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MARYLAND UNIFORM ACT TO SECURE ATTENDANCE OF WITNESSES FROM WITHOUT STATE IN CRIMINAL PROCEEDINGS – MD. CODE ANN., CTS. & JUD. PROC. (1973, 2013 REPL. VOL.) § 9-304(a) – WAIVER OF ISSUE AS TO VIOLATION

Facts:

In the Circuit Court for Baltimore County ("the circuit court"), the State, Respondent, charged Alexander Bennett ("Bennett") with first-degree murder and other crimes. The State filed an application pursuant to Md. Code Ann., Cts. & Jud. Proc. (1973, 2013 Repl. Vol.) ("CJ") § 9-303 of the Maryland Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, seeking to secure the attendance of Grant Agbara Lewis ("Lewis"), Petitioner, a Colorado resident, as a witness at Bennett's trial. The circuit court certified that Lewis was a material witness.

A Colorado court issued an order in which it scheduled a hearing, at which Lewis would be required to show cause why he should not be compelled to testify at Bennett's trial. In the Colorado court, Lewis filed an "Acceptance of Service and Waiver of Hearing," in which he waived his right to a show cause hearing and agreed to testify at Bennett's trial.

On the day on which Bennett's trial was scheduled to begin, Bennett pled guilty in exchange for a sentence of life imprisonment with all but thirty years suspended. On the same day, Bennett agreed to testify about his involvement in the murder and made a proffer in which he implicated Lewis as an accomplice in the murder. After an investigation, Lewis, who had been in Maryland to testify against Bennett, was arrested. At the time of his arrest, Lewis did not assert the exemption from arrest under CJ § 9-304(a).

In the circuit court, the State charged Lewis with first-degree murder and conspiracy to commit first-degree murder. The evidence adduced at trial showed that, in 2000, Lewis and Bennett devised a plan to make money that involved placing online advertisements for "cleaning services," a cover term for contract killings. According to Lewis, the pair planned to defraud potential customers by taking money and not actually performing any murders. By contrast, according to Bennett, there was no intent to deceive; he and Lewis intended to commit murder in exchange for payment.

At trial, as a witness for the State, Bennett testified that Lewis was responsible for designing and placing the online advertisement. In or before Spring 2000, as a result of the internet advertisement, a man living in Dundalk contacted Lewis and requested a contract killing of his roommate and girlfriend for $60,000. The man provided his address to Lewis, who gave Bennett a map from Baltimore/Washington International Airport ("BWI") to the man's house. Using a ticket that Lewis had bought, Bennett flew from Colorado to BWI.

Bennett traveled from BWI to Dundalk, where he stayed for weeks. Two or three times a day, Bennett called Lewis via pay phones, asking whether the man had e-mailed Lewis, or whether Lewis had any information to share. One day, the man e-mailed Lewis to arrange a meeting with Bennett. At the meeting, the man told Bennett that, at some point, he would leave a key outside the house so that Bennett could enter the house and kill the man's girlfriend.

One day, Bennett telephoned Lewis, who said that the man had e-mailed him, stating that he would drop off his girlfriend in about twenty minutes and that a key was outside of the house. Bennett went to the man's house, found the key, entered the house, and waited. After the man's girlfriend entered the house, Bennett choked her until she become unconscious, then cut her throat with a knife. Bennett left the house, telephoned Lewis, and informed him that he had committed the murder. Lewis told Bennett that he was using a satellite to ensure that no law enforcement officers were in the area. After returning to Colorado, Bennett told Lewis about the killing in more detail.

As a witness on his own behalf, Lewis testified that he and Bennett developed a "silly scam" in which they would accept money for contract killings without following through. Lewis acknowledged that he created an online advertisement for "professional and discreet cleaning services," and that in response to the online advertisement, the man offered to pay $20,000 up front, and another $20,000 upon completion, for a contract killing of his girlfriend. The man e-mailed Lewis to provide his address, and Bennett flew to Baltimore, where he was supposed to collect the up-front payment from the man. Once Bennett was in Baltimore, over time, Lewis heard that the man wanted to lower the amount that he would pay up front, and eventually that the man wanted to cancel the contract killing. Lewis also heard from Bennett that he accosted and threatened the man, who then agreed to proceed with the contract killing. After Bennett returned to Colorado, he told Lewis that he had entered the man's house, where he planned to extort money from him. According to Lewis, Bennett said that, after the man's girlfriend entered the house instead, Bennett panicked and killed her.

A jury found Lewis guilty of first-degree murder and conspiracy to commit first-degree murder. Lewis did not allege, pretrial or during trial, that his arrest violated the Maryland Uniform Act to Secure the Attendance of Witnesses from Without State in Criminal Proceedings.

On appeal, for the first time, Lewis raised the issue of a violation of CJ § 9-304(a), which states: "If a person comes into this State in obedience to a summons directing him [or her] to attend and testify in this State he [or she] shall not while in this State pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his [or her] entrance into this State under the summons." Specifically, before the Court of Special Appeals, Lewis contended that the State's prosecution of him violated CJ § 9-304(a), and argued that, accordingly, the circuit court lacked subject-matter jurisdiction and improperly exercised personal jurisdiction over Lewis.

The Court of Special Appeals disagreed and affirmed the convictions, holding that the circuit court had subject-matter jurisdiction and properly exercised personal jurisdiction, and that Lewis had waived his challenge to the exercise of personal jurisdiction by failing to raise it in the circuit court. Lewis filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held that an out-of-State witness who enters Maryland to testify at a trial in a criminal case pursuant to a summons under the Maryland Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, and who is then arrested and charged with a crime in Maryland, waives any issue as to a violation of CJ § 9-304(a) by failing to raise the issue pretrial as required by Maryland Rule 4-252.

Maryland Rule 4-252(a) identifies certain matters, such as "[a] defect in the institution of the prosecution[,]" and provides that such "matters shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise[.]" Maryland Rule 4-252(d) unequivocally states that, other than a motion asserting failure of the charging document to show jurisdiction in the court or to charge an offense, any "defense, objection, or request capable of determination before trial without trial of the general issue, shall be raised by motion filed at any time before trial."

The Court concluded that Maryland Rule 4-252(a)(1) requires that an alleged violation of CJ § 9-304(a) be raised pretrial, as Maryland Rule 4-252 requires that a motion alleging a defect in the institution of the prosecution be filed within the timeframe specified under Maryland Rule 4-252(b). Instituting prosecution in a criminal case involves, among other things, the arrest of the defendant or issuance of process to secure the defendant's appearance in the matter. In addition to the requirements of Maryland Rule 4-252(a)(1) and (b), Maryland Rule 4-252(d) applies. The matter of whether CJ § 9-304(a) has been violated is capable of determination before trial and does not involve trial of the general issue, as the facts that would be relevant in a determination of such a matter are wholly independent of the alleged criminal conduct. Specifically, the facts

that would be at issue in deciding whether CJ § 9-304(a) has been violated include: whether the defendant received a summons pursuant to the Maryland Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings; whether the defendant entered Maryland pursuant to such summons; and whether the defendant was arrested or served with process "in connection with matters which arose before his [or her] entrance into this State under the summons." Because a trial court is capable of determining before trial whether a violation of CJ § 9-304(a) occurred, Maryland Rule 4-252(d) requires the defendant to raise the issue in a pretrial motion; if the defendant fails to do so, the issue is waived.

The Court determined that, independent of the requisites of Maryland Rule 4-252(a)(1), (b) and (d), where, as here, a defendant not only fails to raise an alleged violation of CJ § 9-304(a) in a pretrial motion, but also fails to raise the issue at any time in the trial court, a defendant may forfeit appellate review of the matter under Maryland Rule 8-131(a), which provides, in pertinent part, that "the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Allowing a defendant to raise the issue of an alleged violation of CJ § 9-304(a) for the first time on appeal would enable defendants to refrain from raising the issue, wait to see the outcome of trial, and, if the defendant is convicted, attempt to secure reversal by raising the alleged violation of CJ § 9-304(a) for the first time on appeal.

The Court explained that it is fair to require a defendant from outside Maryland to assert an issue as to a violation of CJ § 9-304(a) before trial. Given that such a defendant would have entered Maryland pursuant to a summons for an out-of-State witness and then been charged with a crime, the issue of whether the defendant was arrested or served with process in violation of CJ § 9-304(a) would have been known, or should have been known, to the defendant well in advance of trial, thereby giving the defendant an opportunity to raise the matter in a pretrial motion pursuant to Maryland Rule 4-252.

The Court rejected Lewis's contention that the circuit court had the burden to *sua sponte* raise the issue of a violation of CJ § 9-304(a) because the same circuit court judge issued the Certificate for Attendance of Witness from Colorado State and presided over Lewis's trial. The Court saw no valid reason, even where the same judge issues the summons and presides at trial, to treat an alleged violation of CJ § 9-304(a) differently from any other defense that a defendant, not a trial court, is obligated to raise prior to trial under Maryland Rule 4-252.

The Court rejected Lewis's contention that its holding was inconsistent with Md. Code Ann., Crim. Proc. (2001, 2008 Repl. Vol.) ("CP") § 9-124, which is part of the Uniform Criminal Extradition Act, and requires an express, written waiver of service of a warrant for extradition; according to Lewis, an express waiver of any issue as to a violation of CJ § 9-304(a) is also required. The Court explained that entering Maryland pursuant to a summons, and then being arrested or served with process in connection with a crime in Maryland, is not comparable to being extradited to Maryland. Because Lewis was not extradited to Maryland, CP § 9-124(a)(1)'s requirement of an express waiver did not apply.

Applying its holding to the case's facts, the Court concluded that Lewis waived the issue of a violation of CJ § 9-304(a) by failing to raise the issue pretrial in the circuit court, whether in a motion pursuant to Maryland Rule 4-252 or otherwise; instead, Lewis raised the issue for the first time on appeal. The Court declined Lewis's request for the Court to exercise its discretion, pursuant to Maryland Rule 8-131(a), to review the unpreserved issue. There was no indication that there were recurring violations of CJ § 9-304(a). There was not a need to provide guidance for purposes of a new trial, given that the issue concerning the propriety of Lewis's arrest did not involve resolution of matters that occurred during trial. Finally, there was no need to offer assistance for purposes of a collateral attack on Lewis's convictions, given that, to prevail on a claim of ineffective assistance of counsel, Lewis would have to satisfy the "prejudice" prong under *Strickland v. Washington*, 466 U.S. 668, 694 (1984)—*i.e.*, Lewis would have to prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This would be difficult to do because, if Lewis had not been arrested in Maryland and had returned to Colorado, the State would have been able to initiate extradition proceedings, and prosecute Lewis in the same manner that it did at his trial in this case.

Finally, the Court concluded that the circuit court had personal jurisdiction over Lewis by virtue of his physical presence before the circuit court. Under the *Ker-Frisbie* Doctrine, a trial court has personal jurisdiction over a defendant in a criminal case where the crime was committed within the trial court's jurisdiction and the defendant is physically present before the trial court, regardless of how the defendant was brought before the trial court. Any unlawful act in arresting Lewis in Maryland and bringing him before the circuit court would not have undermined the existence of the circuit court's jurisdiction.

Michael M. Johnson v. State of Maryland, No. 38, September Term 2016, filed April 26, 2017. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2017/38a16.pdf

CRIMINAL LAW – TRIAL – PROVINCE OF COURT AND JURY IN GENERAL – DIRECTION OF VERDICT – OF ACQUITTAL – NECESSITY, REQUISITES AND TIME OF MOTION

CRIMINAL LAW – TRIAL – ISSUES RELATING TO JURY TRIAL – DISCHARGE OF JURY WITHOUT VERDICT; MISTRIAL – DECISION OR ORDER; FINDINGS

Facts:

During a second trial for a second-degree murder charge in the Circuit Court for Baltimore City, Michael M. Johnson moved for mistrial after the State failed to make required redactions of a wiretapped cellular phone conversation that was presented to the jury. On the same day, the State rested its case and Johnson timely moved for judgment of acquittal pursuant to Maryland Rule 4-324. The trial judge granted Johnson's motion for mistrial and discharged the jury, but failed to rule on the motion for judgment of acquittal. Weeks later, after Johnson's retrial had been scheduled, the trial judge revoked his grant of the mistrial and granted the motion for judgment of acquittal. The State reindicted Johnson for second-degree murder, in response to which Johnson argued that his retrial was barred under double jeopardy principles in light of the trial judge's acquittal. The trial judge dismissed the indictment, and the State appealed the dismissal to the Court of Special Appeals. The Court of Special Appeals reversed the dismissal, determining that the principles of double jeopardy did not bar Johnson's retrial because the trial judge could not acquit Johnson after declaring a mistrial and discharging the jury.

Held: Affirmed.

The Court of Appeals held that the trial judge acted without authority in acquitting Johnson outside the purview of Maryland Rule 4-324 and after granting Johnson's motion for mistrial and discharging the jury. As a result, the acquittal did not implicate federal Constitutional and Maryland common law principles of double jeopardy, and reprosecution was not barred. In response to Johnson's claim that the trial court never lost "fundamental jurisdiction" to grant his motion for judgment of acquittal, even in error, the Court reasoned that even when a trial judge has subject matter jurisdiction and personal jurisdiction over a case, the grant of acquittal outside the scope of Maryland Rule 4-324 is not a mere procedural irregularity but an act without authority. The Court concluded that the declaration of a mistrial and discharge of the jury obviated the trial judge's authority to enter a judgment of acquittal.

Darrell Bellard v. State of Maryland, No. 72, September Term 2016, filed March 31, 2017. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2017/72a16.pdf

FIRST-DEGREE MURDER – LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE – SENTENCING DETERMINATION – SENTENCING SCHEME – MD. CODE ANN., CRIM. LAW (2002, 2012 REPL. VOL., 2016 SUPP.) § 2-304 – CONSTITUTIONALITY

Facts:

Darrell Bellard ("Bellard"), Petitioner was charged in the Circuit Court for Prince George's County ("the circuit court") with four counts of first-degree murder and related offenses arising out of crimes which resulted in the deaths of two women and two children, all of whom had been shot in the head. On February 4, 2011, the State filed a notice of intent to seek the death penalty. Prior to the start of Bellard's trial, in 2013, the General Assembly passed Senate Bill 276, repealing the death penalty, and on May 2, 2013, the Governor of Maryland approved Senate Bill 276. The act was to take effect on October 1, 2013.

On June 3, 2013, in response to the pending repeal of the death penalty, the State filed in the circuit court a "Notice to Withdraw Intent to Seek Death Penalty." On June 6, 2013, the State filed a "Notice of Intent to Seek Sentence of Imprisonment for Life without Possibility of Parole" as to all four counts of first-degree murder.

On March 5, 2014, Bellard filed a "Notice of Defendant's Election to be Tried by Jury and, if Convicted of First[-]Degree Murder, to be Sentenced by Jury. On April 4, 2014, Bellard filed a motion to strike the State's notice of intent to seek life imprisonment without the possibility of parole, contending that the amended version of Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol., 2016 Supp.) ("CR") § 2-304 requires a jury to determine whether to impose a sentence of life imprisonment without the possibility of parole. Bellard also argued that a sentence of life imprisonment without the possibility of parole would violate his rights under the United States Constitution and the Maryland Declaration of Rights.

On April 7, 2014, the State filed a motion to strike Bellard's notice of election to be sentenced by jury, contending that, in repealing the death penalty, the General Assembly did not intend to create a statutory right for a defendant to have a jury determine whether to impose a sentence of life imprisonment without the possibility of parole.

On April 7, 2014, the circuit court conducted a hearing, at which it heard argument on the motions to strike. At the conclusion of the hearing, the circuit court orally ruled from the bench, denying Bellard's motion to strike the State's notice and striking, or denying, Bellard's notice of election to be sentenced by a jury.

The case proceeded to trial, and a jury convicted Bellard of four counts of first-degree murder, four counts of use of a handgun in the commission of a felony or crime of violence, and three counts of conspiracy to commit murder. On June 27, 2014, the circuit court sentenced Bellard, in relevant part, to four consecutive sentences of life imprisonment without the possibility of parole, one for each conviction for first-degree murder.

Bellard noted an appeal, and in a reported opinion, the Court of Special Appeals held, among other things, that CR § 2-304 does not give a defendant the right to have a jury determine whether the defendant should be sentenced to life imprisonment with the possibility of parole or life imprisonment without the possibility of parole. See *Bellard v. State*, 229 Md. App. 312, 338, 145 A.3d 61, 77 (2016). The Court also rejected Bellard's contention that CR § 2-304 was void for vagueness, and concluded that there was "no basis on which to find the sentencing procedures at issue unconstitutionally vague." *Id.* at 338-39, 145 A.3d at 77-78.

Bellard thereafter filed a petition for a writ of *certiorari*, which this Court granted. See *Bellard v. State*, 450 Md. 660, 150 A.3d 817 (2016).

Held: Affirmed.

The Court of Appeals held that, under CR § 2-304(a), where the State has given notice of an intent to seek life imprisonment without the possibility of parole and where a defendant is convicted of first-degree murder, the trial court, not the jury, determines whether to sentence the defendant to life imprisonment or life imprisonment without the possibility of parole; stated otherwise, CR § 2-304 does not grant a defendant who is convicted of first-degree murder the right to have a jury determine whether to impose a sentence of life imprisonment without the possibility of parole.

The Court of Appeals held that CR § 2-304's language is ambiguous, and pointed to the conflict between CR § 2-304(a) and CR § 2-304(b)—CR § 2-304(a) provides that a trial court shall conduct a sentencing proceeding to determine whether to sentence a defendant who is convicted of first-degree murder to life imprisonment without the possibility of parole, whereas CR § 2-304(b), although not a grant of authority for a jury to conduct a sentencing proceeding, appears to contemplate that a jury determine whether to sentence a defendant to life imprisonment without the possibility of parole.

The Court of Appeals examined CR § 2-304's legislative history, and determined that, in repealing the death penalty and amending Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol.) ("CR (2012)")§ 2-304(a), without amending CR (2012) § 2-304(b), the General Assembly did not intend to give a defendant who is convicted of first-degree murder the right to elect to have a jury determine whether to impose a sentence of life imprisonment without the possibility of parole. The Court of Appeals concluded that Senate Bill 276's sole purpose was to repeal the death penalty and enact necessary and related changes to effectuate the repeal of the death penalty. The General Assembly's intent to repeal the death penalty was demonstrated by the

amendments that it enacted with respect to CR § 2-304: CR § 2-304(a) contained references to the death penalty, which the General Assembly deleted, whereas CR § 2-304(b) lacked references to the death penalty, and the General Assembly left CR § 2-304(b) intact. The Court noted that nothing in Senate Bill 276's purpose clause or elsewhere evidenced an intent by the General Assembly, in repealing the death penalty, to create a right for a defendant who is convicted of first-degree murder to elect to have a jury determine whether to impose life imprisonment without the possibility of parole.

The Court of Appeals observed that CR § 2-304(b) does not contain any provision empowering a jury to conduct a sentencing proceeding independent of what previously existed in CR (2012) § 2-304(a)(2); indeed, under CR (2012) § 2-304, subsection (b) became operative only if a jury chose not to impose the death penalty under CR (2012) § 2-304(a)(2). Plainly put, standing alone, CR § 2-304(b) is not a grant of authority or empowerment for a jury to conduct a sentencing proceeding to determine whether to impose life imprisonment without the possibility of parole. Rather, CR § 2-304(b) merely explains how a jury's determination was to be handled under the circumstances that existed before the repeal of the death penalty. The Court concluded that it is evident that CR § 2-304(b) is a vestige of CR (2012) § 2-304 that is no longer operative in light of the General Assembly's repeal of the death penalty.

The Court of Appeals concluded that, although CR § 2-304 is ambiguous, the rule of lenity did not apply under the circumstances of the case because the tools of statutory construction did not fail—Senate Bill 276's legislative history plainly demonstrated that the General Assembly's sole purpose was to repeal the death penalty, not to grant a defendant a right to jury sentencing, or to expand a jury's role to a sentencing determination, where a defendant is convicted of first-degree murder and the State seeks life imprisonment without the possibility of parole.

The Court of Appeals also held that Maryland's sentencing scheme for life imprisonment without the possibility of parole does not violate the United States Constitution or the Maryland Declaration of Rights, and that neither the United States Constitution nor the Maryland Declaration of Rights provides a defendant with the right to have a jury determine the levying of a sentence of life imprisonment without the possibility of parole. Stated otherwise, both the United States Constitution and the Maryland Declaration of Rights permit imprisonment without the possibility of parole to be imposed in the same manner as every other sentence except the death penalty. The Court concluded that Bellard's sentence of life imprisonment without the possibility of parole, as imposed by the circuit court, was statutorily and constitutionally valid, and Maryland's sentencing scheme for life imprisonment without the possibility of parole does not deny due process of law or otherwise subject a defendant to cruel and unusual punishment.

State of Maryland v. Jeffrey D. Ebb, Sr., No. 40, September Term 2016, filed April 24, 2017. Opinion by Hotten, J.

McDonald and Watts, JJ., concur.

http://www.mdcourts.gov/opinions/coa/2017/40a16.pdf

CRIMINAL LAW – POSTCONVICTION RELIEF – PETITION FOR WRIT OF ACTUAL INNOCENCE – PLEADING REQUIREMENTS – STATEMENT OF INNOCENCE

CRIMINAL LAW – POSTCONVICTION RELIEF – PETITION FOR WRIT OF ACTUAL INNOCENCE – PLEADING REQUIREMENTS – LEAVE TO AMEND

CRIMINAL LAW – POSTCONVICTION RELIEF – PETITION FOR WRIT OF ACTUAL INNOCENCE – HEARING

Facts:

On November 28, 1992, a gunman, later identified as Jeffrey D. Ebb, Sr., entered Brodie's Barbershop and during the course of an attempted robbery, killed two people and wounded another. At Mr. Ebb's trial, Stephanie Stevenson, an accomplice, testified that she participated in the attempted robbery with Mr. Ebb, but Mr. Ebb was the person who shot all three victims. Jerome House-Bowman, Ms. Stevenson's uncle, also testified and corroborated his niece's testimony that Mr. Ebb was involved in the murders, and described in detail how Mr. Ebb intended to rob the barbershop, but something went wrong and he shot two people. On November 3, 1993, Mr. Ebb was convicted on two counts first-degree felony murder, one count of attempted second-degree murder, one count of attempted armed robbery, and three counts of first-degree assault. On November 11, 1993, the trial court sentenced Mr. Ebb to two life sentences without the possibility of parole on the murder counts, and an additional 80 years of incarceration, to run concurrently, as to the remaining unmerged counts.

On May 7, 2015, Mr. Ebb filed a petition for writ of actual innocence, *pro se*, in the Circuit Court for Montgomery County, alleging that Mr. House-Bowman had recanted his testimony from the 1993 trial, and attached a statement from Mr. House-Bowman. In his statement, Mr. House-Bowman asserted that he lied in court to protect his niece from prosecution. On July 17, 2015, the circuit court denied Mr. Ebb's petition without a hearing finding that it did not contain material evidence that could create a "substantial or significant possibility" that the result of his trial may have been different. Mr. Ebb subsequently filed a motion for reconsideration, which was denied by the circuit court on July 24, 2015. On appeal, the Court of Special Appeals reversed the circuit court's denial of Mr. Ebb's petition. The Court concluded that Mr. Ebb's petition "alleged facts that theoretically could have resulted in a different trial." Thereafter, the State filed a petition for writ of certiorari to this court, which was granted on September 2, 2016.

Held: Judgment vacated; case remanded for further proceedings.

The Court of Appeals has previously determined that for petitions filed under Md. Code Ann., Criminal Procedure Article ("Crim. Proc.") §8-301, the petition is only required to "'assert' grounds for relief, it does not require the petitioner to satisfy the burden of proving those grounds" in the petition. *See Douglas v. State*, 423 Md. 156, 179, 31 A.3d 250, 264 (2011). The Court has also concluded that a petition filed pursuant to Crim. Proc. §8-301, in addition to complying with the pleading requirements contained in Crim. Proc. §8-301(e), must also comply with the pleading requirements contained in Maryland Rule 4-332(d)(6)–(9) and (12)–(13). *See State v. Hunt*, 443 Md. 238, 249-50, 116 A.3d 477, 483-84 (2015). The Court held that Mr. Ebb's petition complied with all of the pleading requirements contained in Crim. Proc. §8-301(e) and Maryland Rule 4-332(d), except for the requirement in Maryland Rule 4-332(d)(9) that his petition contain an averment "that the conviction sought to be vacated is based on an offense that [Mr. Ebb] did not commit[.]"

The Court of Appeals held in *Hunt* that Maryland Rule 4-332(i)(1)(A) contains a "relief valve" that allows the circuit court to avoid dismissing a petition if the petition "compl[ies] substantially with the requirements" in Maryland Rule 4-332(d). 443 Md. at 255-56, 116 A.3d at 487. In *McGhie v. State*, 449 Md. 494, 114 A.3d 752 (2016), the Court of Appeals concluded that because of the "relief valve" contained in Maryland Rule 4-332(i)(1)(A), and because the petitioner testified at trial to his actual innocence of the charged crimes, the petition should not be dismissed due to its lack of an averment of innocence. *Id*. at 509, n. 6, 114 A.3d at 761, n. 6. In *Keyes v. State*, 215 Md. App. 660, 84 A.3d 141 (2014) the Court of Special Appeals considered another petition that did not comply with Maryland Rule 4-332(d)(9)'s requirement, but concluded that because the circuit court "did not grant leave to amend the petition prior to dismissing it ... and made no mention in its order as to the reasons it denied the petition[]" the Court did not rely on the petition's noncompliance with Maryland Rule 4-332(d)(9) for affirming the circuit court's denial of the petition. *Id*. at 666, n. 3, 84 A.3d at 144, n. 3.

The Court of Appeals held that a petitioner's failure to include an averment of innocence in the petition, alone, is not a basis for dismissing a petition under Crim. Proc. §8-301. Rather, for petitions that otherwise satisfy the pleading requirements contained in Maryland Rule 4-332(d), but fail to assert an averment of innocence, the circuit court may grant the petitioner leave to amend his or her petition to correct the deficiency if the circuit court determines that allowing the petitioner to amend his petition would do substantial justice. See Maryland Rule 4-332(h). In determining whether allowing a petitioner to amend his or her petition would do substantial justice, the circuit court must articulate its reasoning on the record. Additionally, if the circuit court concludes a petitioner may amend his or her petition to comply with Maryland Rule 4-332(d)(9), the amendment must allege which convictions the petitioner is "actually innocent" of, meaning the offenses he or she alleges he or she "did not commit." See *Smallwood v. State*, 451 Md. 290, 320, 152 A.2d 776, 793 (2017). The Court held that Mr. Ebb may amend his petition to comply with the pleading requirement in Maryland Rule 4-332(d)(9) if the circuit court determines that allowing such amendment would do substantial justice.

Ruben Arnez Collins v. State of Maryland, No. 24, September Term, 2016, filed April 21, 2017. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2017/24a16.pdf

CRIMINAL LAW – VOIR DIRE – PROCEDURE

Facts:

Petitioner Ruben Arnez Collins was tried before a jury in the Circuit Court for Wicomico County on charges related to the robbery of a convenience store in Delmar, Maryland. The jury found Collins guilty of armed robbery, robbery, second degree assault, theft under $1000, and wear, carry, and transport of a weapon with intent to injure. He was sentenced to twenty years of imprisonment for armed robbery, with the other offenses merged.

Collins appealed his conviction, arguing that the trial judge abused his discretion in his conduct of voir dire. After the prospective jurors were sworn, the trial judge began the voir dire process by asking questions of the venire as a group and requesting they stand should they have an affirmative response. The trial judge told the prospective jurors that he would then ask additional questions, but he did not indicate whether these questions would be asked in open court or at the bench, and did not explain to the prospective jurors that they could request to answer in relative privacy at the bench. In practice, the trial judge asked follow-up questions in open court only in regards to one question—whether any member of the venire or his or her immediate family was employed currently or in the past by a law enforcement agency or a prosecutor's office. For every other question that elicited affirmative responses, the trial judge brought prospective jurors to the bench for further questioning.

On appeal, Collins argued that this method of voir dire was an abuse of discretion because the public nature of questioning in open court could embarrass jurors and discourage them from responding with candor. The Court of Special Appeals disagreed, relying on *White v. State*, 374 Md. 232 (2003).

Held: Judgment of the Court of Special Appeals affirmed.

The Court noted that voir dire is a flexible process in Maryland, not bound by statutory prescriptions, *see Davis v. State*, 333 Md. 27, 34 (1993), but instead built over time through our case law. The trial judge is granted significant latitude in the process of conducting voir dire and the scope and form of questions presented to the venire. "[N]o formula or precise technical test exists for determining whether a prospective juror is impartial." *White*, 374 Md. at 241. "[W]e do not require perfection in its exercise." *Wright v. State*, 411 Md. 503, 514 (2009). The "trial court reaches the limits of its discretion only when the voir dire method employed by the court

fails to probe juror biases effectively." *Id*. at 508. However, voir dire may not be "cursory, rushed, and unduly limited," *White*, 374 Md. at 241, but instead should be "a comprehensive, systematic inquiry that is reasonably calculated, in both form and substance, to elicit all relevant information from prospective jurors." *Wright*, 411 Md. at 514.

The Court agreed with Collins that a better method would be to inform the jury that follow-up questioning will occur at the bench. And, the Court included a note on best practices, commending to the bench and bar the Maryland State Bar Association's Model Jury Selection Questions for Criminal Trials. Those model questions include instruction to the prospective jurors that they will or may request to answer follow-up questions at the bench, rather than in open court.

However, the Court held that use of a different process, such as the one employed by the trial judge here, is not automatic grounds for reversal. The Court has never held that failing to inform jurors they may respond in private is an abuse of discretion, and declined to do so in this case. Maryland law does not require the trial judge to question the venire at the bench. Instead, "[i]n Maryland, unlike some of our sister jurisdictions, the trial judge may, at his or her discretion, conduct individual voir dire out of the presence of other jurors but is not required to do so." *White*, 374 Md. at 241.

In addition, the Court noted that the trial judge here asked follow-up questions in open court in regards to only one question—the non-sensitive inquiry into whether any member of the venire was employed or had close relatives employed in law enforcement. For all other questions that elicited affirmative initial responses, including the more sensitive religious and moral concern question, the judge conducted follow-up inquiry at the bench. This fact made it yet clearer that there was no abuse of discretion in this case.

Thomas Clifford Wallace v. State of Maryland, No. 29, September Term 2016, filed April 21, 2017. Opinion by Getty, J.

http://www.mdcourts.gov/opinions/coa/2017/29a16.pdf

CRIMINAL PROCEDURE – POSTCONVICTION DNA TESTING STATUTE – DUTY TO PRESERVE SCIENTIFIC IDENTIFICATION EVIDENCE

CRIMINAL PROCEDURE – POSTCONVICTION DNA TESTING STATUTE – APPOINTMENT OF COUNSEL

Facts:

Darrius Fetterhoff disappeared from Hagerstown, Maryland on August 20, 1997. Police located Mr. Fetterhoff along a creek bank five days later, unconscious but still alive. On August 28, Mr. Fetterhoff died in the hospital without regaining consciousness.

On the morning of Mr. Fetterhoff's disappearance, a witness observed Mr. Fetterhoff (a white male) with the appellant, Thomas Clifford Wallace (a black male), and a woman (a white female), all in Mr. Fetterhoff's car. The same witness saw Mr. Wallace and the woman again later that day, at which time Mr. Wallace was shirtless and had a bloody rag wrapped around his hand. Two other witnesses observed Mr. Wallace and a woman in Mr. Fetterhoff's car, without Mr. Fetterhoff, on the morning of his disappearance. One of these witnesses stated that Mr. Wallace was wearing a white t-shirt with red stains on it when she saw him, and the other stated that Mr. Wallace had a bloody white t-shirt wrapped around his hand.

On the same day that Mr. Fetterhoff disappeared, at 6:20 p.m., Mr. Wallace was arrested for drug charges unrelated to the Fetterhoff investigation. When he was arrested, Mr. Wallace was wearing a black t-shirt and blue shorts, which were inventoried and stored by detention center officials. After connecting Mr. Wallace to Mr. Fetterhoff's death, an investigator took possession of all of Mr. Wallace's property stored at the detention center. In an affidavit for a search and seizure warrant of the property, the investigator noted that he had "observed hair fibers" on Mr. Wallace's black t-shirt. DNA testing revealed the presence of Mr. Fetterhoff's blood on Mr. Wallace's blue shorts, but the black t-shirt, which did not have any stains on it, was never tested for DNA. Investigators also recovered hair fibers from Mr. Fetterhoff's car that were "Negroid in origin," but did not match Mr. Wallace.

On November 30, 2000, Mr. Wallace was convicted of first- and second-degree murder, first-degree assault, and the unlawful taking of a motor vehicle. On March 8, 2001, he was sentenced to life imprisonment without the possibility of parole, and a concurrent five-year term of imprisonment.

On May 23, 2013, Mr. Wallace filed a Public Information Act Request requesting the results of any testing performed on the hair fibers from the black t-shirt he was wearing when he was arrested. In response, one of the prosecutors who tried Mr. Wallace's case informed him that no testing had been done on the t-shirt. The prosecutor also revealed that the black t-shirt had since been "destroyed."

On April 29, 2014, Mr. Wallace filed a Petition for a Postconviction DNA Hearing in the Circuit Court for Washington County, pursuant to the Postconviction DNA Testing Statue, Maryland Code, Criminal Procedure Article ("CP") § 8-201(j)(3), "to determine whether the [State's] failure to produce evidence was the result of intentional and willful destruction." The State responded that Mr. Wallace was not entitled to a hearing because the black t-shirt did not constitute "scientific identification evidence" as defined by CP § 8-201(a)(5), and, therefore, the State did not have a duty to preserve it.

At an initial hearing, the State asserted that the circuit court would be required to appoint counsel for Mr. Wallace for any further proceedings. Mr. Wallace did not request appointment of counsel in his petition, but did indicate a desire for appointed counsel at the initial hearing. Following this initial hearing, the circuit court issued a memorandum order in which it declined to appoint counsel for Mr. Wallace, finding that the decision whether to do so is in the court's discretion rather than mandatory. The circuit court also decided that an additional hearing was necessary to determine whether Mr. Wallace's black t-shirt constituted "scientific identification evidence."

At the second hearing, Mr. Wallace argued that DNA testing the hair fibers on the black t-shirt could have produced exculpatory evidence by showing a match to the hairs found in Mr. Fetterhoff's car. Mr. Wallace admitted that he obtained the black t-shirt after the murder "allegedly" occurred. The State maintained that the black t-shirt was not "scientific identification evidence" under the Statute.

On May 31, 2016, the circuit court issued a memorandum opinion and order denying Mr. Wallace's Petition for a Postconviction DNA Hearing. The court found that Mr. Wallace had "utterly failed to show any connection between the black shirt he was wearing on the evening of August 20 and the murder that occurred earlier that day." Therefore, the court concluded "that there is no reasonable probability that DNA testing of the black t-shirt would have produced exculpatory or mitigating evidence." Mr. Wallace appealed the circuit court's denial directly to the Court of Appeals. He argued that the circuit court erred in denying his petition and in declining to appoint counsel to represent him at the hearing.

Held: Affirmed.

Although the circuit court used an incorrect legal standard in reaching its conclusion, the court correctly determined that Mr. Wallace's black t-shirt did not constitute "scientific identification evidence" as defined by the CP § 8-201(a)(5). "Scientific identification evidence" is evidence

that "contains biological evidence from which DNA may be recovered that may produce exculpatory or mitigating evidence relevant to a claim of a convicted person of wrongful conviction or sentencing if subject to DNA testing." CP § 8-201(a)(5)(iii). Multiple eyewitnesses described Mr. Wallace as wearing a white t-shirt when the crime occurred, and Mr. Wallace admitted that he did not obtain the black t-shirt until later that day. Thus, even if the black t-shirt contained hair fibers, there was no possibility that testing those fibers "may produce exculpatory or mitigating evidence relevant to" Mr. Wallace's claim of wrongful conviction. See CP § 8-201(a)(5)(iii). Accordingly, the State did not have a duty to preserve the black t-shirt under the Statute, and Mr. Wallace was not entitled to a hearing to determine whether the State's failure to produce the black t-shirt "was the result of intentional and willful destruction." CP § 8-201(j)(3)(i).

In addition, *Fuster v. State*, 437 Md. 653 (2014), holding that appointment of counsel under the Postconviction DNA Testing Statute is discretionary, is not "clearly wrong or contrary to established principles," and has not "been superseded by significant changes in the law or facts," such that it would be appropriate for the Court to overrule its own precedent. The circuit court did not abuse its discretion in declining to appoint counsel for Mr. Wallace where he did not request counsel in his petition, he had previously litigated a postconviction proceeding represented by counsel, and the court perceived his potential for success as being minimal.

Motor Vehicle Administration v. Robert Allen Krafft, No. 52, September Term 2016; *Motor Vehicle Administration v. Paul McGuire Styslinger*, No. 53, September Term 2016, filed April 21, 2017. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2017/52a16.pdf

MARYLAND VEHCLE LAW – DRIVERS LICENSES – ADMINISTRATIVE REMEDIES – IMPLIED CONSENT, ADMINISTRATIVE PER SE LAW – TEST REFUSAL

Facts:

In each of these two cases, the Motor Vehicle Administration ("MVA") appealed a decision of an Administrative Law Judge ("ALJ") taking "no action" on a driver license suspension of a suspected drunk driver who had refused to take a breath test. In each case, the ALJ had concluded that the MVA had not proven that the licensee had been driving while impaired.

MVA v. Styslinger

On March 28, 2015, Officer Alex Pockett of the Gaithersburg City Police Department responded to a report that a driver was slumped over his steering wheel at a location on Washington Boulevard in Gaithersburg. Upon his arrival, Officer Pockett found Paul M. Styslinger asleep in the driver's seat with the motor running. Officer Pockett detected a moderate odor of alcohol on the breath of Mr. Styslinger who, upon waking, admitted that he had been drinking alcohol that evening.

Officer Pockett then detained Mr. Styslinger and transported him to the Gaithersburg police station for further investigation. Officer Pockett advised Mr. Styslinger of his rights. He asked Mr. Styslinger if he was willing to undergo a blood alcohol concentration test. Mr. Styslinger refused to submit to a test. Officer Pocket confiscated Mr. Styslinger's driver's license, and issued an order of suspension together with a temporary license. Mr. Styslinger made a timely request for an administrative hearing concerning the suspension.

At the hearing, the ALJ found that the officer had reasonable grounds to believe that Mr. Styslinger had been driving. But the ALJ ruled in favor in Mr. Styslinger because the ALJ was unpersuaded that Mr. Styslinger had actually been driving or attempting to drive while under the influence of alcohol. On appeal, the Circuit Court upheld the decision of the ALJ, because the judge believed that the MVA must prove, as "a prerequisite to applying the implied consent law," that the licensee was driving (or attempting to drive).

MVA v. Krafft

On October 10, 2015, Trooper John Dize of the Maryland State Police responded to a report of an accident in front of a residential address in Princess Anne in Somerset County. Upon his

arrival, Trooper Dize found an empty vehicle with a Maryland license plate. He ran the registration record of the vehicle and learned that it was registered to Mr. Krafft, who resided at that address.

Trooper Dize approached the house and observed that the door was open with Mr. Krafft "passed out on his couch." Trooper Dize began to question Mr. Krafft, who could barely stand up. Trooper Dize also noted that Mr. Krafft had a strong odor of alcohol on his breath, slurred speech, and red and glassy eyes. During their conversation, Mr. Krafft admitted to Trooper Dize that he had been drinking, and Trooper Dize asked him to take a breath test for blood alcohol concentration. Mr. Krafft was provided with an advice of rights form and refused the requested breath test for blood alcohol concentration. Trooper Dize then confiscated Mr. Krafft's license and completed an order of suspension and temporary license, which Mr. Krafft declined to sign.

At the administrative hearing, the ALJ held that the MVA failed to establish, by a preponderance of evidence that Mr. Krafft had been driving. In her decision, she did not address whether trooper Dize had "reasonable grounds" for believing that Mr. Krafft had been driving while impaired. On appeal, the Circuit Court affirmed the ALJ's decision on the grounds that there was no error of law and that the court was not persuaded that Mr. Krafft had been driving.

Held:

The Court held that, in a test refusal case under the implied consent law, there is no requirement that the MVA prove that the individual was actually driving (or attempting to drive) while under the influence of alcohol. Rather, the relevant question is whether the officer had *reasonable grounds to believe* that that the individual was doing so when the officer asked the individual to take a breath test. In *Styslinger*, the ALJ clearly found that the officer had reasonable grounds, and thus the suspension should have been upheld. In *Krafft*, the ALJ's finding on the issue of reasonable grounds was at best ambiguous, and the Court remanded the case for clarification based on the legal standard explained its legal opinion.

COURT OF SPECIAL APPEALS

Board of Liquor License Commissioner for Baltimore City, et al. v. Brett Austin et al., No. 599, September Term 2015, filed April 26, 2017. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2017/0599s15.pdf

ALCOHOLIC BEVERAGES BALTIMORE CITY – TRANSFER OF LIQUOR LICENSE – 180 DAY RULE.

ALCOHOLIC BEVERAGES BALTIMORE CITY – TRANSFER OF LIQUOR LICENSE – PENDING TRANSFER

ALCOHOLIC BEVERAGES BALTIMORE CITY – TRANSFER OF LIQUOR LICENSE – CLARIFICATION OF FOOTNOTE IN *YIM, LLC v. TUZEER*

Facts:

The Circuit Court for Baltimore City reversed a September 25, 2014, two-to-one decision of the Board of Liquor Commissioners for Baltimore City (the "Board") that the license to sell liquor at an establishment previously known as Turner's in Federal Hill, (the "License"), had "expired." Appellants are the Federal Hill Neighborhood Association in addition to a number of individuals (collectively referred to in this opinion as the "Association") and the Board. The appellees, Brett Austin and Joshua Foti, are the contract purchasers of the License (the "Contract Purchasers").

Turner's closed for business on or about July 11, 2009, during the license year ending April 30, 2010. The first application to the Board to transfer the License to the Contract Purchasers was filed on June 19, 2009. That application was approved by the Board on July 23, 2009. On January 19, 2010, the then-Executive Secretary of the Board signed a memorandum recommending that the deadline to complete the transfer be extended 180 days to July 5, 2010. The Board granted three additional sixty-day extensions to complete the transfer, all of which were granted after the prior extension period had ended. The last extension was granted on November 15, 2012. In the meantime, the License was renewed in the name of the Contract Purchasers for the license years ending on April 30 in 2011, 2012, and 2013.

On February 25, 2013, a second Application for Transfer and Expansion was filed. The validity of the License itself was raised when the Association sought judicial review on that issue. On

December 23, the circuit court remanded the case to the Board to create a record on the validity issue. On February 20, 2014, the Board held the remand hearing "to determine the status of the license." At that hearing, the Association argued that the License had "sat dormant since July 2009," and even though the "Board approved the application for a transfer of ownership to a new location and repeatedly extended [the] approval, no transfer was ever completed."

The Board, in the "decision phase" of the February 20, 2014 hearing, concluded that "even with an extension, legal or otherwise, the [L]icense would have been considered dormant" as of October 17, 2011, notwithstanding extensions or "a transfer of ownership hearing after that time." But, the Board concluded "that the only way to avoid the injustice . . . is to declare the [L]icense viable as of today."

The Association again sought judicial review of the Board's decision. On August 13, 2014, a Stipulation of Dismissal and Agreement for Remand to the Board was entered at the request of the Board and the Association and, on September 17, 2014, the circuit court issued an order remanding to the Board and dismissing the case. The stated purpose of the remand was "so the [Board] can conduct further proceedings on this matter within sixty (60) days after the date of the dismissal of this appeal."

The second remand hearing was held on September 25, 2014. The Board expressly ruled on the validity of the License and, by implication, on the Contract Purchasers' recently filed hardship extension request, which would fail in the absence of a viable License to transfer. The Chairman concluded that "the license has expired." He based his decision on the "clear command of the law," and which had been "ignored" by the Board in granting the earlier purported extensions and license renewals "outside the scope of its authority."

On October 7, 2014, the Contract Purchasers filed a Petition for Judicial Review. A hearing was held on May 1, 2015, and on May 5, 2015, the circuit court reversed the Board, stating that its decision "was not supported by substantial evidence and was clearly erroneous as a matter of law." The court concluded that "failure to complete a transfer of a license within 180 days pursuant to Art. 2B § 10-503(d)(4) does not carry a sanction of expiration of the license." In its view, "[t]o hold that such a sanction applies is illogical in the face of Art. 2B § 10-504(d)(2)(i), which provides an exception to the 10-504(d)(2) 180 day expiration provision when a transfer 'has been approved or is pending.'"

Held:

The plain language of the statute supports the Board's conclusion at the remand hearing that the License had "expired." The closing of Turner's in July of 2009 triggered the 180 day rule, i.e., "180 days after the holder of any license . . . has closed the business or ceased active alcoholic beverages business operations . . . the license shall expire[.]" The 180 days can be tolled by "[a]n application for approval of a transfer to another location or an application for assignment to another person" which "has been approved or is then pending." In context, "pending" clearly

refers to a transfer application that is awaiting Board action and not the intended completed transfer. In the absence of a "hardship extension" by the Board, the transfer of a license must be completed not more than 180 days after the Board approves the transfer.

Not only is the plain language of the Art. 2B § 10-504(d) clear, paragraph (5) of the subsection states the legislative intent, that is, "the total time period for which a license may be deemed unexpired . . . is 180 days if no undue hardship extension is granted, and no more than 360 days if an undue hardship extension has been granted." And, this same intent is reflected in other related statutory provisions. For example, the initial transfer request was filed under § 10-503(d), which also provides that the transfer "shall be completed not more than 180 days after the Board approves the transfer." And, under section 10-504(d), a hardship extension "filed within the 180 day period," may extend the life of the license to "no more than 360 days" from "the date of closing or cessation of alcoholic beverages business operations[.]"

When the application was approved on July 23, 2009, the applicant had 180 days to complete the transfer, i.e., until January 19, 2010, subject to filing a request for a hardship extension during the 180 day period. As noted, no hardship extension request was filed until August 13, 2013, and even if the first 180 day extension could be considered a hardship extension, the transfer had to be completed within 360 days of the closing of the business or the cessation of liquor sales in July of 2009.

The language of the footnote in *Yim, LLC v. Tuzeer*, 211 Md. App. 1, 36 n.30 (2013) in no way suggests that the renewal of a license overcomes the requirements of Article 2B § 10-504(d) to complete an approved transfer within 180 days of the approval in the absence of a granted hardship extension request. At most, it recognizes a possible delay between the filing of a transfer request and it being acted upon by the Board.

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Cassandra Murray v. Midland Funding, LLC, No. 2280, September Term 2015, filed April 26, 2017. Opinion by Friedman, J.

http://www.mdcourts.gov/opinions/cosa/2017/2280s15.pdf

VOID JUDGMENTS – STATUTE OF LIMITATIONS

VOID JUDGMENTS – LACHES

Facts:

Midland Funding is a debt-buyer. It bought the Cassandra Murray's delinquent credit card debt. Midland then obtained a judgment against Murray in district court for her failure to pay that debt. At the time Midland obtained the judgment, it was not licensed to act as a debt collection agency as required by the Maryland Collection Agency Licensure Act.

Held:

The Court held that the three-year statute of limitations for civil claims may apply to a debtor seeking a monetary remedy for payment of a void judgment.

Further, the Court held that laches may apply to equitable remedies, such as an injunction, sought by a judgment debtor against a judgment creditor.

Finally, the Court held that a simple declaration that a judgment is void is not subject to a statute of limitation or laches.

Crystal Brookman v. State of Maryland and *Marvin Randy Carnes v. State of Maryland*, Nos. 182 and 183, September Term 2016, filed April 27. 2017. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2017/0182s16.pdf

CRIMINAL LAW – APPEALABLE JUDGMENTS AND ORDERS

CONSTITUTIONAL LAW – DUE PROCESS – HEARING PROCEEDINGS – IMPOSITION OF DRUG COURT SANCTIONS

CRIMINAL LAW – SENTENCING AND PUNISHMENT – VIOLATION OF DRUG COURT PROGRAM – IMPOSITION OF DRUG COURT SANCTIONS

Facts:

Separately, the two consolidated appellants, Crystal Brookman and Marvin Carnes, were sentenced to probation with the special condition of completing the Montgomery County Adult Drug Court program (the "Drug Court"). While participating in Drug Court, Ms. Brookman and Mr. Carnes each encountered circumstances where, pursuant to the Drug Court's Participant Handbook or the Adult Drug Court Policies and Procedures Manual, they were treated as having failed a drug test. After separate appearances, the Drug Court imposed sanctions that included overnight incarceration on both. Both appealed, and the State contended that the sanctions weren't appealable. The Court of Special Appeals granted the applications for leave to appeal, ordering Ms. Brookman and Mr. Carnes to address whether the imposed sanctions were reviewable as well as the merits of each of their appeals.

Held: Vacated and remanded for further proceedings consistent with the opinion.

The Court of Special Appeals held that although violations of the terms of a Drug Court program are not final judgments under § 12-301 of the Courts and Judicial Proceedings Article ("CJ") of the Maryland Code, the imposition of sanctions by a Drug Court program is appealable. CJ § 12-302(g), which recognizes a defendant's right to appeal a revocation of probation, extends to drug court sanctions because, where participation in a drug court is a term of a defendant's probation and there exists an independent possibility of sanctions that deprive the defendant of liberty or extend his or her participation in the program, the defendant stands in a position akin to someone who may have violated probation. On the merits of Ms. Brookman's and Mr. Carnes's appeals, the Court held that participants in a drug court program are entitled, as a matter of due process, to notice, a hearing, and counsel where, in the face of the violations specified by the drug court program, they face a loss of liberty by incarceration. Further, the Court held that where a drug court program specifies that the participants "have the right to request and have a

formal adversarial hearing before the imposition of a sanction of incarceration or before being terminated from Drug Court," the drug court cannot automatically follow the drug court menu and impose sanctions without exercising some discretion.

Daniel Nicholas Smith v. State of Maryland, No. 987, September Term 2016, filed April 28, 2017. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2017/0987s16.pdf

CRIMINAL LAW – ACTS PROHIBITED BY STATUTE

CRIMINAL LAW – CONSTRUCTION AND EFFECT OF CHARGE AS A WHOLE

CRIMINAL LAW – NECESSITY OF OBJECTIONS IN GENERAL

THREATS, STALKING, AND HARASSMENT – INTENT, KNOWLEDGE

THREATS, STALKING, AND HARASSMENT – NATURE OF CONDUCT

Facts:

This appeal arises out of the criminal charges, jury trial, and guilty verdict that resulted from events which took place on August 13, 2015. Appellant, Daniel Smith, appeared before district court Commissioner Marie Ann Caron following Smith's arrest on a warrant. Caron imposed money bail as a condition of Smith's release. Smith became angry and shouted at Caron. As a result, Smith was charged with threatening a state or local official. On June 27, 2016, a jury trial was held in the Circuit Court for Washington County. Smith was convicted by the jury and sentenced to three years' incarceration, all suspended, with nine months to be served in home detention, followed by a period of probation. Smith timely appealed, contending that the state threat statute for which he was convicted, Md. Code Ann. (2002, 2012 Repl. Vol.), § 3-708(b) of the Criminal Law Article, and the related jury instruction, were substantially similar to the federal threats statute, 18 U.S.C § 875(c), and the federal pattern jury instruction, which the Supreme Court held improperly employed merely a negligence standard of intent where the jury was required only to find that a reasonable person would regard the defendant's communications as threats. *Elonis v. United States*, 135 S. Ct. 2001 (2015). He sought plain error review.

Held: Affirmed.

Md. Code Ann. (2002, 2012 Repl. Vol.), § 3-708(b) of the Criminal Law Article includes an intent requirement, and the jury was properly instructed that the State must prove that the defendant communicated a threat to another, that the threat was to physically injure a state official, and third, that the defendant made the threat knowingly and willfully.

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Michael Vaughn v. State of Maryland, No. 2914, September Term 2015, filed April 26, 2017. Opinion by Salmon, J.

http://www.mdcourts.gov/opinions/cosa/2017/2914s15.pdf

CRIMINAL LAW – *CORAM NOBIS* RELIEF

In Maryland, a petitioner must prove that five conditions exist in order to be entitled to *coram nobis* relief. One of those conditions is that the petitioner is suffering or facing significant collateral consequences from the conviction. To prove that last mentioned condition, petitioner must show that the "collateral consequences" is one that he or she did not know about at the time the guilty plea was entered.

Facts:

Michael Vaughn pled guilty in 2004, in the Circuit Court for Baltimore City, to a third-degree sex offense pursuant to an agreement with the Prosecutor and the circuit court judge that accepted the plea. Before he pled guilty, Vaughn was told, among other things, that if the plea was accepted he would be required to register as a sex offender "as required by law."

The circuit court, at sentencing, ordered Vaughn to register as a sex offender.

Mr. Vaughn took no action for over 11 years. He then filed a petition for a writ of error *coram nobis* and claimed that as a "collateral consequence" of his conviction, he was required to register as a sex offender. The issue that the circuit court was required to decide was whether the aforementioned "collateral consequence" was sufficient to meet one of the five conditions required for *coram nobis* relief. The trial judge held that it was not.

Held: Affirmed.

The Court held that the "collateral consequence" relied upon by Vaughn was insufficient to allow *coram nobis* relief. In reaching that conclusion, the Court closely analyzed the landmark case of *Skok v. State*, 361 Md. 52 (2000). In *Skok*, the Court of Appeals made it clear that the reason it was changing the common law concerning *coram nobis* relief, was to provide relief for convicts under some special conditions. The *Skok* Court described the special conditions as follows:

> Very often in a criminal case, because of a relatively light sanction imposed or for some other reason, a defendant is willing to forego an appeal even if errors of a constitutional or fundamental nature may have occurred. Then, when the defendant later learns of a substantial collateral consequence of the conviction, it may be too late to appeal, and, if the defendant is not incarcerated or on parole or probation, he or she will not be able to

> challenge the conviction by a petition for a writ of *habeas corpus* or a petition under the Post-Conviction Procedure Act. 361 Md. at 77.

The Court of Special Appeals interpreted the *Skok* opinion as meaning that in order to show a "collateral consequence" the *coram nobis* petitioner is required to show that, at the time the guilty plea was entered, the petitioner did not know of the collateral consequence relied upon in his or her petition. In the case under review, however, the petitioner indisputably knew of the consequence (the requirement that he register as a sex offender) because that consequence was mentioned both at the time the plea was accepted and at the time of sentencing.

Lionel Admonion Holloway v. State of Maryland, No. 2863, September Term 2015, filed March 29, 2017. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2017/2863s15.pdf

APPEAL AND ERROR – CORAM NOBIS – LAW OF THE CASE – RAISING DEFENSE FOR THE FIRST TIME ON APPEAL

Facts:

In March 2000, appellant Lionel Holloway pleaded guilty to possession with intent to distribute heroin in the Circuit Court for Baltimore City. Holloway received two twenty-year sentences, with all but five years suspended. In October 2009, Holloway was convicted of possession of a firearm by a convicted felon in the United States District Court for the District of Maryland. Due to his prior state drug convictions, Holloway was subjected to a mandatory minimum sentence of fifteen years on his federal conviction.

In December 2009, Holloway filed a petition for writ of error coram nobis, in an attempt to vacate his underlying drug convictions. Holloway argued that the trial court did not apprise him of the nature of his charges when he entered his guilty plea. The court denied Holloway's coram nobis petition on the basis that he had waived his right to seek coram nobis relief by failing to file an application for leave to appeal. Holloway appealed this denial to the Court of Special Appeals. This Court found that Holloway had not waived his right to coram nobis relief, but denied his appeal on the merits, holding that the court did sufficiently advise him during his guilty plea.

Holloway responded by filing a second coram nobis petition with the circuit court, arguing that the trial court failed to advise him of the presumption of innocence. The court again denied relief on the grounds that he had waived his right to seek coram nobis relief. Holloway then filed another appeal with the Court of Special Appeals. The State conceded that the circuit court relied on improper grounds in denying the petition, but that it should still be denied under the law of the case doctrine.

Held: Affirmed.

The law of the case doctrine provides that once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling. Generally, decisions rendered by a prior appellate panel will govern the second appeal at the same appellate level as well. The Court of Special Appeals first addressed whether this defense could be raised for the first time on appeal. The Court held that the law of the case doctrine may be raised as a defense for the first time on appeal, because it presents a purely legal question and courts have a strong

interest in promoting judicial efficiency by avoiding relitigation of issues that have already been settled. The Court then went on to hold that a coram nobis plaintiff who lost his appeal challenging the validity of his guilty plea for an alleged judicial failure to advise him of the nature of the charges cannot on a second appeal attack the validity of his guilty plea for a failure to advise him of the presumption of innocence. Accordingly, the law of the case doctrine precluded Holloway from relitigating the issue of the validity of his guilty plea.

John Paul Grimes, et al. v. Karen Gouldmann, et al., No. 2454, September Term 2015, filed March 29, 2017. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2017/2454s15.pdf

REAL PROPERTY – LIFE ESTATES – TRANSFER BY GIFT

Facts:

Dianne Hudson owned property in Baltimore County, Maryland. In 1990, Ms. Hudson executed a deed in which she granted herself a life estate in the property, with the remainder fee simple interest passing to three of her relatives, the appellees. Under the language of the deed, however, Ms. Hudson reserved the right to "sell, mortgage, lease or otherwise encumber" both her life estate and the entire interest of the remaindermen at any point prior to her death.

In 2009, Ms. Hudson executed a second deed to the same property. In the 2009 deed, Ms. Hudson again granted herself a life estate in the property, but gifted the remaining interest to appellants.

After Ms. Hudson's death in 2015, appellees filed suit in the Circuit Court for Baltimore County, seeking a declaratory judgment that the 2009 Deed was invalid and that the 1990 Deed was valid. At trial, the two deeds were the only evidence. At the conclusion of the trial, the court found that the 1990 Deed did not give Ms. Hudson the ability to dispose of the property by gift. Accordingly, the 2009 Deed was found to be invalid. Appellants filed a timely notice of appeal.

Held: Affirmed.

The Court of Special Appeals affirmed the judgment of the Circuit Court for Baltimore County. The Court held that Ms. Hudson's subsequent gift of the property to appellants was invalid, because the language in the 1990 Deed granting her the power to "sell, mortgage, lease, or otherwise encumber" the property did not include the power to dispose of the property by gift. To authorize a transfer of property by gift, a deed must grant the life tenant the power to "sell, mortgage, lease, or otherwise dispose" of the property.

A.C. v. Maryland Commission on Civil Rights, et al., No. 322, September Term 2016, filed April 28, 2017. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2017/0322s16.pdf

EMPLOYMENT DISCRIMINATION CLAIMS -- STATE AND FEDERAL FILING DEADLINES -- STATE AGENCY INVESTIGATIVE FILE

Facts:

A.C., who was appointed to serve as an Assistant Attorney General at the Office of the Attorney General of Maryland ("OAG") in 2005, was terminated on May 4, 2012. On October 29, 2012, A.C. filed a complaint for discrimination based on race under state law with the Maryland Commission on Civil Rights ("the Commission") -- the state agency responsible for investigating employment discrimination complaints. It was not until October 1, 2015, however, that the Commission completed its investigation and issued its written decision, finding no evidence of discrimination.

A.C. received information regarding her appeal rights with the Commission's written decision, including that her complaint had been dually filed with the United States Equal Employment Opportunity Commission (EEOC), that she had fifteen days to file a request for a Substantial Weight Review by the EEOC, and that she had "the right to request a Federal Notice of Right to Sue from the EEOC which would enable [A.C.] to file a complaint in Federal District Court." A.C. timely requested a review by the EEOC. Around the same date, A.C. also submitted a request for reconsideration with the Commission, which was denied on November 15, 2015.

On December 15, 2015, the EEOC upheld the Commission's findings. The EEOC's notice of the decision sent to A.C. included that her charge had been dismissed, and that a Notice of Rights was included, enabling her to file suit pursuant to Title VII of the Civil Rights Act of 1964 in Federal Court within 90 days. On December 4, 2015, rather than file suit in a U.S. District Court, however, A.C. filed a petition for judicial review of the Commission's "no probable cause" finding. A.C. subsequently sent a request to the Commission for transmission of the investigative file.

The Commission filed a "Motion to Dismiss Petition for Judicial Review and Preclusion from Transmitting Investigative File." On March 1, 2016, the OAG also filed a motion to dismiss A.C.'s petition for judicial review, adopting the arguments presented by the Commission. The circuit court granted the Commission's and the OAG's motion to dismiss and denied a request by A.C. for leave to amend her complaint for a writ of mandamus requiring the transmission of the investigative file.

Held:

The Circuit Court did not err when it dismissed A.C.'s petition for judicial review and the commission was not required to transmit its confidential investigative files to the circuit court.

If the Commission finds no probable cause of discrimination, or if the claimant wishes to bring her claim in state court prior to the conclusion of the investigation, she may file a civil action in the circuit court. *See* SG § 20-1013. To bring a civil action, the claimant must (1) have "initially filed a timely administrative . . . complaint"; (2) "at least 180 days have elapsed since the date the claimant filed the administrative . . . complaint"; and (3) the claimant must file the civil action in state court "within two years after the unlawful employment practice occurred." SG § 20-1013(a). In contrast to the two-year statutory limitations period under state law, however, receipt of a "Right to Sue" letter from the EEOC review provides the claimant ninety days to file a claim in federal court, regardless of the date of the alleged unlawful act. *See* 42 U.S.C. § 2000e-5(f)(1).

Ultimately, the EEOC upheld and adopted the Commission's findings and dismissed A.C.'s EEOC complaint, finding no evidence of discrimination based on race; therefore, the EEOC included a "Notice of Rights" (i.e. "Right to Sue") letter along with the notice of the EEOC's dismissal of her claim. At this point, because A.C. did not file a civil action in state court within two years of the date of her termination in 2012, the time for A.C. to file a private action in state court had expired. In contrast, upon receiving the "Right to Sue" letter -- sent on or around December 15, 2015 -- A.C. was permitted to file a civil action in the U.S. District Court for Maryland under federal law within ninety days.

A.C., however, filed a petition for judicial review of the Commission's decision in the circuit court, attempting to appeal the Commission's finding of no probable cause and denial of reconsideration. A petition for judicial review of the Commission's decision, however, is not a proper avenue available to A.C. for pursuing her claim because the circuit court is not authorized to review the Commission's decision in this case. See Md. Rule 7-201(a) and 7-202(a). More generally, to permit judicial review in the circuit court, the contested administrative agency decision must be a final, appealable order. Subsection 20-1005(d)(2) of the State Government Article provides that *"[u]nless the United States Equal Employment Opportunity Commission (EEOC) has jurisdiction over the subject matter* of the complaint, a denial of a request for reconsideration of a finding of no probable cause by the Commission, is a final order appealable to the circuit court . . . ." A.C.'s claim falls squarely within the EEOC's jurisdiction. See 42 U.S.C. 2000e.

Additionally, A.C. argued that she was entitled to have the Commission's investigative file transmitted to the circuit court. Pursuant to SG § 20-1101(a), "the activities of . . . the Commission in connection with the investigation shall be conducted in confidence and without publicity . . ." "until the matter reaches the stage of public hearings." A "public hearing" is a "public hearing before either the Office of Administrative Hearings or any federal or State court of law." COMAR 14.03.01.18B. As we have explained, the circuit court did not have the statutory authority to entertain A.C.'s petition for judicial review of the Commission's denial of

A.C.'s request for reconsideration. The circuit court, therefore, properly dismissed the petition without a hearing. The Commission was entitled to keep its investigation of A.C.'s complaint confidential until the charge of discrimination and retaliation was properly filed and reached the public hearing stage in either a federal or state court.

Valerie Heneberry v. Bashar Pharoan, No. 2440, September Term 2015, filed April 27, 2017. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2017/2440s15.pdf

BREACH OF CONTRACT BETWEEN DOCTOR AND PATIENT – MEDICAL MALPRACTICE CLAIMS – NEGLIGENCE CLAIMS AS THE PREFERRED CLAIM

Facts:

On October 15, 2011, Valerie Heneberry went to the Greater Baltimore Medical Center (GBMC) complaining of abdominal pain. She was treated by Dr. Pharoan, the surgeon on call for the emergency room. After a CT scan, Dr. Pharoan diagnosed Heneberry with acute appendicitis and recommended a laparoscopic appendectomy, a surgical procedure to remove the appendix. Dr. Pharoan performed the procedure, and his medical notes describe an uneventful surgery and that Heneberry responded well to the surgery. Dr. Pharoan, however, had only removed the majority of the appendix, and apparently unintentionally left the "stump" of the appendix in place.

Thereafter, Heneberry alleges that she experienced severe pain. Another physician performed an additional surgery to remove the stump of the appendix. Heneberry alleges that Dr. Pharoan's failure to completely remove her appendix was the cause of her subsequent pain and surgery.

On September 11, 2014, Heneberry filed a complaint in the Circuit Court for Baltimore County against Dr. Pharoan for medical malpractice. Count I of the complaint was based on the grounds of negligence, and Count II alleged a loss of consortium. On March 17, 2015, Heneberry filed an amended complaint, this time adding Count III, a breach of contract claim based on the same facts.

On March 31, 2015, Heneberry filed a motion for partial summary judgment on the issues of liability on the negligence count and on the breach of contract count. On June 2, 2015, the court denied partial summary judgment on Count I for negligence. Thereafter, Dr. Pharoan filed a motion to dismiss Count III of the amended complaint. In an Order filed August 31, 2015, the circuit court granted Dr. Pharoan's motion to dismiss for failure to state a claim on Count III, the breach of contract claim.

The case proceeded to a jury trial on the issue of liability for medical negligence and the jury found in favor of Dr. Pharoan. On December 16, 2015, Heneberry noted a timely appeal.

Held: Affirmed.

Although Maryland courts generally recognize that the doctor-patient relationship is contractual in nature, and that the doctor impliedly agrees to exercise a reasonable degree of care and medical skill, the failure to exercise that care is tortious in nature and is generally not governed by contract law. *Benson v. Mays*, 245 Md. 632, 636 (1967). To establish a prima facie case of breach of contract where the facts relate to a physician's performance of a medical procedure, the plaintiff must show that the physician made an additional promise or warranty separate and apart from the physician's agreement to properly perform the procedure. *See Dingle v. Belin*, 358 Md. 354, 372 (2000) (citing *Robins v. Finestone*, 308 N.Y. 543, 546 (1955)); *Sard v. Hardy*, 281 Md. 432, 451-52 (1977).

In short, *Dingle* and *Sard* reflect the policy in Maryland and other states that medical malpractice cases typically sound in negligence and are not determined by the laws of contract, unless unique circumstances are present. Accordingly, we do not recognize contract actions in medical malpractice cases unless the physician made some special promise or warranty apart from a promise to use the medical skill necessary to deliver the treatment in the manner generally accepted by other physicians in the community. It is not enough to establish a prima facie case of breach of contract to allege that a physician promised to perform a surgery and then performed the procedure incorrectly. An action in contract must be based on a failure to perform a special promise or warranty in addition to the physician's agreement to perform the surgery with a reasonable degree of care and medical skill.

In her amended complaint, Heneberry alleged that Dr. Pharoan agreed to perform an appendectomy and that not all of the appendix was removed; therefore, Heneberry argues that a breach of contract occurred. Indeed, in the amended complaint adding the breach of contract claim, Heneberry alleged virtually the same facts as those alleged in the original complaint for negligence, adding no new allegations to establish any special promise or warranty in addition to Dr. Pharoan's agreement to perform an appendectomy. Notably, Heneberry's was never able to put forward any evidence of a separate promise in addition to Dr. Pharoan's ordinary obligation to properly perform the appendectomy.

Because Heneberry could not recall any additional verbal promise made by Dr. Pharoan, she relied on the written affirmations made by Dr. Pharoan. The only promise, however, that Heneberry alleged to be made by Dr. Pharoan before the surgery was that he would take the appendix out. Although, as Heneberry alleges, Dr. Pharoan failed to remove the entire appendix, the promise breached by Dr. Pharoan is not an additional promise separate from the promise to conduct the surgery. In Maryland, when a plaintiff alleges that a medical procedure was not properly performed, the claim is governed by tort law unless the plaintiff alleges some additional promise or warranty.

Viewing all of the facts and reasonable inferences in the light most favorable to Heneberry, Heneberry did not establish that Dr. Pharoan made a special promise or warranty separate from his obligation to perform the appendectomy with the requisite standard of care. Accordingly, we affirm the circuit court's entry of judgment in favor of Dr. Pharoan on Count III of the amended complaint.

ATTORNEY DISCIPLINE

*

By a Per Curiam Order of the Court of Appeals dated April 3, 2017, the following attorney has been disbarred:

DENISE LEONA BELLAMY

*

By a Per Curiam Order of the Court of Appeals dated April 3, 2017, the following attorney has been disbarred:

MELODIE VENEE SHULER

*

By a Per Curiam Order of the Court of Appeals dated April 4, 2017, the following attorney has been disbarred:

MARK KOTLARSKY

*

By a Per Curiam Order of the Court of Appeals dated April 4, 2017, the following attorney has been disbarred:

BONNIE ELIZABETH PLANK

*

By an Order of the Court of Appeals dated April 5, 2017, the following attorney has been disbarred by consent:

CHARLES GRANT BYRD, JR.

*

*

By an Order of the Court of Appeals dated April 7, 2017, the following attorney has been suspended for ninety (90) days by consent:

WILLIAM NORMAN ROGERS

*

By an Order of the Court of Appeals dated April 19, 2017, the following attorney has been disbarred by consent:

JOSEPH IGNATIUS TIVVIS, JR.

*

By an Order of the Court of Appeals, dated April 20, 2017, the following attorney has been disbarred:

SEAN PATRICK McMULLEN

*

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

http://www.mdcourts.gov/appellate/unreportedopinions/index.html

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