SUMMARY
February 29, 2024

2024COA21

No. 22CA0058, *People v. Melendez* — Constitutional Law — Sixth Amendment — Confrontation Clause; Criminal Procedure — Postconviction Remedies — Conviction Obtained or Sentence Imposed in Violation of the Constitution — *Margerum* Rule —Retroactive Application

A division of the court of appeals considers the novel issue of whether the rule that our supreme court announced in *Margerum v. People*, 2019 CO 100, 454 P.3d 236, that "the defense must be permitted to question a prosecution's witness about her probationary status when the witness is on probation in the same sovereign as the prosecution," *id.* at ¶ 12, 454 P.3d at 240, is a "watershed rule[] of criminal procedure" under *Teague v. Lane*, 489 U.S. 288 (1989). The division holds that it is not, and, thus, the rule announced in *Margerum* does not apply retroactively.

The division also considers and rejects the defendant's claims that his rights to effective assistance of counsel and to a fair and impartial jury were violated.

COLORADO COURT OF APPEALS **2024COA21**

Court of Appeals No. 22CA0058
City and County of Denver District Court No. 07CR2501
Honorable Kandace C. Gerdes, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Gene Sterling Melendez,

Defendant-Appellant.

ORDER AFFIRMED

Division VII
Opinion by JUDGE LIPINSKY
Tow and Grove, JJ., concur

Announced February 29, 2024

Philip J. Weiser, Attorney General, Claire V. Collins, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Law Office of Daniel H. Kyser, L.L.C., Daniel H. Kyser, Greenwood Village, Colorado, for Defendant-Appellant

¶ 1 Decisions announcing a new constitutional rule of criminal procedure generally do not apply retroactively. *Teague v. Lane*, 489 U.S. 288, 310 (1989); *Edwards v. People*, 129 P.3d 977, 983 (Colo. 2006). But there are exceptions. One such exception applies to decisions announcing a "watershed rule of criminal procedure," meaning a rule that, if infringed, would "seriously diminish the likelihood of obtaining an accurate conviction" and that "alter[s] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Edwards*, 129 P.3d at 987 (quoting *Tyler v. Cain*, 533 U.S. 656, 665 (2001)).

¶ 2 As we explain in Part II.B.1 below, the United States Supreme Court has only once held that a decision announced a "watershed rule of criminal procedure," and no Colorado appellate decision has done so. Moreover, the United States Supreme Court abandoned the "watershed rule" in 2021. *See Edwards v. Vannoy*, 593 U.S. ___, ___, 141 S. Ct. 1547, 1557, 1559-60 (2021). Because our supreme court has not followed suit, the "watershed rule" remains embedded in Colorado jurisprudence.

¶ 3 This case requires us to consider whether a particular decision of our supreme court announced a "watershed rule of criminal

procedure" and, therefore, applies retroactively. In *Margerum v. People*, the supreme court held, for the first time, that "the defense must be permitted to question a prosecution's witness about her probationary status when the witness is on probation in the same sovereign as the prosecution" (the *Margerum* rule). 2019 CO 100, ¶ 12, 454 P.3d 236, 240.

¶ 4 We hold that the *Margerum* rule is not a "watershed rule of criminal procedure" and, therefore, does not apply retroactively.

¶ 5 In this case, defendant, Gene Sterling Melendez, appeals the postconviction court's order denying his Crim. P. 35(c) petition for postconviction relief without a hearing. Because we hold that the *Margerum* rule does not apply retroactively, and that Melendez's rights to effective assistance of counsel and to a fair and impartial jury were not violated, we affirm.

I. Background Facts and Procedural History

¶ 6 In 2008, Melendez was convicted of felony murder, second degree murder, aggravated robbery with intent to kill or maim, aggravated robbery with a deadly weapon, aggravated robbery with intent to kill or maim with a confederate, and two counts of menacing. He was sentenced to life without the possibility of parole

on the felony murder conviction, with the sentences on the other convictions to run concurrently.

¶ 7 A division of this court affirmed all but one of Melendez's convictions — the conviction for second degree murder, which the division held merged with the felony murder conviction. *People v. Melendez*, (Colo. App. No. 08CA1606, Oct. 11, 2012) (not published pursuant to C.A.R. 35(f)). The supreme court denied Melendez's petition for a writ of certiorari. *Melendez v. People*, (Colo. No. 12SC897, Oct. 28, 2013) (unpublished order).

¶ 8 On April 14, 2021, Melendez, through court-appointed counsel, filed a petition for postconviction relief pursuant to Crim. P. 35(c). In the petition, Melendez challenged all his convictions and raised one constitutional claim, four ineffective assistance of counsel claims, and one fair and impartial jury claim.

¶ 9 On October 2, 2021, the postconviction court ruled that the petition was timely only as to Melendez's claims regarding his felony murder conviction and denied all his claims without a hearing. Melendez contends on appeal that he is entitled to a hearing on all his claims.

II. Analysis

A. Standard of Review and Applicable Law

¶ 10 We review de novo a court's decision to deny a Crim. P. 35(c) motion without an evidentiary hearing. *See People v. Cali*, 2020 CO 20, ¶ 14, 459 P.3d 516, 519.

¶ 11 Crim. P. 35(c) grants "every person convicted of a crime" the right "to make application for postconviction review" when, for purposes of this appeal, the defendant alleges "in good faith" that the conviction was "obtained or sentence imposed in violation of the Constitution or laws of the United States or the constitution or laws of this state." Crim. P. 35(c)(2)(I). But the mere filing of a Crim. P. 35(c) petition does not entitle a defendant to a hearing.

¶ 12 "A Crim. P. 35(c) motion may be denied without a hearing if the motion, files, and record clearly establish that the defendant is not entitled to relief." *People v. Venzor*, 121 P.3d 260, 262 (Colo. App. 2005). "Summary denial of a postconviction relief motion is also appropriate if the claims raise only an issue of law, or if the allegations, even if true, do not provide a basis for relief." *Id.* "Likewise, if the claims are bare and conclusory in nature, and lack

supporting factual allegations, the motion may also be denied without a hearing." *Id.*

B. Melendez's Constitutional Claim

¶ 13 Melendez contends that he is entitled to a hearing to demonstrate how "his rights guaranteed to him under the Federal and States Constitutions to adequately cross-examine the prosecution's leading witness" were violated under the *Margerum* rule, which he asserts applies retroactively. Melendez argues that the *Margerum* rule entitled him to establish through cross-examination that Christopher Snow, the prosecution's lead witness, had been charged with "several crimes within weeks" following Melendez's alleged crime. Melendez asserts that such cross-examination would have called Snow's credibility into question by showing the jury that Snow "hoped to curry favor from the same sovereign" that was prosecuting Melendez.

¶ 14 We reject Melendez's argument because we determine that the *Margerum* rule is not a "watershed rule of criminal procedure" and, therefore, does not apply retroactively.

1. Applicable Law

¶ 15 The Colorado Supreme Court has held that a newly announced criminal rule applies retroactively if three conditions are satisfied: (1) "the defendant's conviction is final"; (2) "the rule in question is in fact new"; and (3) the rule "meets either of the two *Teague* exceptions to the general bar on retroactivity." *Edwards*, 129 P.3d at 983 (citing *Beard v. Banks*, 542 U.S. 406, 411 (2004)). The two *Teague* exceptions are for substantive rules and "watershed rules of criminal procedure." *Teague*, 489 U.S. at 311. Because Melendez does not contend that the *Margerum* rule is substantive, we consider whether it is a "watershed rule[] of criminal procedure." *Id.*

¶ 16 The watershed rule exception is "extremely narrow." *People v. Tate*, 2015 CO 42, ¶ 56, 352 P.3d 959, 971 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)). It is so narrow that the United States Supreme Court has only once held that a new procedural rule applies retroactively. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (recognizing a defendant's right to counsel in cases where the defendant faces a possible prison sentence). Likewise, the Colorado Supreme Court has never deemed a new

procedural rule to be a watershed rule since it adopted the reasoning of *Teague* in *Edwards*, 129 P.3d 977. *See, e.g.*, *Tate*, ¶¶ 4, 61, 352 P.3d at 962, 972 ("Because [the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012),] is procedural in nature, and is not a 'watershed' rule of procedure, it does not apply retroactively . . . ."); *People v. Johnson*, 142 P.3d 722, 722-23 (Colo. 2006) (holding that, for the same reason, *Blakely v. Washington*, 542 U.S. 296 (2004), does not apply retroactively).

¶ 17 Nor has any division of this court ever done so. *See, e.g.*, *People v. McDowell*, 219 P.3d 332, 337-38 (Colo. App. 2009) (deciding that *Missouri v. Seibert*, 542 U.S. 600, 609 (2004), did not announce a "watershed rule of criminal procedure"); *People v. Wenzinger*, 155 P.3d 415, 421 (Colo. App. 2006) (deciding that *Blakely* did not announce a watershed rule of criminal procedure); *People v. Bradbury*, 68 P.3d 494, 499 (Colo. App. 2002) (deciding that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not announce a watershed rule of criminal procedure).

¶ 18 The United States Supreme Court eliminated the watershed rule exception in 2021, putting the final nail in the exception's coffin (at least in federal cases) by announcing that "no new rules of

criminal procedure can satisfy the watershed exception." *Edwards*, 593 U.S. at ___, 141 S. Ct. at 1559. The court reasoned that, because in the years following *Teague* the Court never held that "a new procedural rule qualifies for the purported watershed exception," continuing to articulate "a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes . . . resources." *Id.* at 1560.

¶ 19 But the Colorado Supreme Court has not abolished the watershed rule in Colorado as a matter of state law. The People request that we take this momentous step to "align Colorado's rules for retroactivity with those of the United States Supreme Court." But "we are bound by the rule[s] as expressed by the Colorado Supreme Court, and we are not free to depart from [its] precedent." *People v. Robson*, 80 P.3d 912, 914 (Colo. App. 2003). In any event, we need not make such a broad pronouncement in this case because we hold that, even if the watershed rule exception remains good law in Colorado, the *Margerum* rule is not such a rule.

2. The *Margerum* Rule Is Not a Watershed Rule

¶ 20 Even though two of the prongs of the retroactivity test are satisfied here — Melendez's conviction is final and the *Margerum* rule is "in fact new" — we hold that the *Margerum* rule is not a watershed rule under the third prong. *Edwards*, 129 P.3d at 983.

¶ 21 First, we agree with Melendez and the People that Melendez's conviction is final. Second, we further agree with the parties that the *Margerum* rule is "in fact new" because *Margerum* was the first Colorado Supreme Court decision to hold that defendants have the right "to question a prosecution's witness about her probationary status when the witness is on probation in the same sovereign as the prosecution." *Margerum*, ¶ 12, 454 P.3d at 240. As the parties note, this conclusion "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301.

¶ 22 Nonetheless, we hold that *Margerum* is not a "watershed rule[] of criminal procedure." *Id.* at 311. As noted above, the United States Supreme Court "has identified only one pre-*Teague* procedural rule as watershed: the right to counsel," *Vannoy*, 593 U.S. at ___, 141 S. Ct. at 1557, even though the Court had

numerous opportunities to grant retroactive effect to other important new rules of criminal procedure. *See id.* at ___, 141 S. Ct. at 1557-60 (collecting cases).

¶ 23 In *Edwards*, the supreme court concluded that the rule articulated in *Crawford v. Washington*, 541 U.S. 36 (2004) — that testimonial out-of-court statements violate the Confrontation Clause unless the witnesses are unavailable and the defendants had a prior opportunity to cross-examine them — is not a watershed rule. *Edwards*, 129 P.3d at 979. The supreme court reasoned that, because the *Crawford* rule "does not alter fundamental due process rights to the extent that the *Gideon* guarantee of right to counsel does, . . . *Crawford* does not qualify as a watershed rule." *Id.*; *see O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (explaining that, "[u]nlike the sweeping rule of *Gideon*," the rule at issue "has hardly '"alter[ed] our understanding of the *bedrock procedural elements*" essential to the fairness of a proceeding'" (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990))); *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (declining to recognize a rule as watershed because "it has none of the primacy and centrality of the rule adopted in *Gideon*"); *Banks*, 542 U.S. at 407

(quoting the Court's language in *O'Dell*, 521 U.S. at 157, and *Saffle*, 494 U.S. at 495).

¶ 24 The same reasoning applies to Melendez's claim that the *Margerum* rule is a watershed rule. While the *Margerum* rule is significant, it "does not alter fundamental due process rights to the extent that the *Gideon* guarantee of right to counsel does." *Edwards*, 129 P.3d at 979.

¶ 25 (We note that, even if *Margerum* announced a "watershed rule of criminal procedure," that rule may not apply here. Unlike in *Margerum*, where the witness was on probation, Melendez sought to cross-examine Snow regarding Snow's *pending* criminal charges; Snow was not on probation. We need not analyze the scope of *Margerum* in light of our holding that the case does not apply retroactively and because the People do not argue that *Margerum* is limited to cases where the subject witness is on probation.)

¶ 26 Therefore, we hold that the *Margerum* rule does not apply to this case.

C. Melendez's Ineffective Assistance of Counsel Claims

1. Applicable Law

¶ 27 A criminal defendant is constitutionally entitled to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Davis v. People*, 871 P.2d 769, 772 (Colo. 1994).

¶ 28 A defendant's conviction may be reversed upon a determination that his counsel was ineffective, but only if the defendant establishes that (1) counsel's performance was outside the wide range of professionally competent assistance and (2) the defendant was prejudiced by counsel's substandard legal work. *Strickland*, 466 U.S. at 687. To demonstrate the second prong of *Strickland*, a defendant must establish a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *Id.* at 688. Mere disagreement as to trial strategy does not establish that counsel was ineffective. *People v. Bossert*, 722 P.2d 998, 1010 (Colo. 1986).

¶ 29 A defendant has the burden of proving both *Strickland* prongs by a preponderance of the evidence. *See Holland v. Jackson*, 542 U.S. 649, 654 (2004); *see also People v. Naranjo*, 840 P.2d 319, 325 (Colo. 1992).

2. The Postconviction Court Properly Denied Melendez's Ineffective Assistance of Counsel Claims Without a Hearing

¶ 30 Melendez contends that he is entitled to a hearing on his ineffective assistance of counsel claims for three reasons: (1) his counsel mishandled Snow's testimony regarding previously undisclosed facts; (2) his counsel did not "properly advise [him] as to his right to testify"; and (3) his counsel failed to "adequately interview[] or examine[]" a "necessary witness." He further contends that "the cumulative effect of [these] errors resulted in ineffective counsel." We consider each contention in turn.

¶ 31 First, Melendez's contention regarding the admission of the previously undisclosed evidence fails because his counsel's performance regarding such evidence was not "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. (Melendez argued in his petition that Snow testified regarding five material facts that the prosecutor had not disclosed to the defense, including the existence of a witness of whom defense counsel had not previously been aware.)

¶ 32 As Melendez concedes, his counsel repeatedly objected to, and moved for a mistrial on the basis of, the admission of the previously

undisclosed evidence. Noting counsel's responses to the evidence, the postconviction court concluded that "trial counsel did what a reasonably competent attorney would have done in the situation, by contemporaneously objecting and moving for a mistrial." Therefore, Melendez's first contention fails because he did not allege facts that would support a finding that his counsel's performance was deficient.

¶ 33 Second, Melendez's contention that his counsel provided him with an improper advisement about testifying also fails. As the postconviction court concluded, Melendez was not prejudiced by his counsel's advice about testifying, *id.* at 687, if only because the trial court advised Melendez about the implications of testifying and his right to testify. (On appeal, Melendez does not contest the validity of his waiver of the right to testify or argue that the court did not sufficiently advise him.) Melendez does not point to *any* evidence, let alone evidence sufficient to establish "a reasonable probability," that he would have chosen to testify had his counsel provided him with a more complete advisement and that, had he testified, "the result of the proceeding would have been different." *Id.* at 694.

¶ 34 Third, Melendez's contention that his counsel "neglected to interview and call a necessary witness," Sarah Hall, who "could have rebutted essential facts to [another witness's] testimony," fails because Melendez's allegations regarding Hall are conclusory. *See Venzor*, 121 P.3d at 262.

¶ 35 In addition, Melendez does not explain how "the result of the proceeding would have been different" had his counsel interviewed Hall or called her to testify. *Strickland*, 466 U.S. at 694. The record supports the postconviction court's finding that Melendez could not show prejudice resulting from his counsel's alleged deficient representation regarding Hall, as Melendez's "allegations rely on an assumption that [Hall] would have testified in such a way that the jury would have reached a different conclusion." Therefore, as the postconviction court concluded, Melendez's third contention also fails "[a]bsent more specific factual allegations."

¶ 36 Lastly, as the postconviction court correctly stated, "because no error has been found, [Melendez] is not entitled to relief based upon his argument of cumulative error."

¶ 37 We hold that the postconviction court properly denied all of Melendez's ineffective assistance claims without a hearing.

D. Melendez's Fair and Impartial Jury Claim

1. Applicable Law

¶ 38 "Rule 35 proceedings are intended to prevent injustices after conviction and sentencing, not to provide perpetual review." *People v. Rodriguez*, 914 P.2d 230, 249 (Colo. 1996). Crim. P. 35(c)(3)(VII) requires that a court "deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought." *See People v. Valdez*, 178 P.3d 1269, 1275 (Colo. App. 2007) ("Subject to enumerated exceptions, claims that could have previously been brought on direct appeal or in postconviction proceedings must be denied.").

2. Melendez's Argument Regarding the Fairness and Impartiality of the Jury Is Barred as Successive

¶ 39 Melendez could have presented in his merits appeal, if not at trial, his argument that he was denied "the right to a fair and impartial jury" because a juror and the mother of a key witness had an "undisclosed relationship." He failed to do so, however. Thus, his "fair and impartial jury" argument is successive, and we need not consider it further.

¶ 40 We acknowledge that the postconviction court rejected this argument on the grounds that "the record . . . is devoid" of any indication that the juror recognized the witness's mother. But we may affirm a lower court's decision "on any ground supported by the record, whether relied upon or even considered by the [lower] court." *People v. Dyer*, 2019 COA 161, ¶ 39, 457 P.3d 783, 792.

III. Disposition

¶ 41 The order is affirmed.

JUDGE TOW and JUDGE GROVE concur.