Amicus Curiarum

VOLUME 36
ISSUE 4 APRIL 2019

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

Return to ToC

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Jon A. Lefkowitz, Misc. Docket AG No. 29, September Term 2018, filed March 29, 2019. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2019/29a18ag.pdf

ATTORNEY DISCIPLINE – RECIPROCAL ACTION – INTENTIONAL DISHONEST CONDUCT – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Jon A. Lefkowitz on October 25, 2018. Bar Counsel alleged that Respondent engaged in professional misconduct, in connection with his conviction for criminal facilitation in the fourth degree in the State of New York, in violation of Maryland Attorneys' Rule of Professional Conduct ("MARPC") 19-308.4(a), (b), (c), and (d) (Misconduct).

On May 11, 2016, Respondent pled guilty before the Onondaga County Court of New York to one count of criminal facilitation in the fourth degree, N.Y. Penal Law § 115.00(1), and entered into a plea and cooperation agreement. The conduct leading to Respondent's guilty plea occurred in connection with a criminal case in which the State of New York prosecuted Respondent's cousin and his cousin's wife, Alexander March and Sima March respectively, for mortgage fraud. At Mr. March's request, Respondent obtained and prepared a subpoena template, accompanied by a questionnaire, to be served upon a Grand Jury witness in the March's mortgage fraud case.

The subpoena drafted by Respondent was purportedly witnessed by Judge Donald A. Greenwood of the Court at Syracuse, New York. However, the subpoena was neither directed nor authorized by Judge Greenwood. Additionally, neither Judge Greenwood's, nor Respondent's signature, appeared on the subpoena. Furthermore, a signature line with Respondent's name, address, and title as "Attorney for Sima March" below it, appeared in the corner of the subpoena. However, Respondent never formally represented Mr. and Ms. March or entered his appearance as their attorney before the court.

On July 19, 2017, Respondent was ordered by the Supreme Court of the State of New York Appellate Division, Second Judicial Department (the "New York Court") to show cause as to why an order of suspension, censure, or disbarment should not be imposed upon his license to practice law in the State of New York due to his above conduct. On July 11, 2018, the New York Court suspended Respondent from the practice of law in New York for two years, commenting that "[R]espondent's conduct on its face created a deception."

Respondent promptly notified the Maryland State Bar of his suspension. In response to a Show Cause Order issued by the Court of Appeals on October 26, 2018, Bar Counsel asked that reciprocal discipline not be imposed, and recommended disbarment due to Respondent's deceitful and intentionally dishonest conduct. Respondent requested that a reprimand be imposed, or in the alternative, that his suspension be concurrent with that of the New York suspension and inclusive of his time already served.

Held: Disbarred.

The Court of Appeals concluded that Respondent violated MARPC 19-308.4(a), (b), (c), and (d) as alleged by Bar Counsel. Pursuant to Maryland Rule 19-737(e), the Court found clear and convincing evidence that Respondent's conduct was an exceptional circumstance and warranted substantially different discipline in Maryland than that imposed in New York. Respondent drafted a judicial subpoena on behalf of a family member whom he did not formally represent, purportedly witnessed by a New York State judge, which ordered a witness, upon penalty of contempt and fines, to answer written questions under oath. Respondent admitted to this conduct and, as a result, pled guilty to "engag[ing] in conduct which provides [a person who intends to commit a crime] with means or opportunity for the commission thereof and which in fact aids such person to commit a felony[.]" N.Y. Penal Law § 115.00(1). Respondent failed to demonstrate any appreciation for the gravity of his conduct or express any remorse for his actions, going as far as denying that his actions interfered with the justice system. Respondent's conduct violated the basic tenet of upholding the integrity of our justice system, and constituted an abuse of the administration of justice. Accordingly, the Court ordered disbarment.

COURT OF SPECIAL APPEALS

Michael J. Holzheid, et al. v. Comptroller of the Treasury of Maryland, et al., No. 2374, September Term 2017, filed March 28, 2019. Opinion by Battaglia, J.

https://mdcourts.gov/data/opinions/cosa/2019/2374s17.pdf

ADMINISTRATIVE LAW AND PROCEDURE – EXHAUSTION OF ADMINISTRATIVE REMEDIES

ADMINISTRATIVE LAW AND PROCEDURE – EXCEPTION TO THE EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIREMENT – CONSTITUTIONAL QUESTIONS

ADMINISTRATIVE LAW AND PROCEDURE – CIVIL RIGHTS – TAXATION – EXHAUSTION OF ADMINISTRATIVE REMEDIES

Facts:

The State of Maryland provides a credit against an individual's State income tax liability for income taxes paid to other states levied on income earned in those other states. Prior to 2013, however, a credit to offset income taxes collected on behalf of Baltimore City and each of the counties, oftentimes referred to as a "piggy back" tax, was not available for a Maryland resident who earned out-of-state income, resulting in "double taxation" at the local level. This practice changed following *Comptroller v. Wynne*, 431 Md. 147 (2013), *aff'd*, 135 S. Ct. 1787 (2015), when the Court of Appeals and the Supreme Court held that the State must not only offer a credit against taxes collected on behalf of the State but also on taxes collected on behalf of the counties, because otherwise, such a scheme violated the dormant Commerce Clause of the United States Constitution.

As a result, the Appellants, herein, all of whom had filed amended returns claiming refunds for the amount paid to the local government proportionate to their out-of-state income, became entitled to those refunds as well as interest on those refunds thereon.

At the time of the *Wynne* litigation, the rate of interest on refunds was set at 13% pursuant to statute. While *Wynne* was pending before the Supreme Court, however, the General Assembly enacted Section 16 of the Budget Reconciliation and Financing Act of 2014 ("Section 16"), which reduced the interest rate on *Wynne* refunds to approximately 3%.

Contending that they were entitled to 13% interest on their refunds, Appellants filed a complaint in the Circuit Court for Baltimore City challenging the legality of Section 16, alleging that it violated the Fifth Amendment, the Fourteenth Amendment, and the Commerce Clause of the United States Constitution, in addition to a count alleging a civil rights violation under 42 U.S.C. § 1983 against the Comptroller in his personal capacity.

The State filed a motion to dismiss the complaint, positing that the circuit court lacked jurisdiction to hear the case because the Appellants had failed to exhaust their administrative remedies by not pursuing their action in the Maryland Tax Court. The circuit court ultimately granted the State's motion to dismiss.

Held: Affirmed.

The Court of Special Appeals held that the Maryland Tax Court has exclusive jurisdiction over refund claims including refunds of income taxes paid to the State, based on an analysis of the comprehensive nature of the Tax-General Article and its legislative history with regard to the refund of income taxes.

The Court also held that interest accrued and owed on an income tax refund, albeit not a part of the refund definitions provided by the Tax-General Article, is inextricably intertwined with refunds statutorily, such that the Tax Court retains exclusive jurisdiction. As a result, Appellants were required to exhaust administrative remedies before the Tax Court.

In addressing the various exceptions that Appellants raised to the exhaustion requirement, the Court noted that the constitutional exception was overcome by the exclusive nature of the remedy before the Tax Court.

With regard to the Section 1983 claim, Appellants asserted that exhaustion was not required, but the Court determined that exhaustion was required by precedent established by the Supreme Court in the past 25 years.

Return to ToC

Romechia Simms v. Maryland Department of Health, et al., No. 1898, September Term 2017, filed February 27, 2019. Opinion by Wright, J.

https://mdcourts.gov/data/opinions/cosa/2019/1898s17.pdf

CONDITIONAL RELEASE – HOSPITAL WARRANT – DANGEROUSNESS – DUE PROCESS

Facts:

In May 2015, police found Romechia Simms pushing her deceased three-year-old son in a swing; reportedly, Ms. Simms pushed her son for forty straight hours. In September 2015, Ms. Simms was charged with Child Abuse Resulting in Death, Involuntary Manslaughter and Child Neglect. In February 2016, Ms. Simms was found not criminally responsible for her son's death, and she signed an Alford plea. She was conditionally released from commitment to the Maryland Department of Health ("the Department"), subject to an Order of Conditional Release.

In September 2017, after missing several therapy appointments in violation of her Conditional Release, the State petitioned the Circuit Court for Charles County to issue a hospital warrant pursuant to Md. Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP") § 3-121(c). The circuit court granted that relief and issued a hospital warrant, directing that Ms. Simms be transported to the Clifton T. Perkins Hospital Center ("Perkins Hospital") for evaluation and an administrative hearing.

Seven days into her stay at Perkins Hospital, Ms. Simms appeared before an Administrative Law Judge ("ALJ"). Pursuant to CP § 3-121(f), the ALJ had to determine whether Ms. Simms had violated a condition of her release and whether she was eligible for release with conditions. Ms. Simms and the Department agreed to modified conditions and decided that Ms. Simms would stay at Perkins Hospital until a residential treatment center placement was available. The ALJ recommended that the Circuit Court for Charles County adopt the modified released conditions. In October 2017, the Circuit Court for Charles County adopted the findings and recommendations of the ALJ, and conditionally released Ms. Simms for the second time.

Before the October 2017 conditional release, Ms. Simms filed a Petition for Writ of Habeas Corpus with the Circuit Court for Howard County, where Perkins Hospital is located, alleging that her confinement at Perkins Hospital was unconstitutional and a violation of her due process rights. The circuit court found that Ms. Simms was not entitled to habeas relief because the hospital warrant issued by the Circuit Court for Charles County was lawful. Ms. Simms appealed.

Held:

Ms. Simms presented the Court of Special Appeals with a question of first impression: Whether a finding of dangerousness must be made to support a circuit court's issuance of a hospital warrant for a person on conditional release and whether a lack of such a finding is violative of due process. Ms. Simms alleged that the Circuit Court for Charles County should have made two separate findings before issuing a hospital warrant. First, she claimed that the circuit court should have found that there was probable cause to believe she violated the terms of her conditional release. Second, she argued that the circuit court should have found that there was probable cause that she was no longer eligible for conditional release because she posed a danger to herself, others or property. She further alleged that under CP § 3-131, a circuit court could only issue a hospital warrant if probable cause existed as to both considerations. A circuit court would violate one's due process rights if it did not consider the second prong, dangerousness.

The Court engaged in a statutory construction analysis and held that a plain reading of the statute did not indicate that there was a requirement of a finding of danger to self, property or others at the hospital warrant stage. The Court held that "[t]he procedures in place and followed by the State are practical, logical and protective of the rights of Ms. Simms.

Turning to Ms. Simms' due process concerns, the Court held that the Circuit Court for Charles County's issuance of a hospital warrant, without a finding of dangerousness, did not violate Ms. Simms' due process rights. Reiterating the statute's plain language, the Court held that the Circuit Court for Charles County was only required to review the State's petition and to determine that there was probable cause that Ms. Simms violated a term of her conditional release.

Return to ToC

Tevin Moultrie v. State of Maryland, No. 213, September Term 2017, filed March 29, 2019. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2019/0213s17.pdf

APPLICATION FOR LEAVE TO APPEAL – CONDITIONS OR SUBSTANTIVE LIMITATIONS

INEFFECTIVE ASSISTANCE OF COUNSEL – RESPONSIBILTIY TO PURSUE RULING ON MODIFICATION OR REDUCTION OF SENTENCE

INEFFECTIVE ASSISTANCE OF COUNSEL – MISINFORMING DEFENDANT ABOUT FACT MATERIAL TO LENGTH OF INCARCERATION

Facts:

In 2007, fifteen-year-old Tevin Moultrie shot and killed another young man and then threw the gun on the ground as two police officers pursued him, causing it to discharge. Moultrie was tried as an adult. He pleaded guilty to second-degree murder, using a handgun in the commission of a crime of violence, and two counts of reckless endangerment. The plea agreement bound the court to a maximum total sentence of 30 years. On October 7, 2008, Moultrie was sentenced to a total of 30 years' imprisonment.

Under Md. Rule 4-344, Moultrie had 30 days after sentencing to file an application for review of his sentence by a three-judge panel. At the sentencing hearing, Moultrie's counsel advised him that a three-judge panel could raise his sentence, lower his sentence, or leave it the same. Counsel filed no application for sentence review.

Under Md. Rule 4-345(e), Moultrie had 90 days after sentencing to file a motion for modification or reduction of sentence. Md. Rule 4-345(e) prohibits the court from revising the sentence more than five years after the date that the original sentence was imposed. Moultrie's counsel filed a timely motion to modify or reduce sentence. The motion asked that it be held sub curia and that the court "[g]rant a hearing upon petition of counsel[.]" Moultrie's counsel did not request a hearing or ruling on his motion before the expiration of the five-year deadline.

In 2016, Moultrie petitioned for post-conviction relief. Among other things, the petition argued that Moultrie received ineffective assistance of counsel because his trial counsel: (1) failed to request a hearing on the motion to modify or reduce sentence before the five-year deadline ran; (2) erroneously informed him that a three-judge panel could increase his sentence if he filed an application for review; (3) failed to object to alleged errors at a reverse-waiver hearing; and (4) failed to request that the case be transferred to juvenile court for sentencing. The post-conviction court denied relief.

Moultrie filed an application for leave to appeal. In his application, he argued that the post-conviction court erred only as to his two claims that counsel was ineffective in failing to request a hearing on the motion for modification or reduction of sentence and in misinforming him that a three-judge panel could increase his sentence. The application did not mention the other issues. The Court of Special Appeals issued an order granting Moultrie's application for leave to appeal "to address the two questions presented in [Moultrie's] application for leave to appeal."

Held: Reversed and remanded.

The Court of Special Appeals declined to entertain the additional questions not covered by the order granting the application for leave to appeal. Maryland Rule 8-204(f)(5) authorizes the Court to grant an application for leave to appeal, but it "does not prohibit [the] Court from placing conditions or substantive limitations on our grant of an application for leave to appeal[.]" *Harding v. State*, 235 Md. App. 287, 295 (2017). If the Court places limitations on its grant of leave to appeal, those limitations are ordinarily binding. In exceptional circumstances (such as a change in the controlling authority or a conclusion the earlier decision was clearly erroneous), the appellate panel may permit an appellant to raise an issue that was not encompassed in the order granting leave to appeal. Seeing no exceptional circumstances, the Court chose not to consider the additional issues.

As to both of the questions raised in the application for leave to appeal, the Court held that the defendant received ineffective assistance of counsel. On that basis, the Court reversed the judgment denying the petition for post-conviction relief.

The defendant received ineffective assistance of counsel because his counsel failed to pursue a hearing or ruling on his motion for modification or reduction of sentence. Even though counsel filed a timely motion, counsel thereafter failed to pursue a hearing or ruling during the remainder of the five-year period during which the court could revise the sentence. This deficient performance was prejudicial because it resulted in a lost opportunity for reconsideration of the sentence. As a remedy, the defendant was entitled to a belated hearing on the motion for modification or reduction of sentence.

The defendant also received ineffective assistance of counsel when his counsel erroneously informed him that a three-judge panel could increase his sentence if he filed an application for review. The court had already imposed the maximum sentence permissible under the plea agreement. His counsel advised him that a three-judge panel could increase his sentence, even though it is illegal for a three-judge panel to impose a sentence that exceeds the cap from a plea agreement that is binding on the court. Because this deficient performance likely resulted in the loss of the defendant's opportunity for sentence review, he was entitled to pursue a belated application.

Return to ToC

State of Maryland v. Jimmie Rogers, No. 1993, September Term 2017, filed March 28, 2019. Opinion by Nazarian, J.

https://www.courts.state.md.us/data/opinions/cosa/2019/1993s17.pdf

MARYLAND SEX OFFENDER REGISTRY – STANDARD OF PROOF

Facts:

On October 20, 2015, Jimmie Rogers pleaded guilty in the Circuit Court for Anne Arundel County to a single count of human trafficking under Maryland Code § 11-303(a) of the Criminal Law Article ("CR"). Under Maryland Code §§ 11-701(p)(2) and 11-704 of the Criminal Procedure Article ("CP"), Mr. Rogers qualified as a tier II sex offender and was required to register upon release from prison because he was convicted of violating CR § 11-303 and his victim was a minor. Mr. Rogers registered with the Maryland Sex Offender Registry ("MSOR") as instructed on October 4, 2016.

On January 31, 2017, Mr. Rogers filed a complaint in the circuit court seeking a declaratory judgment that he was not required to register as a sex offender because, he argued, the State had failed to establish that his victim was, in fact, a minor. Both Mr. Rogers and the State filed motions for summary judgment—the State contended that there was no factual dispute that the victim was a minor, while Mr. Rogers argued that there was no factual dispute that she wasn't. The circuit court granted Mr. Rogers's motion and entered a declaratory judgment stating that Mr. Rogers's conviction did not require him to register as a sex offender.

Held: Reversed and remanded

The Court of Special Appeals reversed the circuit court's decision finding that summary judgment was inappropriate because there was insufficient evidence in the record to support summary judgment for either party. The Court reiterated the principle that the MSOR is not a criminal sanction, but a collateral consequence of a conviction. As a collateral consequence, the registration requirements need not be proven beyond a reasonable doubt, but by a preponderance of the evidence. Because the victim's age was disputed, the Court remanded this case for further proceedings to determine whether or not Mr. Rogers's victim was a minor at the time of the offense and, from there, whether Mr. Rogers is required to register with the MSOR.

Return to ToC

Clyde Campbell v. State of Maryland, No. 1103, September Term 2016, filed March 29, 2019. Opinion by Woodward, J.

https://mdcourts.gov/data/opinions/cosa/2019/1103s16.pdf

CRIMINAL PROCEDURE – SIXTH AMENDMENT – RIGHT TO A PUBLIC TRIAL – DE MINIMUS CLOSURE

CRIMINAL PROCEDURE – SIXTH AMENDMENT – RIGHT TO A PUBLIC TRIAL – DE MINIMUS CLOSURE – APPLICATION OF THE *KELLY V. STATE* TEST

CRIMINAL PROCEDURE – SIXTH AMENDMENT – RIGHT TO A PUBLIC TRIAL – JUSTIFIED CLOSURE

CRIMINAL PROCEDURE – FIFTH AMENDMENT – VOLUNTARY AND KNOWING WAIVER OF *MIRANDA* RIGHTS

Facts:

Appellant, Clyde Campbell, lived with his son Jesse and his long-term girlfriend, Dorothy Grubb, in Baltimore County. On the night of July 24, 2014, Jesse recalled that appellant and Grubb got into an argument that culminated in Jesse hearing a "big bang." Later that night, Jesse observed appellant drive his pickup truck to the back of the house, place into the back of the truck a large tarp that appeared to have something "long and big" in it, and then drive away. The next day, appellant proposed to Jesse that they go camping, but the pair eventually drove to Ocean City instead. During this trip, Jesse noticed that the tarp was no longer in the back of appellant's truck.

While appellant and Jesse were on their trip, Grubb's daughter, Kristi, tried and failed to contact her mother, and then filed a missing person report. Based on this report, the police obtained a warrant to search appellant's residence. During the search, the police discovered blood stains inside and outside of the house.

On July 28, 2014, appellant called the police and advised that he would come to the police station to discuss "Grubb being missing." Later that day, appellant was arrested pursuant to a warrant unrelated to Grubb's disappearance. While he was in custody, the police informed appellant that he had been arrested on a weapons charge, but that they did not want to question him about that charge, but rather about Grubb's disappearance. After appellant was advised of his *Miranda* rights, he signed a form indicating that he agreed to waive those rights. Appellant then spoke to the detectives regarding Grubb.

On July 29, 2014, police conducted a search for Grubb. Police discovered her remains wrapped in a blue tarp "within two, two and a half miles" of appellant's residence. The medical examiner later concluded that the manner of Grubb's death was homicide. Appellant was informed that he

was being charged with the murder of Grubb. He then stated that Grubb's death was an accident that occurred when she fell in the bathroom.

On April 11, 2016, appellant's trial began with the *voir dire* of prospective jurors. In the afternoon session of the first day, prosecutors informed the trial court that a prospective juror had voiced a concern about members of appellant's family who were sitting in the jury box. The trial court did not address the issue at that time, but the next day, after the clerk informed the trial judge that one of appellant's other sons wished to observe the proceedings, the State moved to exclude appellant's family from the courtroom. The trial court granted the State's request without considering any alternatives to the exclusion. During the remainder of the *voir dire* and jury selection process, defense counsel repeatedly objected that appellant's family was improperly excluded from the courtroom, and therefore, appellant's Sixth Amendment right to a public trial had been violated. Although it is not clear from the record when exactly appellant's family was allowed to enter the courtroom, it is clear that the family was excluded for a portion of the *voir dire* and for the entire selection and swearing-in of the jury.

On April 19, 2016, appellant was convicted of second degree murder. He was later sentenced to thirty years of incarceration, which was affirmed by a three-judge review panel. This appeal followed.

Held: Reversed and remanded for a new trial.

First, the Court considered whether, under the test articulated in *Kelly v. State*, 195 Md. App. 403 (2010), *cert. denied*, 417 Md. 502, *cert. denied*, 563 U.S. 947 (2011), the courtroom closure at issue in this case was *de minimus* and thus did not implicate the protections of the Sixth Amendment. In holding that the closure was not *de minimus*, the Court examined the three factors identified in *Kelly*; "[1] the length of the closure, [2] the significance of the proceedings that took place while the courtroom was closed, and [3] the scope of the closure, *i.e.*, whether it was a total or partial closure."

On the first factor, the Court determined that the closure here, which lasted "between three and three and one-half hours[,]" was distinguishable from the "two to three hour" closure found to be *de minimus* in *Kelly*, and was more analogous to the closure of the courtroom for an entire morning in *Watters v. State*, 328 Md. 38 (1992), *cert. denied*, 507 U.S. 1024 (1993), which was held not to be *de minimus*. The Court additionally noted that, when evaluating this factor, courts should consider the length of the closure in light of the significance of the proceedings that occurred during the closure. The Court therefore concluded that the first factor weighed against a finding that the closure was *de minimus*.

Regarding the second factor, the Court noted that the selection and swearing-in of the jury are vital proceedings in our judicial system and that the presence of the public at these proceedings promotes the public confidence in the fair and impartial administration of justice. The Court examined the ancient roots of public jury selection and the Supreme Court's more recent cases

regarding the use of peremptory challenges to determine that "the public observation of jury selection furthers the Sixth Amendment's purpose to enhance both the basic fairness of the criminal trial and the appearance of fairness[.]" After a similar inquiry into the history of the swearing-in of the jury, the Court observed that the public swearing-in of the jury impresses upon each juror the solemn duty that he or she is assuming. The Court therefore concluded that the second factor weighed heavily against a finding that the closure here was *de minimus*.

On the third factor, the Court observed that the record is silent as to whether all members of the public or only members of appellant's family were excluded from the courtroom. The Court declined to adopt a *de facto* rule that such a silent record implies either a total or partial closure, and concluded that this factor was neutral.

After holding that the closure here was not *de minimus*, the Court next ruled that the closure was not justified under the test articulated by the Supreme Court in *Waller v. Georgia*, 467 U.S. 39 (1984). The Court focused its analysis on the third factor; that "the trial court must consider reasonable alternatives to closing the proceeding[.]" The Court noted that the trial court here did not consider any alternatives to closing the courtroom. Relying on the Supreme Court's opinion in *Presley v. Georgia*, 558 U.S. 209 (2010), the Court concluded that the trial court's failure to consider any alternatives to closure alone rendered the closure unjustified.

Finally, the Court considered whether the statements that appellant made to the police regarding Grubb should be excluded because, according to appellant, his waiver of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) was knowing and voluntary only as to his answers regarding the weapons charge. The Court, relying on the Supreme Court's decision in *Colorado v. Spring*, 479 U.S. 564 (1987) and its prior decision in *Alston v. State*, 89 Md. App. 178 (1991), held that whether a suspect is aware of all possible topics of questioning is irrelevant to determining whether the waiver of one's Miranda rights was knowing and voluntary, and therefore, appellant's waiver was knowing and voluntary. Accordingly, the trial court properly denied appellant's motion to suppress his statements to the police.

Return to ToC

Steven Hogan v. State of Maryland, No. 160, September Term 2018, filed March 29, 2019. Opinion by Moylan, J.

https://mdcourts.gov/data/opinions/cosa/2019/0160s18.pdf

STATE V. HICKS – THE 180-DAY RULE – "GOOD CAUSE" FOR THE HICKS POSTPONEMENT

SIXTH AMENDMENT SPEEDY TRIAL – A MULTI-FACTORED ANALYSIS – LENGTH OF DELAY: A THRESHOLD CONSIDERATION VS. A FACTOR ON THE ULTIMATE MERITS – REASON FOR THE DELAY

Facts:

On July 14, 2016, the appellant, Steven Hogan, called 911 and asked that Police Sergeant Radcliffe Darby respond to his home. Committed to another assignment, Sergeant Darby was unable to do so. In his stead, Sergeant Richard Lambert responded to the call. When Sergeant Lambert arrived at Hogan's house, he observed a seemingly distraught Hogan holding what appeared to be a cell phone. Hogan explained that he had called the police in the hope that Sergeant Darby would return property that previously had been confiscated. In the process of doing so, Hogan added, "all Darby gave [me] was this … Derringer." Sergeant Lambert realized that the object that Hogan was holding was, in fact, a handgun and attempted to secure the weapon, but to no avail. Following the arrival of backup, including Sergeant Darby, Hogan was tased. As he fell, a .38 Derringer revolver containing two rounds fell from his pocket. He was charged with, *inter alia*, unlawful possession of a firearm and unlawful possession of ammunition.

Defense counsel entered his appearance, along with a demand for a speedy trial, on August 11, 2016. On January 17, 2017, the day initially scheduled for trial, defense counsel requested that the court (i) order a psychiatric evaluation of Hogan and (ii) schedule a hearing to determine whether Hogan was competent to stand trial. Over Hogan's objections, the court granted the defense request. After having been informed on April 5, 2017, that a competency evaluation had been conducted, the court scheduled a competency hearing for May 11, 2017. At the conclusion of that May 11 hearing, the court found Hogan incompetent to stand trial.

Following another psychiatric evaluation conducted during the summer of 2017, Hogan was competent to stand trial. Upon receiving Dr. Hightower's report on September 25, 2017, the court scheduled another competency hearing for October 3, 2017. That competency hearing was twice postponed (because of scheduling conflicts on the parts of the State and the defense), and ultimately was held on December 5, 2017. At the conclusion of that hearing, the court deemed Hogan competent to stand trial. Hogan was tried the following day, and was convicted of unlawful possession of both a firearm and ammunition.

Held: Affirmed.

Hogan's appeal of the court's incompetency ruling is moot. Hogan's incompetence to stand trial constituted good cause to delay trial beyond the *Hicks* 180-day deadline. Given that the delay in Hogan's trial was (i) requested by defense counsel (ii) for the exclusive benefit of the defendant, Hogan was not denied his Sixth Amendment right to a speedy trial. Hogan failed to preserve for appellate review his contention that the State was permitted to make an improper rebuttal argument to the jury. Finally, the court properly instructed the jury as to the *mens rea* for unlawful possession.

Hogan first contends that the court erroneously ruled that he was incompetent to stand trial. Hogan first appealed from the circuit court's May 11 finding that he was incompetent to stand trial on August 3, 2017. In an unreported opinion filed on April 27, 2018, the Court of Special Appeals, held that this issue was rendered moot by the circuit court's December 5, 2017, ruling that Hogan was competent. That prior holding is the established law of the case.

Next, Hogan contends that he was denied his right to a speedy trial pursuant to Maryland Code, Criminal Procedure Article ("CP") § 6–103(a) and *State v. Hicks*. CP § 6–103(a) provides that "[t]he date for trial of a criminal matter in the circuit court … may not be later than 180 days after the earlier of" "(i) the appearance of counsel; or (ii) the first appearance of the defendant before the circuit court[.]" "[D]ismissal of the criminal charges is the appropriate sanction where the State fails to bring the case to trial within the … period prescribed by the rule and where '[good] cause' justifying a trial postponement has not been established." *State v. Hicks*, 285 Md. 310, 318, 403 A.2d 356 (1979). The Court of Special Appeals reviews such a good cause determination for abuse of discretion. *Thompson v. State*, 229 Md. App. 385, 398, 145 A.3d 105 (2016).

CP § 3–104(a) provides that "[i]f … the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial." *Thompson v. State, supra*, is controlling in this case. There, the Court of Special Appeals held that a court's compliance with CP § 3–104(a) "constitutes good cause to delay the trial beyond the Hicks time limit." *Id*. at 399. *See also State v. Cook*, 322 Md. 93, 101, 585 A.2d 833 (1991). Consistent with *Thompso*n, the Court held that Hogan's incompetency constituted good cause to delay his trial until after the *Hicks* deadline.

Hogan further contends that he was denied his Sixth Amendment right to a speedy trial. In determining whether a criminal defendant has been deprived of his right to a speedy trial, the Court first considers whether the "length of delay" between the date of arrest and the date of trial is sufficiently lengthy as to be "presumptively prejudicial." If the Court so finds, it then applies a four-factor balancing test, considering "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

"Length of delay" serves two distinct functions in a speedy trial analysis. Initially, it constitutes a procedural triggering mechanism. Only if the "length of delay" between arrest and trial is "presumptively prejudicial" will the Court consider the "length of delay" as a factor on the merits. In assessing the "length of delay" in this latter sense, the Court considers the "period of time that may be chargeable to the State or to the court system as true 'delay.'" *Ratchford v. State,* 141 Md. App. 354, 360, 785 A.2d 826 (2001).

In this case, 16 months and 22 days elapsed between Hogan's arrest and his trial. Such a delay is sufficiently lengthy as to be "presumptively prejudicial," thereby triggering the four-factor balancing test. As a factor on the merits, the "length of delay" "is heavily influenced by the other three factors, particularly that of 'reasons for the delay.'" *Id*. at 359. In this case, the 10 month 19 day incompetency episode was both requested by the defense and was exclusively for the benefit of the defendant. Accordingly, the delay was chargeable solely to the defense. That the defendant himself protested the delay is inconsequential. Tactical disagreements between defendant and defense counsel do not transform the latter into either the State or the court, particularly where, as here, the defendant was the exclusive beneficiary of the delay.

Hogan further contends that the State was permitted to make an improper rebuttal argument to the jury, claiming that the State "flagrantly lied" to the jury about the state of the evidence. Although Hogan raised this objection during the hearing on his Motion For A New Trial, his doing so did not preserve the issue for appellate review. The primary function of a timely objection is to permit a court to correct an error committed before the jury prior to a verdict's having been rendered. No such objection was made in this case. The Court of Special Appeals declined, moreover, to notice plain error.

Finally, Hogan contends that the court erroneously refused to give his requested jury instruction according to which a defendant cannot be convicted of illegally possessing a firearm if that defendant lacked "wrongful intent"—to wit, if he possessed the firearm with the exclusive intent of relinquishing it to law enforcement. The *mens rea* for unlawful possession, however, is solely the defendant's awareness that he is in actual possession of the item in question.

Return to ToC

Douglas C. Myers v. Board of Commissioners for Carroll County, et al., No. 2305, September Term 2017, filed February 27, 2019. Opinion by Wright, J.

https://www.courts.state.md.us/data/opinions/cosa/2019/2305s17.pdf

SUBJECT MATTER JURISDICTION – ALTERING COUNTY BORDERS

Facts:

On April 26, 2017, Douglas C. Myers ("Myers") filed a Complaint for Declaratory Judgment and Injunctive Relief against the Board of Commissioners for Carroll County, Maryland, and Baltimore County, Maryland ("the Counties"), in the Circuit Court for Carroll County. Myers alleged that the Counties "illegally and erroneously changed the boundary line established by the General Assembly in 1835." He requested that the circuit court declare (1) that any boundary line other than that established in 1835 be declared ineffective, and (2) that the "location of the boundary line [is] in the same position as established by the General Assembly in 1835."

The Counties filed motions to dismiss Myers's complaint, and a hearing on the motions was held on September 26, 2017. At the hearing the Counties averred that the circuit court did not have jurisdiction over Myers's claims. On December 5, 2017, the circuit court issued an order granting the motions to dismiss, wherein the court found that it "[had] no jurisdiction to grant [the] relief [sought by Myers,] as such relief must be granted by the General Assembly." Myers subsequently appealed the circuit court's order to this Court.

Held: Affirmed.

The Court of Special Appeals affirmed the judgment of the Circuit Court for Carroll County. The Court held that "Article 13[, Section 1] of the Maryland Constitution grants the General Assembly the *exclusive authority* to create new counties and to alter boundary lines between existing counties[.]" The Court therefore determined that the relief Myers sought could be afforded only by the legislature, and concluded that the circuit court correctly found that it did not have jurisdiction over Myers's Complaint.

Return to ToC

Gables Construction, Inc. v. Red Coats, Inc., et al., No. 907, September Term 2017, filed February 27, 2019. Opinion by Wright, J.

https://mdcourts.gov/data/opinions/cosa/2019/0907s17.pdf

UCATA – THIRD PARTY CONTRIBUTION – CONTRACTUAL WAIVERS – WAIVERS OF SUBROGATION

Facts:

In the overnight hours between March 31, 2014, and April 1, 2014, thirty days short of certification for occupancy, a fire damaged a 139-unit apartment building that was nearing completion; the building sustained damages over $22,000,000.00. The Project's owner, Upper Rock sued Red Coats, Inc., a security and fire watch company, for gross negligence and breach of contract. In a settlement, Red Coats paid Upper Rock $14,000,000.00 total, $4,000,000.00 of which it paid out-of-pocket, and $10,000,000.00 was paid by Red Coats' insurer.

Red Coats then sued the Project's general contractor, Gables Construction, Inc., ("GCI") seeking contribution under the Maryland Uniform Contribution Among Joint Tort-Feasors Act ("UCATA"). GCI alleged a waiver of subrogation in a contract it signed with Upper Rock protected it from Red Coats' third-party contribution claim.

The case came before the Circuit Court for Montgomery County in April 2016. The circuit court found that a waiver of subrogation in the contract between GCI and Upper Rock did not limit GCI's contribution. A jury determined that GCI was a joint-tortfeasor, found it liable for contribution, and rendered a verdict of damages in the amount of $7,000,000.00, half of the damages owed to Upper Rock.

Held:

The Court of Special Appeals affirmed in part and reversed in part the circuit court's judgments.

On the issue of whether GCI was a joint tortfeasor under UCATA, the Court held that GCI was, in fact, a joint tortfeasor and was liable under the UCATA for contribution. The Court held that a contractual waiver of subrogation, due to its distinction from other bars to contribution under the UCATA, did not prevent Red Coats' contribution claim against GCI. However, the Court held that because Red Coats contractually waived claims against GCI to the extent covered by insurance, GCI's contribution was limited to $2,000,000.00. As such, the Court held that the jury erred in rendering damages of $7,000,000.00 to Red Coats.

Return to ToC

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated March 1, 2019, the following attorney has been disbarred by consent:

LESLIE D. SILVERMAN

*

By an Opinion and Order of the Court of Appeals dated March 6, 2019, the following non-admitted attorney is excluded from the privilege of practicing law in this State:

MELINDA MALDONADO

*

By and Order of the Court of Appeals dated March 11, 2019, the following attorney has been disbarred by consent:

TONI S.L. HOLCOMB

*

By an Opinion and Order of the Court of Appeals dated March 29, 2019, the following attorney has been disbarred:

JON A. LEFKOWITZ

*

By an Order of the Court of Appeals dated March 29, 2019, the following attorney has been indefinitely suspended:

BRANDI SHANEE NAVE

*

Return to ToC

*

This is to certify that the name of

REGINA WANJIRU NJOGU

has been replaced upon the register of attorneys in this State as of March 29, 2019.

*

Return to ToC

UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:

https://mdcourts.gov/appellate/unreportedopinions

	Case No.	*Decided*
101 Geneva, LLC v. Murphy	0887 *	March 4, 2019
A		
Anderson, Russell v. State	2535 *	March 7, 2019
B		
Bailey, Phillip S. v. Lloyd	2486 *	March 19, 2019
Barclay, Darlene v. Castruccio, Sadie M.	2488 *	March 21, 2019
Boskent, Amanda v. Belvedere Condo. Ass'n.	2581 *	March 5, 2019
Bouma, Laura v. State	1258 *	March 1, 2019
Bowers, Ramece v. State	2072 *	March 14, 2019
Boyer, Dewayne v. State	0777 *	March 13, 2019
Burnette, Michelle v. M-NCPPC Police	2258 *	March 4, 2019
Burrison, Lakeisha Ebony v. State	0805	March 22, 2019
Byrns, Floyd Hamilton, Jr. v. State	0341	March 8, 2019
C		
Charles, Anthony M. v. State	1994 *	March 1, 2019
Collins, Shardai v. Haynes	1154	March 7, 2019
Comptroller of the Treasury v. Leadville Insurance	2184 *	March 26, 2019
Concerned Citizens v. Montgomery Cnty. Planning Bd.	2568 *	March 14, 2019
D		
Davis, Ralph Edward v. State	0409	March 7, 2019
Dennis, Orlando Grant v. State	0067	March 5, 2019
Diaby, Mohamed v. Berliner Specialty Distributors	2024 *	March 1, 2019
E		
E.S. v. S.S.	0363	March 12, 2019

September Term 2018
* September Term 2017
** September Term 2015

E.S. v. S.S.	3103	March 12, 2019
Eberhardt, Brian Warren v. State	0207	March 1, 2019
F		
Ferensic, Charlene A. v. Hawkins	2207 *	March 4, 2019
Fitchett, Adrian v. State	0003 *	March 18, 2019
Fleeger, Robert F., Jr. v. State	2286 *	March 4, 2019
Fuquen, Luis v. Everitt	0313	March 5, 2019
G		
Gibson, Jamal A. v. State	0256	March 21, 2019
Gilbert, Larry v. State	0273	March 18, 2019
Gipson, Dashonn v. State	0468	March 4, 2019
Gladden, Keith v. State	1814 *	March 13, 2019
Glanden, Christopher Eric v. State	0006	March 21, 2019
Glanden, Christopher Eric v. State	0007	March 21, 2019
Glanden, Christopher Eric v. State	0008	March 21, 2019
Glanden, Christopher Eric v. State	1956 *	March 21, 2019
Goloko, Abou v. State	0441	March 14, 2019
H		
Hairston, Gerald W. v. State	2063 *	March 8, 2019
Halle Development v. Anne Arundel Co.	1298 *	March 22, 2019
Hawkins, Yolanda v. Hawkins	2276 *	March 21, 2019
Hilton, Robert Berris v. State	0192	March 5, 2019
I		
In re: D.J.	2146	March 13, 2019
In re: Guardianship of A.M. & A.M.	2475 *	March 19, 2019
In re: J.H.	0858	March 20, 2019
In re: J.H.	1748 *	March 20, 2019
In re: J.M.	0404	March 20, 2019
In re: K.W.	1066	March 29, 2019
In re: M.S., A.S., and M.S.	2126 *	March 26, 2019
In re: M.W.	0592	March 1, 2019
In re: R.V., Jr.	2353	March 19, 2019
In the Matter of Anderson	2446 *	March 5, 2019
In the Matter of Dr. Twigg	2510 *	March 26, 2019
In the Matter of Pessoa Construction	0056	March 22, 2019
Ireland, Peter v. Riffey	2264 *	March 4, 2019

September Term 2018
* September Term 2017
** September Term 2015

J.

Jackson, Edward, III v. State	2337 **	March 18, 2019
James, Tevin v. State	0260	March 1, 2019
Jeffreys, Michael Merrell v. State	0186	March 7, 2019
Jerbi, Monica v. Titus	2569 *	March 20, 2019
Jones, Dionne R. v. McReynolds	1430 *	March 19, 2019
Jones, Thomas Duane v. State	2117 *	March 26, 2019

K

Kelleher, Jesse v. Montgomery Cnty.	2231 *	March 19, 2019
Ki., et al. v. Ko., et al.	0913	March 22, 2019
Kirkland, Miller T. v. State	0866 *	March 26, 2019
Knight, Antoinettia v. Brown	1916 *	March 14, 2019

L

Leeth, Rufus K., Jr. v. Leeth	0957 *	March 4, 2019
Link, Michael E. v. Link	2144 *	March 7, 2019

M

M.F.R.V. v. J.R.M.	2495 *	March 15, 2019
Malinowski, Robert v. Malinowski	2224 *	March 12, 2019
McCrea, Nicole Rena v. Devan	1320 *	March 13, 2019
Mercer, Maurice v. State	0604	March 7, 2019
Montgomery Cnty. v. Fones	1026 *	March 14, 2019
Mr. Lucky, LLC v. Calvert Cnty.	2192 *	March 13, 2019

O

Ojong, Patrick v. Hyattsville City Police	2459 *	March 19, 2019
Osorio-Vasquez, Dimas v. State	1908 *	March 20, 2019

P

Panghat, Lijo v. Univ. of Md., Baltimore	2236 *	March 5, 2019
Perkins, Nicholas Allen v. State	1408 *	March 26, 2019
Phillips, Yvette v. Dept. of Human Resources	2235 *	March 26, 2019

R

Royzman, Pavel v. Royzman	1888 *	March 4, 2019

S

Sayles, Edgar Lorenzo v. State	2435 *	March 5, 2019
Shortz, Thaddeus Casimir v. State	0647	March 11, 2019

September Term 2018
* September Term 2017
** September Term 2015

Return to ToC

Sibley, Montgomery Blair v. Littler Mendelson, P.C.	1808 *	March 26, 2019
Smith, Jerry Wayne, Jr. v. State	1439 *	March 14, 2019
Smith, Joshua v. State	2558 *	March 5, 2019
Smith, Thomas B. v. Credit Acceptance	2373 *	March 19, 2019
Spencer, Derek Antoine Collins v. State	0153	March 7, 2019
T		
Terrell, Chastian Devon v. State	1705 *	March 14, 2019
Tunnell, Anthony Marlin v. State	2061 *	March 22, 2019
V		
Vannison, Donnell M., Sr. v. State	0242	March 20, 2019
Vaughn, Donta Terry v. State	1603 *	March 14, 2019
Veres, Edward v. McLaughlin	1275 *	March 4, 2019
W		
Ward, Diandra Noel v. State	2135 *	March 11, 2019
Weaver, Charles Lee, Jr. v. Weaver	0739 *	March 1, 2019
Whitaker, Joshua v. Mayor & City Council of Baltimore	1675 *	March 26, 2019
Wright, William Jamal v. State	2455 *	March 22, 2019
Y		
Yesudian, Daniel Raj, Jr. v. State	0131	March 7, 2019

September Term 2018
* September Term 2017
** September Term 2015