B. Counsel's Alleged Conflict of Interest

Petitioner contends that he did not receive the effective assistance of counsel because his counsel had a conflict that he failed to disclose. The alleged conflict is that one of his attorneys serves on the Commission to Study Campaign Finance Law ("Commission"). Among other duties, the Commission is charged with examining issues relating to the enforcement of election laws, including the roles and responsibilities of the State Board of Elections, the Office of the State Prosecutor and the Office of the Attorney General. Petitioner argues that since he was charged by the Office of the State Prosecutor, an agency referenced in House Joint Resolution 7 (final) (2011) ("Joint Resolution"), a conflict existed that his counsel should have disclosed.

According to the text of the Joint Resolution, the purpose of the Commission is to study campaign finance law and recommend potential legislative changes. The Office of the State Prosecutor, along with the other agencies listed in the Joint Resolution, enforces election law violations.

The U.S. Supreme Court has held that a criminal defendant must establish that a potential conflict of interest adversely affected his counsel's performance before he would be entitled to a reversal. *Mickens v. Taylor*, 535 U.S. 162 (2002). See *Duvall v. Sate*, 399 Md. 210, 227 (2007) (citing *Mickens, supra.*). The *Mickens* Court stated that an actual conflict of interest means a conflict that affects counsel's performance – as opposed to a mere theoretical division of loyalties. *Mickens* at 171, 172 n. 5.

Serving on the Commission that may impact a prosecutorial agency is not an issue that adversely affects counsel's performance. Also noteworthy is the fact that Petitioner was not charged with any laws relating to the mission of the Commission. The Court accordingly finds and concludes that Petitioner's claim

The constitutional guarantee is for a defendant to be afforded the opportunity to present a closing argument before a verdict is issued. That was done in this case. The constitutional guarantee does not prohibit the fact-finder from having thoughts or notes about the case before closing arguments are made.

Petitioner also take issue with the fact that the trial judge made inquiries with the Anne Arundel County Detention Center to ensure that they could accept Petitioner the day of sentencing with the necessary resources to accommodate his medical needs. Petitioner failed to cite where in the record it indicates that the trial judge made arrangements for Petitioner before the verdict and provides no legal support for his contention that a judge may not explore logistical issues before a verdict or sentencing hearing.

The record indicates that the trial judge discussed arrangements for Petitioner's incarceration on the sentencing date (March 14, 2013), almost three (3) months after the verdict was rendered. There is no evidence in the record that the trial judge explored these logistical issues before Petitioner's allocution and Petitioner's counsel's arguments for mitigation. No doubt the trial judge considered the possibility that Petitioner would receive some period of incarceration, but that does not preclude him from investigating logistics particularly when there are existing medical issues to be accommodated. The record reflects that discussion about the Petitioner going to the Anne Arundel County Detention Center took place at sentencing and it was entirely appropriate for a trial judge who is considering incarceration to inquire about logistical details.

Collateral Consequences

Petitioner was forced to resign from his position as the County Executive for Anne Arundel County, Maryland as a result of his convictions. The trial judge also barred him from seeking any political office during the period of supervised probation; however, this particular condition of probation was reversed by the Court of Special Appeals. Upon the reversal of this condition of probation, Petitioner thereafter became a candidate for another political office in Anne Arundel County but was not elected to that office.

In his Petition, Petitioner states that since 1968, political office has been his chosen profession. Petitioner claims that a collateral consequence he suffered was that "[a]s a result of Petitioner's conviction in this matter and facts and/or information alleged within, Petitioner faced zealous character assassination by his opponents and that lead to Petitioner's defeat in the Primary Elections in the spring of 2018."

He also alleges that his thirty (30) day period of incarceration was a collateral consequence. Petitioner supports this allegation by stating that "[a]lthough some may see that as a small amount of time, any period of incarceration, particularly when undeserved and based on error, is tantamount to torture and the after effects far outlive and outweigh the effects on the individual while incarcerated."

Maryland law is clear that the writ of coram nobis is not available for collateral consequences that were expected at the time of a guilty verdict. See *Vaughn v. State*, 232 Md. App. 421, 428 (2017). Petitioner is an experienced politician who should not have been surprised by the fact that his political opponents addressed his criminal convictions during the course of campaigning. He should have been aware of that risk when he made the decision to become a candidate for another political office after being convicted of criminal offenses.

Likewise, the fact that Petitioner served a period of incarceration is a collateral consequence that should have been expected at the time of the guilty verdict. The U.S. Supreme Court has expressly recognized that it is an "obvious fact of life that most criminal convictions do in fact entail adverse legal consequences." *Sibron v. New York*, 392 U.S. 40, 55 (1968).

Petitioner failed to show any significant collateral consequences as a result of his conviction.

Conclusion

Petitioner has not raised any issue that provides a substantive basis for coram nobis relief. The Petition will accordingly be denied.



Judge Diane O. Leasure (Ret.)

Date: April 1, 2019

Entered: Clerk, Circuit Court for
Anne Arundel County, MD
April 2, 2019



CIRCUIT COURT FOR ANNE ARUNDEL COUNTY
CIVIL DEPARTMENT
(410) 222-1431/32 CIVIL
OFFICE FAX (410) 222-2103

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Sarah David

FROM:
Tiffany Jones

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Office of State Prosecutors

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