

IN THE
APPELLATE COURT OF MARYLAND

SEPTEMBER TERM, 2022

NO. 1291

YOUNG LEE, AS VICTIM'S REPRESENTATIVE,
Appellant,

v.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE CIRCUIT COURT
FOR BALTIMORE CITY

(Hon. Melissa Phinn, Motions Judge)

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

In 2000, Adnan Syed was convicted in the Circuit Court for Baltimore City of murdering his former girlfriend, Hae Min Lee. On September 14, 2022, the State's Attorney moved to vacate Syed's conviction under Section 8-301.1 of the Maryland Code's Criminal Procedure Article. The State's Attorney contended that newly discovered exculpatory evidence undermined the State's Attorney's confidence in the validity of the conviction. The circuit court granted the motion.

On September 28, 2022, Young Lee, acting as the victim's representative, noted this appeal, contending that the advance notice he received of the vacatur hearing did not comply with Maryland's victim rights laws.

On October 11, 2022, the State's Attorney nol prossed the charges against Syed under Maryland Rule 4-333(i) (LexisNexis 2022) (mandating that, within 30 days after the circuit court enters a vacatur order, the State's Attorney shall either enter a nolle prosequi of the vacated criminal charge or take other appropriate action).

On November 4, 2022, this Court entered an order directing the parties to brief the following three questions:

QUESTIONS PRESENTED

1. Did the entry of the nolle prosequi render this appeal moot?
2. Even if this appeal is moot, should the Court exercise its discretion to issue an opinion on the merits?
3. Did the notice that appellant received in advance of the circuit court's vacatur hearing comply with applicable constitutional provisions, statutes, and rules?

STATEMENT OF FACTS

Except for argumentative characterizations, the State of Maryland accepts the Statement of Facts in Lee's brief, as supplemented and modified in the following Argument.

ARGUMENT

I.

THE ENTRY OF THE NOLLE PROSEQUI DID NOT RENDER THIS APPEAL MOOT.

Lee argues that “this Court can restore [him] to his prior position by mandating a new vacatur hearing that fully complies with the law.” (Appellant’s Br. at 12). He asks the Court to “remand this case” and “instruct the circuit court to conduct an evidentiary hearing.” (Appellant’s Br. at 24). The State agrees that this relief is possible notwithstanding the State’s Attorney’s entry of a nolle prosequi.

Ordinarily, a nolle prosequi would have had the effect of discontinuing the underlying criminal case against Syed. *Simms v. State*, 232 Md. App. 62, 68–69 (2017) (stating that a “nol pros is an act of prosecutorial discretion—‘an abandonment of the prosecution or a discontinuance of a prosecution by the authorized attorney for the state.’”) (citation omitted), *aff’d*, 456 Md. 551 (2017); *see also* Md. Code Ann., Crim. Proc. § 1-101(k) (LexisNexis 2018 Repl. Vol.) (defining “nolle prosequi” as “a formal entry on the record by the State that declares the State’s intention not to

prosecute a charge”). Stated differently, the entry of the nolle prosequi ordinarily would have terminated the prosecution by dismissing the charging document. Md. Rule 4-247(a) (LexisNexis 2022) (“The State’s Attorney may terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court.”).

That did not happen in this case, however, because the nolle prosequi emanated from a legally defective vacatur hearing, and a valid hearing was a legal prerequisite to the State’s Attorney’s very ability to enter a nolle prosequi. The law is clear that the State does not have the authority to enter a nolle prosequi after entry of a final judgment (meaning, conviction and sentence). *State v. Simms*, 456 Md. 551, 575 (2017). As a consequence in this case, the vacatur was a necessary prerequisite to the State’s Attorney’s nol pros power under Maryland Rule 4-333(i). Having been defectively entered in violation of the rights of the victim’s representative, as discussed in Part III, below, the vacatur was legally incapable of giving rise to the State’s Attorney’s nol pros power.

Because the nolle prosequi was a legal nullity in the wake of the defective vacatur hearing, this appeal is not moot.

II.

EVEN IF THIS APPEAL IS MOOT, THE COURT SHOULD EXERCISE ITS DISCRETION TO ISSUE AN OPINION ON THE MERITS.

Even if this appeal is moot, the Court's decision whether to dismiss an appeal for mootness is discretionary. Md. Rule 8-602(c) (LexisNexis 2022) ("The court *may* dismiss an appeal if: ... (8) the case has become moot.") (emphasis added). Generally, a moot case is dismissed without the Court deciding the merits of the controversy. *Coburn v. Coburn*, 342 Md. 244, 250 (1996) (citation omitted).

In limited circumstances, however, the Court may address the merits of a moot case if the Court is "convinced that the case presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct." *Id.*; see also *J.L. Matthews, Inc. v. Maryland-Nat'l Cap. Park & Plan. Comm'n*, 368 Md. 71, 96 (2002) ("We have the constitutional authority [] to express our views on the merits of a moot case ... in instances where[] the urgency of establishing a rule of future conduct in matters of important public concern is imperative and manifest."). This is particularly true when "the matter involved is

likely to recur frequently” and “the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision.” *Coburn*, 342 Md. at 250.

In *Coburn*, the Supreme Court of Maryland decided to address a moot issue involving an expired protective order issued under Maryland’s domestic-violence statute because protective orders occur frequently but often “escape judicial review by [the Supreme] Court due to [the protective orders’] limited duration.” 342 Md. at 250. The Court also explained that the mooted controversy “involve[d] construction of a statute routinely applied by courts of this state, and [the Court’s] interpretation of it will assist judges in determining whether victims of abuse are in need of protection.” *Id.*

Like *Coburn*, if the controversy in this case is moot, it concerns unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct. In particular, this case raises unresolved issues about victims’ rights to notice of, and attendance at, vacatur hearings under Crim. Proc. § 8-301.1(d). No court has spoken to the nature and quality of those

rights. Doing so here would allow the Court set down a rule for future conduct by the State's Attorneys and the circuit courts.

In addition, the requirement in Maryland Rule 4-333(i) that the State's Attorney act within 30 days of the vacatur order to either enter a nolle prosequi of the vacated criminal charge or take other appropriate action means that an appellate court in the future likely would not be able to reach the merits of the controversy presented here on account of the same time pressures.

For these reasons, the State urges that, if the Court concludes that this appeal is moot, the Court should nonetheless exercise its discretion to issue an opinion on the merits.

III.

THE NOTICE THAT APPELLANT RECEIVED IN ADVANCE OF THE CIRCUIT COURT'S VACATUR HEARING DID NOT COMPLY WITH APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES.

Lee contends that the "circuit court violated [his] rights to reasonable notice, to appear, and to be heard." (Appellant's Br. at 16). Regarding the right to be heard, he argues that he was entitled

“to present evidence, call witnesses, and challenge the state’s evidence and witnesses.” (Appellant’s Br. at 24).

The State agrees with Lee that he did not receive sufficient notice of the vacatur hearing, which led to the denial of his right to attend the hearing in person, as contemplated by law. The State also agrees with Lee that the deficient notice of the vacatur hearing unfairly compromised his ability to be heard on the impact of the vacatur decision on him and the rest of the victim’s family. The State does not agree, however, that Lee had a right to participate in the vacatur hearing akin to a party, whereby he could present evidence, call witnesses, and challenge the State’s motion.

The Maryland Declaration of Rights mandates that crime victims or their representatives be treated with “dignity, respect and sensitivity during all phases of the criminal justice process.” Md. Decl. of Rts. Art. 47(a). Consistent with this broad mandate, the vacatur statute provides a victim’s representative the right to notification of and attendance at the vacatur hearing:

(d) *Notification to victim or representative.* — (1)
Before a hearing on a motion filed under this section,

the victim or victim's representative shall be notified, as provided under § 11-104 or § 11-503 of this article.

(2) A victim or victim's representative has the right to attend a hearing on a motion filed under this section, as provided under § 11-102 of this article.

Md. Code Ann., Crim Proc. § 8-301.1(d).

Section 11-104(f)(1) provides that the prosecuting attorney shall “send a victim or victim’s representative prior notice of each court proceeding in the case, of the terms of any plea agreement, and of the right of the victim or victim’s representative to submit a victim impact statement to the court under § 11-402 of this title if: (i) prior notice is practicable; and (ii) the victim or the victim’s representative has filed a notification request form”¹

Section 11-503, meanwhile, governs “subsequent proceedings,” which, in relevant part, include “a hearing on a

¹ When prior notice of a court proceeding is not practicable or when the victim or victim’s representative does not attend a court proceeding, the prosecuting attorney shall inform the victim or victim’s representative after the court proceeding of the terms of any “plea agreement, judicial action, and proceeding that affects the interests of victim or the victim’s representative, including, a bail hearing, change in the defendant’s pretrial release order, dismissal, nolle prosequi, setting of charges, trial, disposition, and postsentencing court proceeding[.]” Md. Code Ann., Crim. Proc. § 11-104(f)(3).

request to have a sentence modified or vacated under the Maryland Rules” or “any other postsentencing court proceeding.” Under Section 11-503, “the State’s Attorney shall notify the victim or victim’s representative of a subsequent proceeding in accordance with § 11-104(f)[.]” Crim Proc. § 11-503(b).

Finally, Section 11-102 provides, “[i]f practicable, a victim or victim’s representative who has filed a notification request form under § 11-104 of this subtitle has the right to attend any proceeding in which the right to appear has been granted to a defendant.” Crim. Proc. § 11-102(a).

In this case, the State’s Attorney provided insufficient notice, which compromised Lee’s right to attend the vacatur hearing in person. The State first notified Lee of the motion to vacate on September 12, 2022, two days before filing. (E. 180). On September 16, two days after filing, the State’s Attorney informed Lee that an “in person hearing” was set for the next business day—Monday, September 19. (E. 179). Considering that the State’s Attorney had been investigating the grounds for a vacatur motion for nearly a year, Friday notice of a Monday hearing to a victim representative known to be in California was not reasonably

calculated to afford Lee his right to attend the vacatur hearing in person.

Attendance in person—as opposed to what ultimately happened here, meaning, attendance by Zoom—is what the vacatur statute contemplates. Even after the experience of the COVID-19 pandemic, remote hearings are the exception, not the rule. And it was against the backdrop of open, in-court hearings that the General Assembly enacted the vacatur statute.²

The insufficient notice led not only to Lee’s inability to attend the vacatur hearing in person, but also compromised his right to be heard. When a court hearing is convened that might alter a criminal sentence, Crim Proc. § 11-403(b) authorizes a victim or their representative, where practicable, to address a court before the alteration. Section 11-403 is specifically cross-referenced in Maryland Rule 4-333(h)(3), governing the disposition of a motion to vacate. Notwithstanding these protections, Lee was

² This is not a case in which the entirety of the court proceeding occurred by Zoom. And although the State’s Attorney proffered below that Lee agreed to participate by Zoom (E. 130-131, 181-82), that proffer cannot be credited when Friday notice of the Monday hearing took attendance in person off the table as a practical option.

not properly advised of his right to address the court (E. 179), nor ultimately given sufficient time to prepare a victim-impact statement. (E. 137).³

That said, the State cannot agree with Lee that he was denied any right “to present evidence, call witnesses, and challenge the state’s evidence and witnesses.” (Appellant’s Br. at 24). No such victim’s rights exist in connection with the vacatur statute.

Maryland law is clear that neither a victim nor a victim’s representative is a party to a criminal or juvenile proceeding. Md. Code Ann., Crim. Proc. § 11-103(b). Yet Lee’s argument for full evidentiary participation would make him just that—a party.

In addition, Lee bases his argument on Crim Proc. § 11-403 (Appellant’s Br. at 19-20), but, as noted above, that statute contemplates traditional victim-impact statements when a sentence is about to be imposed or altered. Nowhere do Maryland’s

³ The Court’s remedy for these wrongs must not itself violate Syed’s constitutional protection against double jeopardy. Crim. Proc. § 11-103(e)(2). The State agrees with Lee that a remand for a new vacatur hearing does not violate double jeopardy because the existing vacatur did not carry the finality of an acquittal. (Appellant’s Br. at 26–28).

victim-rights provisions supply victims or their representatives with the ability to substantively contest a vacatur motion.

CONCLUSION

The State respectfully asks the Court to reverse the judgment of the Circuit Court for Baltimore City and remand the case for a new vacatur hearing.

Dated: January 9, 2023

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument in this case for
February 2, 2023.

CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH THE MARYLAND RULES

This filing was printed in 13-point Century Schoolbook font; complies with the font, line spacing, and margin requirements of Maryland Rule 8-112; and contains 2,261 words, excluding the parts exempted from the word count by Maryland Rule 8-503.

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CERTIFICATE OF SERVICE

In accordance with Maryland Rule 20-201(g), I certify that on this day, January 9, 2023, I electronically filed the foregoing “Brief of Appellee” using the MDEC System, which sent electronic notification of filing to all persons entitled to service, including Steven J. Kelly, Sanford Heisler Sharp LLC, 111 South Calvert Street, Baltimore, MD 21202, and Erica J. Suter, University of Baltimore School of Law, 1401 North Charles Street, Baltimore, MD 21201.

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