2020 VT 58

No. 2019-072

In re Joseph S. Benoit
(State of Vermont, Appellant)

Supreme Court

On Appeal from
Superior Court, Chittenden Unit,
Civil Division

December Term, 2019

Helen M. Toor, J.

Paul Volk of Blodgett, Watts & Volk, P.C., Burlington, for Petitioner-Appellee.

Heather J. Gray, Department of State's Attorneys and Sheriffs, Montpelier, for Respondent-Appellant.

PRESENT: Reiber, C.J., Robinson, Eaton and Carroll, JJ., and Morris, Supr. J. (Ret.), Specially Assigned

¶ 1. **ROBINSON, J.** This interlocutory appeal requires us to clarify the available legal means for collaterally challenging a predicate conviction to an enhanced charge in light of two distinct lines of case law. Petitioner pled guilty to driving under the influence, third offense (DUI-3), and subsequently challenged his underlying predicate convictions in a petition for post-conviction relief (PCR). The State sought summary judgment on the basis that by pleading guilty to DUI-3, petitioner waived his PCR challenges to any of the predicate convictions. The trial court denied summary judgment, concluding that our case law requires petitioner to raise his challenges

in a post-sentencing PCR proceeding. We granted interlocutory review to resolve the question of whether and how defendants who plead guilty may raise collateral challenges to predicate convictions. We conclude that they may do so by preserving the challenge on the record before the trial court. We affirm the denial of summary judgment on different grounds from the trial court, and remand for the court to consider whether petitioner's waiver was knowing and voluntary in this case.

¶ 2. The following facts are undisputed unless otherwise noted. In 2015, the State charged petitioner with DUI-4, which requires three prior DUI convictions. See 23 V.S.A. §§ 1201, 1210(e)(1). The information listed four prior convictions between 1999 and 2009.

¶ 3. In 2016, while the DUI-4 charge was pending, petitioner's lawyer sent a letter to the State's Attorney describing potential "post conviction relief issues" regarding each of the four listed predicate convictions. Counsel closed, "it would be very helpful if we could speak prior to or at next week's calendar call as to whether we will be able to resolve the case or whether we should be entering into a discovery stipulation."

¶ 4. About ten weeks later, petitioner pled guilty to DUI-3 pursuant to a plea agreement. See id. § 1210(d). At the plea colloquy, he indicated that he understood the terms of the plea bargain and agreed to the facts as recounted by the prosecutor, including two prior DUI convictions in 2002 and 2009. Petitioner did not raise his challenges to the prior convictions at the change-of-plea hearing. The court accepted petitioner's guilty plea.

¶ 5. In 2017, petitioner filed two PCR petitions, challenging his convictions from 2002 and 2009.[1] His claims mirror the issues identified in the 2016 letter: he alleged that his 2002

[1] Petitioner also challenged a third offense, from 2000, but the PCR court referred that petition to another judge because she presided over the change-of-plea hearing at issue in that case. Accordingly, that PCR petition is not before us in this appeal.

conviction was compromised by ineffective assistance of counsel and that his 2009 guilty plea colloquy did not comply with Rule 11 of the Vermont Rules of Criminal Procedure. In raising these claims through a PCR petition, petitioner relied on State v. Boskind, 174 Vt. 184, 185, 807 A.2d 358, 360 (2002), and In re Manning, 2016 VT 53, ¶ 20, 202 Vt. 111, 147 A.3d 645, in which we held that a defendant may challenge a predicate offense only by bringing a PCR proceeding while in custody for the enhanced sentence.

¶ 6. The State, in a motion for summary judgment, argued that petitioner waived his right to challenge the prior convictions by entering a knowing and voluntary guilty plea to DUI-3. It relied on In re Torres, 2004 VT 66, ¶ 9, 177 Vt. 507, 861 A.2d 1055 (mem.), in which we held that a petitioner who pled guilty to second-degree aggravated domestic assault had waived his claim that he did not meet the elements of the aggravated offense because he had no prior conviction for domestic assault. In response to petitioner's argument that his counsel's 2016 letter had provided notice to the State of potential PCR claims, the State countered that the letter served only to advance plea negotiations.

¶ 7. The PCR court denied the State's motion for summary judgment, but noted that "Torres appears to be in conflict with Boskind and Manning." It reasoned that "[o]n its face, Torres seems to bar [petitioner's] claim," yet under Boskind, "challenges to predicate convictions based on Rule 11 deficiencies properly belong in the context of PCR proceedings, rather than in the criminal proceeding." The court concluded that Boskind controlled, and that petitioner could pursue his PCR petitions notwithstanding his guilty plea to DUI-3, in part because "it would not make sense to require defendants who admit guilt on the current charge to go to trial just to preserve the ability to challenge their prior convictions." However, pursuant to Vermont Rule of Appellate

Procedure 5(b)(1), it granted the State's motion for interlocutory appeal, concluding that this Court's applicable decisions "are not in harmony."

¶ 8. The controlling question of law identified by the PCR court was: "Does a defendant who pleads guilty to a DUI-3 waive the right to raise a PCR challenge to the predicate DUIs for purposes of striking the enhanced sentence based upon those predicate convictions?" Petitioner argues that under Boskind, the PCR challenge cannot be waived. The State argues that it is waived. We review this question of law without deference to the trial court's analysis. State v. Phillips, 2018 VT 85, ¶ 14, 208 Vt. 145, 195 A.3d 1099.

¶ 9. In resolving this question, we must harmonize two lines of case law: our case law related to waiver, and our case law related to collateral challenges to predicate offenses. We conclude that a defendant can plead guilty but preserve a PCR challenge to a predicate offense by providing clear notice on the record when entering a guilty plea. In this case, we remand for a determination of whether petitioner's plea was knowing and voluntary.

I. Two Lines of Cases

¶ 10. In this case, two lines of authority intersect. In the first—the Boskind line—we have held that defendants must challenge predicate convictions through PCR petitions, rather than at sentencing for the enhanced charge. 174 Vt at 185, 807 A.2d at 360. In the second—the Torres line—we held that defendants who plead guilty to a charge predicated on a prior conviction waive any nonjurisdictional challenges, including challenges to the validity of the prior conviction. 2004 VT 66, ¶ 9. As described below, these lines developed in parallel, until they recently collided in State v. Gay, 2019 VT 67, ¶ 9, __ Vt. __, 220 A.3d 769, where we held that Torres controls in cases where defendants plead guilty to an enhanced charge. Left unresolved in Gay was whether

a defendant who is prepared to plead guilty has any means to challenge a prior, enhancing conviction without contesting the merits of the enhanced charge.

¶ 11. In Boskind, we held that a challenge to a prior conviction used to enhance a sentence "must take place in superior court pursuant to Vermont's PCR statute." 174 Vt. at 185, 807 A.2d at 360. The defendant[2] in a DUI-3 case moved to dismiss the sentencing enhancements based on Rule 11 challenges to the predicate convictions. The trial court denied the defendant's motion, and we reviewed his argument on appeal of his conditional guilty plea. We first defined the issue as one of policy, rather than constitutional imperative. Id. at 188, 807 A.2d at 362. We then determined that a PCR proceeding, rather than the sentencing proceeding on the enhanced charge, was the proper venue for challenges to predicate convictions. Id. at 192, 807 A.2d at 365. We based this conclusion on several policy considerations. In particular, we sought to avoid "delay and protraction" in the sentencing process, concluded that the State has a better opportunity to prepare a defense to challenges to predicate convictions in the context of a PCR proceeding, and noted that the PCR statute is designed to provide "a clear record and fully articulated arguments from all material witnesses." Id. at 191, 802 A.2d at 364-65 (quotation omitted).[3]

¶ 12. We reaffirmed this holding in at least two subsequent cases. See Manning, 2016 VT 53, ¶ 20; In re Collette, 2008 VT 136, ¶ 5, 185 Vt. 210, 969 A.2d 101. In both cases we also held that that the remedy in the PCR proceeding is not an order vacating the improper underlying

[2] The decision resolved consolidated appeals involving multiple defendants. For simplicity, we describe the facts as if there had been a single defendant.

[3] We noted that a defendant is "in custody under sentence" for purposes of satisfying the jurisdictional requirement of the PCR statute where the defendant is under a sentence that has been enhanced by the prior conviction the defendant seeks to challenge. Id. at 192-93, 807 A.2d at 365-66.

conviction, but, rather, is an order vacating the enhanced sentence. See Manning, 2016 VT 53, ¶ 20; Collette, 2008 VT 136, ¶ 8.

¶ 13. Two years after Boskind, and before Collette and Manning, we addressed the related question of whether by pleading guilty, a petitioner waived his right to challenge a prior conviction that served as the basis for an aggravated charge. See Torres, 2004 VT 66.[4] The petitioner in Torres was charged with, and pled guilty to, second-degree aggravated domestic assault, which at the time was defined as a "second or subsequent offense of domestic assault." Id. ¶ 2 (quotation omitted). However, the petitioner had never been convicted of domestic assault—the State's information had incorrectly identified as a prior conviction a charge for which the petitioner had been arraigned, but which was later dismissed. The petitioner argued that his conviction was unlawful under the aggravated-domestic-assault statute because he had no prior domestic-assault conviction. He also argued that he had received ineffective assistance of counsel. We held that the petitioner "waived his right to challenge his conviction under [the domestic-assault statute] when he pled guilty," noting the well-settled rule that "a defendant who knowingly and voluntarily enters a guilty plea waives all non-jurisdictional defects in the prior proceedings." Id. ¶ 9 (quotation omitted). Instead, we remanded the case for further proceedings on his ineffective-assistance claim. Id. ¶ 15.

¶ 14. After the trial court's decision in the case before us now, this Court decided In re Gay, which, like this case, featured competing arguments rooted in these two distinct lines of

[4] In comparing the applicable case law, counsel for petitioner refers to Torres as a "non-binding memorandum decision," reflecting a misconception that memorandum decisions have less precedential weight than published opinions. We take this opportunity to clarify that memorandum decisions are binding precedent and that, as a general rule, published opinions and published memorandum decisions have equal precedential effect (contrasted with unpublished entry orders, which are nonprecedential). See V.R.A.P. 33.1(d)(1) (providing that unpublished decisions by three-justice panels are not controlling precedent).

authority. 2019 VT 67, ¶ 8. In Gay, the petitioner pled guilty to obstruction of justice and his sentence was enhanced under Vermont's habitual-offender statute on account of several prior felony convictions. The petitioner then filed a PCR petition, seeking to vacate his habitual-offender sentence based on a Rule 11 challenge to two of his prior convictions. The petitioner argued that, under Boskind and Manning, he was required to raise his claims in a PCR petition and had no mechanism for challenging the predicate convictions before he was convicted and sentenced on the obstruction-of-justice charge. The State argued that by pleading guilty to the enhanced charge, the petitioner waived any challenge to the prior convictions under Torres. We determined that Torres controlled. Id. ¶¶ 9, 12. We stated that "it is undisputed that [the petitioner] . . . knowingly, voluntarily, and expressly waived his right to appeal. This waived his right to appeal all nonjurisdictional defects to his obstruction charge, and, under Torres, this includes the existence of any underlying convictions that made him eligible for a sentencing enhancement." Id. ¶ 12. We also noted the Boskind-Manning line was "not in conflict with Torres," because those cases did not involve any claim that the petitioner had waived the right to pursue a post-sentencing PCR challenge. Id. ¶¶ 15-16.

¶ 15. Although there may not be direct conflict between Boskind and Torres, our decision in Gay left unresolved the quandary that arises from our holdings in these cases. In short, Boskind requires defendants who want to challenge predicate convictions to do so in post-sentencing PCR proceedings, but Torres provides that if defendants plead guilty to the enhanced offense they waive their right to collaterally challenge the predicate convictions. As a consequence, defendants have no clear way to preserve their challenges to predicate convictions if they want to plead guilty to the enhanced charge. To avoid waiving the right to collaterally challenge the predicate convictions, defendants must apparently plead not guilty and contest the charge that is subject to

enhancement. That appears to be true even if they have no defense to the charge itself, rather than to the enhancement. See Gay, 2019 VT 67, ¶ 20 (Robinson, J., concurring) ("[I]t is not entirely clear whether and how a defendant who has no defense to the immediate charge, but does challenge prior convictions supporting a sentence enhancement, can preserve the challenge without forcing an unnecessary trial on the immediate charge."). Defendants in petitioner's position are essentially forced to choose between going to trial on the current charge in order to contest the prior conviction, or pleading guilty to an enhanced charge and foregoing any challenges to an underlying conviction. This case calls upon us to resolve this anomaly.

II. Harmonizing the Case Law

¶ 16. In reconciling these decisions, we are mindful of several competing considerations. Forcing defendants to go to trial on enhanced charges in order to preserve challenges to predicate convictions would be inefficient and unduly burdensome to the State, defendants, and the court system. On the other hand, allowing defendants to plead guilty to an enhanced charge and then challenge a predicate conviction would undermine the goal of finality, and could lead to bait-and-switch plea negotiations. Fairness, finality, and efficiency all come into play. We resolve the tension by providing that defendants can specifically preserve post-conviction challenges to prior enhancing convictions by entering something akin to a conditional plea to the enhanced charge. Where a defendant wants to plead guilty, but has a colorable claim that a prior conviction is invalid, requiring a trial to preserve an issue—even on stipulated facts—would elevate "form over substance." State v. Casey, 2013 VT 22, ¶ 12 & n.1, 193 Vt. 429, 71 A.3d 1227 (noting that Court will find preservation of motion to sever if there is "express request," even if request is misstated). However, as we held in Gay, a defendant may not accept the benefit of a plea bargain, expressly waive the right to collaterally attack a predicate conviction, then attempt to make a collateral attack

anyway. 2019 VT 67, ¶ 12. This would defeat the purpose and integrity of the plea agreement and a defendant's waiver.

¶ 17. These competing considerations do not necessarily conflict: if a defendant who pleads guilty to an enhanced charge expressly preserves a PCR challenge to a predicate conviction on the record, then the defendant can avoid waiving the challenge. This approach jibes with the legal rationale underlying Torres and Gay, and promotes the policy goals of efficiency, fairness, and finality.

¶ 18. To be more specific, we hold that with the State's agreement and the court's approval, defendants may preserve a PCR challenge to a predicate conviction even while pleading guilty to an enhanced charge by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a PCR petition, specifically identifying the convictions they intend to challenge, and stating the bases for the challenges. If a defendant pleads guilty or no contest while preserving the PCR claim, with the consent of the State and the approval of the court, the plea will be analogous to a conditional plea under V.R.Cr.P. 11(a)(2) ("With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. [A] defendant [who] prevails on appeal . . . shall be allowed to withdraw [the] plea."). In contrast to the guilty pleas in Torres and Gay, such pleas will not foreclose a PCR petition challenging the specified predicate convictions. See Gay, 2019 VT 67, ¶ 10 n.5 (noting waiver rule does not apply to conditional guilty pleas); State v. Key, 312 P.3d 355, 361 (Kan. 2013) (holding that defendant who pleads guilty may preserve challenge to sentencing enhancement "by an objection on the record at sentencing"). A defendant convicted and sentenced pursuant to such a guilty plea may then challenge the validity

of a prior offense in a PCR proceeding seeking to vacate the enhanced sentence. See Manning, 2016 VT 53, ¶ 20 (explaining that "collateral relief in these circumstances requires that the enhanced sentence be stricken in the event of a meritorious claim" (quotation omitted)).

¶ 19. This holding is consistent with our analysis in Torres and Gay. Those decisions were based on principles of waiver. See State v. Baker, 2010 VT 109, ¶ 11, 189 Vt. 543, 12 A.3d 545 (explaining that waiver requires "a voluntary and intentional relinquishment of a known and enforceable right."). In Torres, we held that a defendant who knowingly and voluntarily enters a guilty plea waives all nonjurisdictional defects in the prior proceedings. 2004 VT 66, ¶ 9. After reviewing the plea colloquy transcript, we concluded that the "defendant entered his plea agreement voluntarily and understood that he was giving up appeal rights by pleading." Id. ¶ 11. Likewise, in Gay we concluded that the defendant had entered into a knowing and voluntary guilty plea to the obstruction charge, and thereby waived his right to appeal all nonjurisdictional defects to that charge, including the existence of any underlying convictions that could enhance his sentence. 2019 VT 67, ¶ 12. In those cases, the defendants did not assert or attempt to preserve PCR challenges. By contrast, if a defendant clearly states on the record when pleading guilty to an enhanced charge that they intend to pursue a specified PCR challenge, it would be a stretch to suggest that the defendant has knowingly and voluntarily relinquished the right to pursue that challenge.

¶ 20. Our holding that a defendant may preserve a PCR challenge in the context of a guilty plea to an enhanced charge also promotes the goals of finality, fairness, and efficiency. It promotes finality by effectively compelling a defendant to identify and assert challenges to prior convictions before pleading guilty to an enhanced charge. In many cases, the State and defendant may take a potentially meritorious challenge to a prior conviction into account in crafting a plea

agreement, further promoting efficiency and finality. In those cases in which a defendant pleads guilty without preserving challenges to predicate convictions, those challenges are, as we held in Gay, waived.[5] It promotes fairness by ensuring that the parties to a plea agreement, and the court, are all operating with the same understanding. The State is not required to agree to a defendant pleading guilty and preserving a PCR challenge to a predicate conviction, and the court is not required to approve it. But if the State does agree to such a plea, and the court approves it, the subsequent PCR petition will not take anyone by surprise. And the procedure ensures that the court is aware at sentencing of the likely PCR proceeding. The process is efficient because it allows a defendant who seeks to preserve a PCR challenge to a predicate conviction to plead guilty, rather than requiring a contested trial. This approach will substantially mitigate the problems arising at the intersection of Boskind and Torres.[6]

III. Resolving this Case

¶ 21. Not anticipating our ruling today, petitioner did not provide notice on the record to the State and the court of his intent to pursue a PCR petition. So the law we announce today does not rescue petitioner from our holding in Gay. As in Gay, petitioner in this case pled guilty to the

[5] The preservation of a challenge to a predicate conviction upon pleading guilty or no contest does not stay the sentence or entry of judgment of conviction on the enhanced offense under V.R.Cr.P. 32(b). Nor does it create any new right of direct appellate review. In contrast to the conditional plea under V.R.Cr.P. 11(a)(2), there is no right under the conditional plea procedure described here to direct review of "the adverse determination of a[ny] specified pretrial motion." The proceeding contemplated here is for collateral review of the validity of the challenged predicate. If a defendant does not secure relief in a subsequent post-conviction challenge, the sentence and judgment of conviction based upon the plea to the enhanced charge stand, barring grounds for relief wholly independent from the validity of the predicate charges.

[6] We will request that the Advisory Committee on the Vermont Rules for Criminal Procedure propose a rule to standardize the process for documenting the type of PCR-conditional plea we recognized here.

enhanced charge. In doing so, he stated that he understood and agreed to the terms of the plea agreement. At first blush, this case appears to be squarely resolved by our holding in Gay.

¶ 22. But one difference between this case and Gay leads us to affirm the trial court's denial of summary judgment to the State and remand for further proceedings. In Gay, the defendant did not argue that he was aware of the challenges to his predicate convictions and acting in reliance on our holding in Boskind. Therefore, there was no issue as to whether his plea to the enhanced charge was knowing and voluntary. 2019 VT 67, ¶ 6. In contrast, the summary-judgment record here, viewed in the light most favorable to petitioner, as the nonmoving party, could support an inference that petitioner pled guilty to the DUI-3 with an understanding that he could pursue his collateral challenges to enhancing convictions in a PCR proceeding, and, importantly, a plan to do so. Specifically, petitioner argues that defense counsel in connection with the enhanced DUI charge identified the potential challenges to his prior convictions in a letter to the prosecutor, and that Boskind prevented him from formally challenging his predicate convictions during the pendency of the DUI-4 charge.[7]

¶ 23. A petitioner who pleads guilty in reliance on a material misunderstanding resulting from misinformation provided by counsel may be entitled to post-conviction relief. See In re Kirby, 2012 VT 72, ¶ 14, 192 Vt. 640, 58 A.3d 230 ("It is well accepted that if a plea is unfairly obtained through ignorance, fear or misunderstanding it is open to collateral attack." (quotation omitted)). The misunderstanding must not arise solely from petitioner's subjective misunderstanding of the law or counsel's statements, but must be based in objective evidence that

[7] Petitioner frames his arguments in terms of notice to the State as to his intent to pursue PCR claims after sentencing. Because the issue in this case is whether petitioner voluntarily and knowingly waived these PCR challenges when he pled guilty to the DUI-3, we focus on the voluntariness of petitioner's waiver rather than on the State's understanding.

reasonably produced the misunderstanding. Id. In this case, petitioner has identified evidence that could support an inference that he pled guilty pursuant to advice from counsel that he would be able to pursue his PCR claims after sentencing. On the basis of the disputed facts on this issue—rather than on the basis relied upon by the trial court—we affirm the denial of the State's motion for summary judgment and remand for further proceedings.

Affirmed and remanded for further proceedings consistent with this opinion.

FOR THE COURT:

Associate Justice