

Amicus Curiarum

VOLUME 28
ISSUE 6

JUNE 2011

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

Administrative Law

Administrative Subpoenas

State Board of Physicians v. Eist 3

Attorney Discipline

Appropriate Sanctions

Attorney Grievance v. Usiak 5

Attorney Grievance v. Zodrow 7

Civil Procedure

Jury Instructions

Barksdale v. Wilkowsky 9

Jury Trial

Grimstead v. Brockington 10

Contracts

Life Insurance

US Life Insurance v. Wilson 12

Rescission

Weichert v. Faust 14

Sovereign Immunity

Beka Insustries v. Board of Education 16

Criminal Law

Competency Evaluation

Peaks v. State 18

Evidence

Griffin v. State 20

Guilty Plea

State v. Daughtry 23

Post-Conviction Proceedings

Tatem v. State 27

Privilege Against Self-Incrimination

Marshall v. State 29

Review by Way of Certiorari

Stachowski v. State 31

Criminal Law	
Sixth Amendment	
State v. Goldsberry	34
Trial Procedure	
State v. Tejada	37
Environmental Law	
Bays Critical Area Protection Program	
Smith v. Kent County	39
Public Safety	
Fireman's Rule	
White v. State	42
COURT OF SPECIAL APPEALS	
Civil Procedure	
Judgments	
U.K. Construction v. Gore	44
Contracts	
Financing Contingency in Real Estate Contract	
Grant v. Kahn	45
Life Insurance	
U.S. Life Insurance v. Wilson	47
Criminal Law	
Coram Nobis Relief from Guilty Plea	
State v. Castellon-Gutierrez	49
Evidence	
Cousar v. State	50
Motor Vehicles	
Stephens v. State	52
Multiplicitous Convictions	
Moore v. State	53
Right to Due Process of Law	
Gimble v. State	55
Sentencing	
State v. Smoot	57
Insurance	
Sovereign Immunity	
Daughton v. MAIF	59
Statutory Law	
Tax Sale Foreclosure	
Voltolina v. Property Homes	61
Workers' Compensation	
Respondeat Superior	
Barclay v. Ports America	62
ATTORNEY DISCIPLINE	63

COURT OF APPEALS

Maryland State Board of Physicians v. Harold I. Eist, No. 110, September Term, 2007. Opinion filed January 21, 2011 by Eldridge, John C. (Retired, Specially Assigned)

<http://mdcourts.gov/opinions/coa/2011/110a07.pdf>

ADMINISTRATIVE LAW - ADMINISTRATIVE SUBPOENAS

Dr. Harold Eist sought judicial review of a reprimand and fine imposed upon him by the Maryland State Board of Physicians based on his refusal to cooperate with a Board investigation of his practice. Both the Circuit Court and the Court of Special Appeals held that the Board was not entitled to the requested documents and therefore Dr. Eist was justified in his refusal to cooperate. The Court of Appeals reversed those judgments and held that because neither Dr. Eist nor his patients took any action to quash the subpoena or to obtain a protective order, the Board was legally entitled to penalize Dr. Eist for his failure to comply with the subpoena.

Facts: After receiving a complaint concerning the treatment of certain patients in Dr. Harold Eist's psychiatric practice, the Maryland State Board of Physicians sent Dr. Eist a subpoena requesting all medical record of those patients. Dr. Eist forwarded the subpoena to his patients who indicated that they refused to waive the psychiatrist-patient privilege of confidentiality. Dr. Eist informed the Board that he refused to release the requested records without the consent of his patients. Consequently, the Board reprimanded and fined him. During the entire process, neither Dr. Eist nor his patients instituted any judicial proceedings to quash the subpoena issued by the Board or to obtain a protective order. Dr. Eist eventually turned over the records and was determined to have given medically appropriate treatment to his patients, but the Board still sanctioned Dr. Eist for his initial failure to comply with the subpoena.

Dr. Eist sought review of the Board-instituted penalty by challenging the sanction before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH). The ALJ found in Dr. Eist's favor and determined that the Board was obliged to seek judicial enforcement of a subpoena when a doctor raises a patient's confidentiality privilege. The Board rejected the ALJ's recommended decision and affirmed the sanction imposed upon Dr. Eist. Dr. Eist then filed a judicial review action in the circuit court. The circuit court found an "error of law" in the administrative proceedings and remanded the case to the ALJ to

develop a sufficient factual record. The ALJ again found in Dr. Eist's favor and the Board again rejected the ALJ's recommendation. Dr. Eist, for the second time, filed an action for judicial review with the circuit court and the circuit court found in his favor. The Board appealed to the Court of Special Appeals which determined that, where a privacy concern is raised with respect to subpoenaed records, the Board has the burden of obtaining judicial enforcement of the subpoena. The intermediate court held that, until a court weighs the governmental interest against the privacy interest, a doctor acting in good faith by withholding subpoenaed records due to a patient's privacy rights concern can not be sanctioned for failing to cooperate with a lawful investigation of the Board.

Held: Judgment of the Court of Special Appeals reversed. The Court of Appeals held that because neither Dr. Eist nor his patients sought either to quash the subpoena or to obtain a protective court order, Dr. Eist had to comply with the subpoena or face the penalty imposed by the Board for failing to turn over the subpoenaed documents. The Court emphasized that, under the Health Occupations Article of the Maryland Code and case law, the Board does not have the burden of instituting a judicial action to enforce its subpoenas.

An action to quash a subpoena or a motion for a protective order is the appropriate judicial proceeding for review of a patient's privacy rights in his or her records when the government also has an interest in those records. Because Dr. Eist refused to comply with the subpoena without previously seeking a protective order and because he never sought to quash the valid subpoena, his deliberate refusal to comply with the Board's subpoena in a timely manner supported the penalty imposed upon him.

Attorney Grievance Commission v. Norman C. Usiak, Misc. AG No. 22, September Term, 2010, Opinion by Greene, J., filed April 25, 2011.

<http://mdcourts.gov/opinions/coa/2011/22a09ag.pdf>

ATTORNEY DISCIPLINE - APPROPRIATE SANCTIONS - Disruption of court proceedings - disrespect for judge - conduct prejudicial to the administration of justice - violation of MRPC 8.4(d)

Facts: On May 15, 2008, Respondent represented Paz-Rubio at his trial in the District Court of Maryland before the Honorable Janice Rudnick Ambrose. At trial, Respondent and the Prosecutor made a joint motion for a continuance. Judge Ambrose denied the motion for a continuance, but agreed to the State's request to pass the case and move it to the afternoon docket. When the case was recalled, the Prosecutor moved, "based on evidentiary issues," to place the case on the stet docket upon the condition that Paz-Rubio provide proof of obtaining a license within 60 days, that he complete 24 hours of community service, and obey all laws. Judge Ambrose declined to accept the stet. Respondent asserted that he had no objection to the stet, argued that judge was procedurally bound to accept it, and asked to be excused. When Respondent was advised that the case would be heard, Respondent proceeded to continue to argue with the judge regarding whether it was appropriate for the judge to refuse to accept the stet.

Judge Ambrose asked Respondent for Paz-Rubio's plea, but Respondent persisted, saying "we believe that the case has been statted" and continued arguing with the judge. Afterward, Respondent walked out of the courtroom without Paz-Rubio. But, during court recess, Respondent gave Paz-Rubio the choice of not returning to the courtroom or returning with another lawyer recruited by Respondent. Paz-Rubio chose not to return to the courtroom.

After recess, Judge Ambrose heard other matters before calling the case again. When there was no response, Judge Ambrose found Respondent in contempt, sanctioned him and fined him \$250. In addition, Judge Ambrose issued a bench warrant for Paz-Rubio's arrest and set a bond at \$500.00.

In an effort to obtain review of the District Court contempt ruling, Respondent filed a petition for a writ of certiorari in the Circuit Court for Frederick County. The action was titled Paz-Rubio versus Judge Ambrose. Paz-Rubio's case on the traffic charge was rescheduled for trial to be held on August 8, 2008. Respondent again attempted to delay the disposition of the case by advising Paz-Rubio not to attend the August 8 trial so that Respondent's "petition for certiorari, filed in the Circuit

Court, would not become moot" in an effort for Respondent to argue his "position on the stet question." Only after a second bench warrant was issued for Paz-Rubio on August 8, 2008, did Respondent agree to accept the State's final offer to *nol pros* the charges against Paz-Rubio.

At Respondent's evidentiary hearing before Judge Thompson, he claimed that he had not heard Judge Ambrose's instructions to remain in the courtroom. However, the hearing judge, after listening to the court recording, concluded that "Judge Ambrose's statements to Respondent and Paz-Rubio could be clearly heard." Further, Judge Thompson found that Respondent's action of walking out of the courtroom delayed resolution of his client's case even though the delay eventually worked to his client's advantage. Judge Thompson, concluded that "Respondent's conduct was in pursuit of his [own] legal philosophy as opposed to his clients interests," and resulted in a "waste of the time of clerical personnel, the time of the State's Attorney, and the Court." Moreover, Judge Thompson determined that Respondent's behavior constituted "a breach of ethical responsibility" to his client resulting in a bench warrant being issued for Paz-Rubio and probably "anxiety, uncertainty, and bewilderment" to his client.

Later, during oral argument, in response to the Court's questioning, Respondent showed no remorse and was adamant that if presented with the same situation again, his actions would be the same.

Held: The Court found that Respondent acted inappropriately and that his conduct was both disruptive and disrespectful to the court. Respondent's decision to disrupt the legal proceedings and to disrespect the trial judge in the manner in which he did was a calculated response to the judge's anticipated ruling. The appropriate sanction is a 60-day suspension from the practice of law.

Attorney Grievance Commission v. John Joseph Zodrow, Misc. Docket AG No. 40, September Term, 2009, Filed April 27, 2011, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/40a09ag.pdf>

ATTORNEY DISCIPLINE - SANCTIONS - DISBARMENT

Facts: Pursuant to Maryland Rule 16-773, the Attorney Grievance Commission ("Petitioner"), acting through Bar Counsel, filed a Petition for Disciplinary Action or Remedial Action against Respondent, attorney John Joseph Zodrow. The reciprocal discipline action was based on Respondent's suspension from the practice of law in Colorado for one year and one day, following the Colorado Supreme Court's acceptance of Respondent's "Conditional Admission of Misconduct." Attached to the Petition were a certified copy of the Colorado Supreme Court's disciplinary order and the "Stipulation, Agreement, and Affidavit Containing the Respondent's Conditional Admission of Misconduct."

According to his Conditional Admission of Misconduct, Respondent admitted under oath that he had engaged in conduct that violated Colorado Rules of Professional Conduct 3.3(a)(1), 3.4(c), and 8.4(c). These rules of professional conduct were violated, according to Respondent's admissions, when he knowingly failed to make pertinent disclosures as required by law during his personal bankruptcy proceeding. Bar Counsel alleged that, based on Respondent's admissions of misconduct, Respondent violated Maryland Rules of Professional Conduct ("MRPC") 3.3(a)(1) (Candor Toward the Tribunal), 3.4(c) (Fairness to Opposing Party and Counsel), and 8.4 sections (a), (b), (c), and (d) (Misconduct), all of which are identical to their Colorado counterparts.

Pursuant to Maryland Rules 16-773 and 16-752, the Court designated the Honorable Laura S. Kiessling of the Circuit Court for Anne Arundel County to hear the matter and make findings of fact and conclusions of law in accordance with Maryland Rule 16-757. Judge Kiessling held a hearing on November 8, 2010, and issued written findings of fact and conclusions of law on November 17, 2010. Pursuant to Maryland Rule 16-773(g), Judge Kiessling found, based on Respondent's admissions of misconduct, that Respondent knowingly failed to make pertinent disclosures during his personal bankruptcy proceeding, thereby violating MRPC 3.3, 3.4, and 8.4.

Neither Bar Counsel nor Respondent excepted to Judge Kiessling's findings of fact or conclusions of law. Based on Respondent's misconduct, Bar Counsel recommended disbarment as the appropriate sanction.

Held: Respondent violated Rules 3.3(a)(1), 3.4(c), and 8.4, did not present sufficient mitigation, and the appropriate sanction is disbarment

The Court began by explaining that the Colorado Supreme Court's disciplinary order, by which it accepted and approved Respondent's Conditional Admission of Misconduct, constituted a final adjudication under Maryland Rule 16-773(g), and thus was conclusive evidence of Respondent's misconduct. As such, all that was left for the Court to determine was the appropriate sanction.

Turning to the question of the appropriate sanction for Respondent's misconduct, the Court noted that, in reciprocal discipline cases, it is inclined, though not required, to impose the same sanction as that imposed by the jurisdiction in which the misconduct occurred. The Court will impose a different sanction, explained the Court, when the sanction imposed by the other jurisdiction is inconsistent with Maryland disciplinary precedent. To decide that matter, the Court looked to attorney discipline cases involving intentional dishonest misconduct similar to that engaged in by Respondent. Analogizing the facts of this case to those of *Attorney Grievance Comm'n v. Garcia*, 410 Md. 507, 979 A.2d 146 (2009), and *Attorney Grievance Comm'n v. Byrd*, 408 Md. 449, 970 A.2d 870 (2009), in which disbarment was ordered, the Court concluded that disbarment was the sanction necessary to protect the public.

<http://mdcourts.gov/opinions/coa/2011/66a10.pdf>

CIVIL PROCEDURE – JURY INSTRUCTIONS – HARMLESS ERROR

Facts: In this lead paint case, we revisit the standard for determining “harmless error” in a civil case involving a faulty jury instruction. The Petitioner, Janay Barksdale, sued the owners of her childhood home (the “Owners”), alleging injuries from lead paint on the premises. At trial, the Owners questioned Barksdale’s grandmother whether she had ever notified them of flaking and peeling paint in Barksdale’s home. The Owners then requested a jury instruction indicating that a person’s failure to report flaking paint to the landlord is evidence of negligence. The trial court gave the instruction, even though the grandmother’s negligence was not attributable to Barksdale, and Barksdale herself was too young to have any duty to report. The jury issued a verdict in favor of the Owners. On appeal, the Court of Special Appeals upheld the jury verdict. It held that the jury instruction was erroneous, but also harmless.

Held: Court of Special Appeals reversed. A party arguing that a jury instruction given was error must also show that the error was prejudicial. When prejudice is not easily ascertained, as is generally the case with erroneous jury instructions, a reviewing court must focus on the context and magnitude of the error. An erroneous instruction may be prejudicial if it is misleading or distracting for the jury, and permits the jury members to speculate about inapplicable legal principles, or precludes a finding of liability where one was warranted. Moreover, in certain cases, the mere inability of a reviewing court to rule out prejudice, given the facts of the case, may be enough to declare an error reversible. The reviewing court, in considering these issues, should engage in a comprehensive review of the record, and base its determination on the nature of the instruction and its relation to the issues in the case.

In this case, the erroneous jury instruction was not harmless error. The requested instruction, although not explicitly a “superseding cause” or “contributory negligence” argument, may have served the same purpose and had the same impermissible effect, *i.e.*, to deflect liability to a third party. The jury was prohibited by law from blaming Barksdale or her grandmother for contributory or superseding negligence, but inclusion of the erroneous instruction may well have enticed them down that road. At the very least, we are unable to determine if the jury relied on Barksdale’s grandmother’s conduct in reaching a verdict in favor of the Owners.

Joyce Grimstead v. McNeal Brockington, No. 130, September Term 2007. Opinion filed December 17, 2010 by Eldridge, John C. (Retired, Specially Assigned)

<http://mdcourts.gov/opinions/coa/2010/130a07.pdf>

CIVIL PROCEDURE - JURY TRIALS

Prior to jury deliberations, the judge in this civil trial instructed the alternate jury members to attend the deliberations without participating. During the course of deliberations, two regular jury members were excused and replaced with two alternates. The Court of Special Appeals held that the trial court had erred and remanded for a new trial. The Court of Appeals affirmed.

Facts: In a civil action, the defendant, Dr. McNeal Brockington, was sued for medical malpractice by his former patient, plaintiff Joyce Grimstead. At the close of evidence, the jury pool consisted of six jurors and two alternates. The trial judge sought consent of counsel to allow the two alternates to attend jury deliberations without participating. Plaintiff's counsel objected and defense counsel consented. Despite the objection, the judge proceeded to allow the alternate jurors attend deliberations, although the alternates were instructed to sit apart from the jury, refrain from participating, and avoid making any facial expressions.

After several days of deliberations, during which the jury twice indicated it was deadlocked and another juror submitted a doctor's note seeking medical release, defense counsel moved for a mistrial. During his mistrial motion, defense counsel for the first time objected to the alternates attending deliberations, and he also objected to the substitution of an alternate for an excused regular juror. Plaintiff's counsel countered that defense counsel had previously waived his objections to the deliberation process. The judge excused two jurors for medical reasons and replaced them with the two alternates. The reconstituted jury returned a verdict for the plaintiff.

Both parties appealed to the Court of Special Appeals, which agreed with defense counsel's contention that the trial court erred when it allowed the presence of alternates in the jury room during deliberations. Before the Court of Special Appeals filed its opinion, however, the plaintiff died. Plaintiff filed a petition for certiorari with the Court of Appeals, which was granted, but defense counsel sought to have the motion dismissed because no personal representative had been appointed.

Held: Judgment of the Court of Special Appeals affirmed. Defendant's motion to dismiss the writ of certiorari was denied. Although under Maryland Rule 1-203(d) a personal representative

for the deceased plaintiff should have been appointed earlier in the proceedings, defense counsel had not alleged any unfair prejudice to his rights due to the delay. Plaintiff's intent to carry on with appellate proceedings had been clearly evinced during her lifetime and her counsel's actions in filing the petition were appropriate.

The Court of Appeals determined that the presence of alternates during jury deliberations and the substitution of alternates for regular jurors after the start of deliberation were two separate and distinct issues. The Court did not need to address whether defense counsel had waived his objection to the alternates attending the deliberations because defense counsel had consistently objected to mid-deliberation substitution of the alternates for the regular jurors. Even if waiver principles applied, defense counsel never waived his objection to the mid-deliberation substitution. The Court concluded that the trial judge's substitution of alternates for regular jurors after the commencement of deliberations was clear error and presumptively prejudicial.

The Court relied on precedent established in two criminal cases, *Stokes v. State*, 379 Md. 618, 843 A.2d 64 (2004), and *Hayes v. State*, 355 Md. 615, 735 A.2d 1109 (1999), to determine that under Maryland law an alternate juror may not be substituted after jury deliberations have begun. Maryland law permits the substitution of an alternate juror only before the jury begins its deliberations. Moreover, alternate jurors who did not replace regular jurors must be discharged when the jury retires to consider its verdict. Alternate jurors neither can be present at deliberations after the jury retires nor can be substituted for regular jurors after the jury retires. Because the presence of alternate jurors during deliberations impinges upon a defendant's right to a jury trial and potentially injects an improper outside influence on the deliberations, prejudice must be presumed.

The United States Life Insurance Company In The City Of New York v. Wilson, No. 2544, September Term 2009, filed April 28, 2011. Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2011/2544s09.pdf>

CONTRACTS - LIFE INSURANCE - REINSTATEMENT OF LAPSED POLICY - ACCEPTANCE OF OFFER TO REINSTATE LAPSED POLICY - ACCEPTANCE BY PAYMENT - TIME OF PAYMENT - PAYMENT MADE BY CHECK REQUESTED IN ON-LINE BANKING DIRECTIVE AND THEN ISSUED ON PAPER AND SENT TO INSURER'S AGENT - "MAIL BOX RULE" - POST-DATED CHECK - LIABILITY ON CONTRACT OF AGENT OF DISCLOSED PRINCIPAL.

Facts: Effective November 15, 1998, Dr. John G. Griffith was insured under a life insurance policy ("the Policy") issued by The United States Life Insurance Company in the City of New York ("US Life") and administered by the AMA Insurance Agency ("AMAIA"), the appellees. Dr. Griffith's semi-annual premium payments were made to AMAIA and were due on May 15 and November 15 each year. Dr. Griffith failed to make his May 15, 2007 premium payment. AMAIA sent him a reminder notice advising that he could make payment within 60 days of the due date of the premium, or by July 14, 2007. At some later point, AMAIA sent Dr. Griffith a lapse notice advising him that he could reinstate the Policy by paying his overdue premium and completing an "Application for Reinstatement of Coverage" within 30 days. On July 23, 2007, Dr. Griffith accessed his on-line bank account with Bank of America and electronically directed that his premium payment be made to AMAIA. A check for the amount of the overdue premium was sent to AMAIA on July 25, 2007, and delivered on July 30, 2007. In the interim, on July 28, 2007, Dr. Griffith was struck by a car and killed while on vacation with his family.

After AMAIA received Dr. Griffith's premium payment, but before it had learned of his death, it rejected the payment and returned it to him with a letter advising that, because it was received outside of the 30-day grace period provided for under the Policy, he was required to complete the "Application for Reinstatement of Coverage" to request reinstatement of the Policy.

Dr. Griffith's widow, Elizabeth Wilson, the appellant, was the primary beneficiary under the Policy. She brought suit in the Circuit Court for Baltimore County for breach of contract against US Life and AMAIA. US Life and AMAIA jointly moved for summary judgment and Wilson filed a cross-motion for summary judgment. After argument, the circuit court granted Wilson's motion for summary judgment and denied US Life's and AMAIA's motions.

Held: Judgment affirmed as to US Life and reversed as to

AMAIA. Under the unambiguous terms of the Policy, the premium payment was due May 15, 2007, but was properly payable during a "grace period" up to 30 days after that date (June 15). The grace period could be extended, however, by written notice to the insured informing the insured of its extension and of the date on which the Policy would lapse. The reminder notice sent to Dr. Griffith extended the grace period until July 14, 2007. Under the Policy, Dr. Griffith could reinstate the Policy within 30 days of the end of the grace period by paying the overdue premium without being required to apply for reinstatement or otherwise provide proof of insurability.

Within 30 days of the end of the extended grace period, Dr. Griffith directed that payment be made and Bank of America sent the check to AMAIA. Time of payment in this situation is determined by the mailbox rule, which is the established convention for pinpointing when an offer is accepted by means of a writing. Payment was made, and reinstatement occurred, therefore, when the check was sent by Bank of America to AMAIA, at which time Dr. Griffith was still alive. The fact that the check was post-dated did not alter this fact. Thus, the Policy was in force when Dr. Griffith died, and US Life breached the contract by failing to pay Wilson \$650,000 in death benefits under the terms of the Policy.

AMAIA, however, was working for a disclosed principal -- US Life -- and was not a party to the insurance contract. Therefore, it was not liable in contract for payment of the benefits owed under the Policy.

Weichert v. Faust, No. 43, September Term 2010. Opinion filed on April 27, 2011 by Greene, J.

<http://mdcourts.gov/opinions/coa/2011/43a10.pdf>

CONTRACTS - RESCISSION

EMPLOYMENT CONTRACTS - BREACH OF DUTY

EMPLOYMENT CONTRACTS - ATTORNEYS FEES

Facts: Petitioner, Weichert Co. of Maryland, Inc. ("Weichert"), instituted a breach of contract claim against its former employee, Respondent, Dorothy Crago Faust ("Faust"). Faust served as Vice President and Manager of Weichert's Bethesda, Maryland, Real Estate Sales Office. Two weeks after Faust ended her employment with Weichert, she joined Long & Foster Real Estate, Inc. ("Long & Foster"). Weichert claimed that Faust violated the terms of her employment agreement by breaching the duty of loyalty and the non-solicitation clause of the Employment Agreement by recruiting Weichert sales agents and employees to work for Long & Foster. Under the terms of the contract, if Weichert brought a claim under the non-solicitation clause, and did not succeed on that claim, Faust would be entitled to recover attorney's fees incurred in defending against the claim.

A jury determined that Faust breached the duty of loyalty but did not violate the non-solicitation clause. Faust then petitioned for attorney's fees under the terms of the non-solicitation clause. After an evidentiary hearing, Faust was awarded attorney's fees by the Circuit Court. Weichert appealed to the Court of Special Appeals, arguing that Faust was not entitled to recover under the terms of the fee shifting provision because Weichert prevailed on its claim that Faust had breached the duty of loyalty. Weichert also argued that because Faust did not personally incur the attorney fees, she was not entitled to the award. The Court of Special Appeals affirmed the award of attorney fees, holding that Faust's breach of the duty of loyalty did not result in the forfeiture of her right to attorney's fees under the non-solicitation provision.

Held: Affirmed. The Court of Appeals held that Faust's breach of the duty of loyalty did not result in a forfeiture of her rights under the non-solicitation clause, and thus Faust was entitled to recover attorney's fees. The Court stated that in order for a breach on the part of the employee to release the employer from its obligations under the contract, the breach must be shown to be material. In this case, the duty of loyalty was never determined to be material, and therefore Weichert was not excused from performance. The Court also held that attorney's

fees include those fees for legal services incurred on behalf of a client regardless of who pays them, and therefore Faust was entitled to assert a claim for attorney's fees incurred on her behalf.

Beka Industries, Inc. v. Worcester County Board of Education, No. 47, September Term 2010, filed April 26, 2011. Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2011/47a10.pdf>

CONTRACT - SOVEREIGN IMMUNITY - JUDGMENT - RECOUPMENT

Facts: Beka Industries, Inc. ("BEKA") contracted with the Board of Education of Worcester County to contribute to the construction of a new elementary school. Dissatisfied with the method and amounts of the County Board's payment for its work, BEKA filed suit in the Circuit Court for Worcester County for breach of contract. In that court, the County Board sought to reduce any potential amount of money damages awarded to BEKA by asserting its entitlement to "credits, backcharges, and/or set-offs" totaling \$531,079.52 arising from changes to the contract. Following a four day bench trial, the Circuit Court "compromised the claim" between what the trial judge viewed to be BEKA's final claim for \$1,215,035,80 and the County Board's claim that \$505,487 of BEKA's claim was not owed under the contract. A judgment for \$1,100,000 in favor of BEKA was then entered. The County Board obtained a stay of execution of the judgment after the County Commissioners filed a *supersedeas* bond in the Circuit Court. Subsequently, the County Board obtained a reversal of the judgment in the Court of Special Appeals and an order for a new trial.

In the Court of Appeals, BEKA asked that the trial court's judgment be fully reinstated. To that end, BEKA contended that the intermediate appellate court erred in holding the trial court judgment to be deficient under Md. Rule 2-522(a) and holding that sovereign immunity was waived only if BEKA proved there was money to pay a judgment. Lacking money (or the ability to raise money on its own) to pay a judgment, the Board contended that the doctrine of sovereign immunity barred the suit. BEKA asserted that even if sovereign immunity applied the doctrine had been legislatively waived for its contract claim pursuant to Md. Code (2009 Repl. Vol.), §§ 12-201 *et seq.* of the State Government Article ("S.G"). The parties also contested the applicability of S.G. § 12-203 as a funding mechanism to satisfy BEKA's judgment, as well as the status of the *supersedeas* bond filed in the Circuit Court. The County Board, as Cross-Petitioner, asserted that BEKA may obtain only a limited judgment because sovereign immunity has only been legislatively waived for claims of \$100,000 or less, or the limits of an insurance policy, pursuant to Md. Code (2006 Repl. Vol.), § 5-518 of the Courts and Judicial Proceedings Article. Additionally, BEKA asserted error in the intermediate appellate court's resolution of the Board's claim that its recoupment claim had been erroneously precluded by the trial judge's ruling on BEKA's motion *in limine* to exclude

evidence on the claim.

Held: The Court of Appeals affirmed the Court of Special Appeals's judgment that a new trial was warranted because the County Board was precluded from presenting evidence on its recoupment claim and, additionally, BEKA may have been awarded impermissible "delay damages" under the contract. But, the Court reversed the intermediate appellate court's holding that the County Board's governmental immunity has not been waived unless and until BEKA proves that there is a funding mechanism to satisfy a judgment. The Court held that S.G. § 12-203 provided a funding mechanism for a judgment rendered against the County Board following a waiver of sovereign immunity under S.G. 12-201(a). The Court held that S.G. § 12-203 applied because its statutory companion, S.G. § 12-201(a), waived the County Board's governmental immunity and the plain language of S.G. § 12-203 requires that payment of all judgments rendered against the State, its officers or units, upon breach of a written contract shall be provided for by the Governor as part of a budget bill. Thus, S.G. § 12-203 provides a proxy for the common law requirement that sovereign immunity is waived only when the entity has the ability to pay, e.g., through appropriation or taxation. Furthermore, the application of S.G. § 12-203 to written contract disputes between a State entity and a private party was notably consistent with the General Assembly's purpose in providing a waiver to immunity in contract actions involving written agreements. Moreover, the Court held that the limited waiver of sovereign immunity contained in C.J.P. § 5-518 did not apply. Accordingly, we affirmed in part, reversed in part, and remanded the case to the intermediate appellate court with direction to remand to the Circuit Court for a new trial.

Dwayne Antonio Peaks v. State of Maryland, No. 59, September Term, 2010, Filed April 26, 2011. Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2011/47a10.pdf>

CRIMINAL LAW AND PROCEDURE – COMPETENCY EVALUATION

Facts: In 2004, Dwayne Antonio Peaks was arraigned on multiple charges. Following arraignment, defense counsel entered a plea of not criminally responsible on Peaks's behalf and requested an evaluation of his competency to stand trial. The Court ordered a competency evaluation to be completed at Clifton T. Perkins Hospital Center. In 2005, evaluators at Clifton submitted the results of their evaluation, finding that Peaks was competent to stand trial. When the case was called for trial in November of 2006, the trial judge determined, based on evidence on the record, that Peaks was competent to stand trial. Two weeks later, based on Peaks's erratic behavior, the judge reconsidered his earlier determination and ordered an additional competency evaluation. When the trial was called in June of 2007, the subsequent competency evaluation had not been performed, and neither party raised the issue of competency. Peaks discharged his counsel and was later removed from the court room when his behavior again deteriorated. Before opening arguments, the trial judge, on the basis of the evidence on the record, determined that Peaks was competent to stand trial. Peaks was convicted by a jury in abstentia.

Peaks appealed his conviction to the Court of Special Appeals, claiming that Judge Alpert did not comply with Md. Code (1974, 2008 Repl. Vol.), § 3-104 of the Criminal Procedure Article because Peaks argued that the judge did not make a proper determination regarding competency prior to trial. In an unreported opinion, the Court of Special Appeals affirmed the conviction, holding that there was sufficient evidence on the record to support a finding of competency.

Held: Affirmed. The court held that the trial court did not violate § 3-104. Once an initial determination was made prior to trial pursuant to § 3-104(a), the court had discretion to reconsider its holding under § 3-104(c). The Court held that subsection (c) of the statute authorizes a judge to reevaluate a defendant's possible incompetence, after the defendant has been determined competent under § 3-104(a). The Court explained that unlike § 3-104(a), a reconsideration may be made, within the court's discretion, at any time before final judgment. The trial court satisfied § 3-104(c) in determining, prior to final judgment, that there was not sufficient evidence to rebut the earlier determination of competency.

Steven Hill, Terri Alston, & Charles Yates v. State of Maryland, No. 93, September Term, 2010, filed on May 23, 2011. Opinion written by Adkins, J.

<http://mdcourts.gov/opinions/coa/2011/93a10.pdf>

CRIMINAL LAW – ESCAPE – INVALIDITY OF UNDERLYING SENTENCE

Facts: The Petitioners were sentenced to terms of imprisonment with a deferred, or "springing," start date. Under these sentences, their jail terms were scheduled to begin three to five years after the sentencing date. The sentencing judge informed Petitioners that if they stayed out of further legal trouble during that time, they could return to court before the start date and have their sentences vacated. Petitioners, however, did not return to court, and later failed to report on the respective start dates, and each was charged and pled guilty to second degree escape.

After the escape convictions, this Court decided *Montgomery v. State*, 405 Md. 67, 950 A.2d 77 (2008), and invalidated a "springing sentence" similar to the underlying sentences here. After that decision, Petitioners attempted to vacate their escape convictions, arguing that they could not be criminally responsible for failure to report for the now-invalid sentences. The Circuit Court denied the motions to vacate the convictions, and the Court of Special Appeals affirmed in an unreported opinion.

Held: Court of Special Appeals affirmed. Maryland law does not allow criminal defendants, seeking relief from their sentences, to engage in self-help, i.e. by failing to report for a term of imprisonment. A criminal defendant who wishes to challenge his sentence must do so through the appropriate legal channels. Absent such a challenge, the defendant will be guilty of escape for failing to report for a term of imprisonment, whether or not the underlying court order would be invalid if properly challenged.

Antoine Levar Griffin v. State of Maryland, No. 74, September Term 2010. Opinion filed April 28, 2011 by Battaglia, J.

<http://mdcourts.gov/opinions/coa/2011/74a10.pdf>

CRIMINAL LAW - EVIDENCE

Facts: Antoine Levar Griffin was charged in numerous counts with the shooting death, on April 24, 2005, of Darvell Guest at Ferrari's Bar in Perryville, in Cecil County. During the trial, the State sought to introduce Griffin's girlfriend's, Jessica Barber's, MySpace profile to demonstrate that, prior to trial, Ms. Barber had allegedly threatened another witness called by the State. The printed pages contained a MySpace profile in the name of "Sistasouljah," describing a 23-year-old female from Port Deposit, listing her birthday as "10/02/1983" and containing a photograph of an embracing couple. The printed pages also contained the following blurb:

FREE BOOZY!!!! JUST REMEMBER SNITCHES GET
STITCHES!! U KNOW WHO YOU ARE!!

When Ms. Barber had taken the stand after being called by the State, she was not questioned about the pages allegedly printed from her MySpace profile. Instead, the State attempted to authenticate the pages, as belonging to Ms. Barber, through the testimony of Sergeant John Cook, the lead investigator in the case. Defense counsel objected to the admission of the pages allegedly printed from Ms. Barber's MySpace profile, because the State could not sufficiently establish a connection between the profile and posting and Ms. Barber.

When defense counsel questioned Sergeant Cook, outside of the presence of the jury, he testified that he knew the MySpace page belonged to Ms. Barber "[t]hrough the photograph of her and Boozy on the front, through the reference to Boozy, [] the reference [to] the children, and [] her birth date indicated on the form." The trial judge, thereafter, indicated that he would permit Sergeant Cook to testify in support of authentication of the redacted portion of the pages printed from MySpace, containing the photograph "of a person that looks like Jessica Barber" and Griffin, allegedly known as "Boozy," adjacent to a description of the woman as a 23 year-old from Port Deposit, and the blurb, stating "FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!" The redacted MySpace page was ultimately admitted.

The Court of Special Appeals determined that the trial judge did not abuse his discretion in admitting the printed MySpace pages containing the "snitches get stitches" language.

Held: The Court of Appeals reversed. Initially the Court described social networking websites, such as MySpace, as

"sophisticated tools of communication," which enable members to create online "profiles" or "individual web pages on which members [can] post photographs, videos, and information about their lives and interests." The Court noted that anyone with an email address can create a MySpace profile, and although a unique username and password is generally required to both establish a profile and access it, posting on the site by those that befriend the user does not. The Court further observed that the identity of who generated the profile may be confounding because anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password.

After highlighting the potential for fabricating or tampering with electronically stored information on a social networking site, the Court observed that authentication, generally, is governed by Maryland Rule 5-901, which states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 5-901(b)(4), in turn, provides that "[c]ircumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics," may be offered to demonstrate that the electronic evidence is what it purports to be. The Court also referred to *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007), wherein Magistrate Judge Paul W. Grimm, of the Maryland Federal District Court, outlined issues regarding authentication of electronically stored information, with respect to the federal analogue to Maryland Rule 5-901.

The Court of Appeals held that the trial judge abused his discretion in admitting the MySpace evidence pursuant to Rule 5-901(b)(4), because the picture of Ms. Barber, coupled with her birth date and location, were not sufficient "distinctive characteristics" on a MySpace profile to authenticate its printout, given the prospect that someone other than Ms. Barber could have not only created the site, but also posted the "snitches get stitches" comment. The Court reasoned that, "[t]he potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user leads to our conclusion that a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site in order to reflect that Ms. Barber was its creator and the author of the "snitches get stitches" language." The Court also referred to cases from other jurisdictions that have suggested greater scrutiny when authenticating electronically stored information on social networking sites, because of the heightened possibility for manipulation by other than the true user or poster. Because the

MySpace evidence was a key component of the State's case, the Court determined that the error in the admission of its printout required reversal.

Finally, the Court suggested a number of opportunities for authentication of social networking sites, including asking the purported creator if she indeed created the profile and also if she added the posting in question, i.e. "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be." Rule 5-901(b)(1). The second option, reasoned the Court, may be to search the computer of the person who allegedly created the profile and posting and examine the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question. Finally, the Court offered that a third method may be to obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it.

State of Maryland v. Demetrius Daughtry, No. 81, September Term 2010. Opinion filed on April 25, 2011 by Harrell, J.

<http://mdcourts.gov/opinions/coa/2011/81a10.pdf>

CRIMINAL LAW - GUILTY PLEAS - VOLUNTARINESS - MARYLAND RULE 4-242 - PRESUMPTION THAT DEFENSE COUNSEL EXPLAINS CHARGES TO HIS/HER CLIENT OUTSIDE OF THE RECORD

ALLOWING A TRIAL COURT, IN ENSURING THAT A GUILTY PLEA IS KNOWING, VOLUNTARY, AND ENTERED INTELLIGENTLY, TO RELY ON NOTHING MORE THAN A PRESUMPTION THAT "IN MOST CASES DEFENSE COUNSEL ROUTINELY EXPLAIN THE NATURE OF THE OFFENSE IN SUFFICIENT DETAIL TO GIVE THE ACCUSED NOTICE OF . . . WHAT HE IS BEING ASKED TO ADMIT" RUNS CONTRARY TO MARYLAND RULE 4-242'S REQUIREMENT THAT THERE BE AN ADEQUATE EXAMINATION "ON THE RECORD IN OPEN COURT." ACCORDINGLY, WHERE THE RECORD REFLECTS NOTHING MORE THAN THE FACT THAT A DEFENDANT IS REPRESENTED BY COUNSEL AND THAT THE DEFENDANT DISCUSSED GENERICALLY THE PLEA WITH HIS OR HER ATTORNEY, SUCH A PLEA COLLOQUY IS DEFICIENT UNDER RULE 4-242(c), AND THE PLEA MUST BE VACATED.

Facts: On 14 December 2005, police officers responded to the report of a shooting. Upon arriving at the scene, the officers observed a vehicle, containing passengers matching descriptions given to the 911 dispatcher by a witness, leaving the scene at a high rate of speed. Eventually, the officers apprehended one of the occupants of the vehicle, Demetrius Daughtry ("Daughtry"). Ultimately, Daughtry admitted that he and a friend went to visit one Anthony Brown and rob him of some marijuana. Upon entering Brown's apartment, there was a struggle between Daughtry's acquaintance and Brown, at which point Daughtry fired a handgun in the direction of Brown, leading ultimately to Brown's death - ruled a homicide following an autopsy.

Daughtry was charged by indictment in the Circuit Court for Prince George's County with murder, robbery with a deadly weapon, and use of a handgun in the commission of a crime of violence. He negotiated with the State to plead guilty to first-degree murder and use of a handgun in the commission of a crime of violence. On 5 September 2006, at the plea hearing, Daughtry responded, "Yes," to the trial court's question of, "Have you talked over your plea with your lawyer?" The Circuit Court agreed to the terms of the plea agreement - life imprisonment, suspend all but thirty years - but after Daughtry refused to testify against his acquaintance, the Circuit Court imposed a sentence of life imprisonment plus twenty years.

On 19 August 2008, Daughtry's appellate counsel filed a Supplemental Application for Leave to Appeal, asserting that Daughtry's plea of guilty should be vacated because the Circuit

Court judge did not "determine on the record that defense counsel had advised [him] of the elements of first degree murder." The Court of Special Appeals directed the State to respond to Daughtry's claim. The Court of Special Appeals granted Daughtry's application for Leave to Appeal, and vacated his convictions, reasoning that the plea colloquy was deficient under Maryland 4-242, as Daughtry's implying that he had "talked over his plea" with his counsel, in no way "assure[d] that he understood the elements of the charge of first-degree murder."

The State filed timely a Petition for Writ of Certiorari, which we granted, *State v. Daughtry*, 415 Md. 608, 4 A.3d 512 (2010), to consider whether:

1. As a matter of first impression, did the Supreme Court's opinion in *Bradshaw v. Stumpf*, 545 U.S. 175[, 125 S. Ct. 2398, 162 L. Ed. 2d 143] (200[5]), eliminate the longstanding presumption set forth in *Henderson v. Morgan*, 426 U.S. 637[, 96 S. Ct. 2253, 49 L. Ed. 2d 108] (1976), that "even without . . . [an] express representation" by defense counsel that the nature of the offense to which a defendant enters a plea of guilty "has been explained to" the defendant "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of . . . what he is being asked to admit"?

2. If the *Henderson* presumption is no longer viable, should the intermediate appellate court's opinions in *Abrams [v. State]*, 176 Md. App. 600, 933 A.2d 887 (2007), be given retrospective application?

Held: Affirmed. The Court traced the development of Maryland Rule 4-242 and its progeny. The Court noted the critical passage of *Henderson v. Morgan*, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976), where the Supreme Court stated that "even without such an express representation [by defense counsel that the nature of the offense has been explained to the accused, or an explanation of the charge by the trial judge], it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." The Court noted that, although the Supreme Court noted a presumption, it did not apply it in *Henderson* (and thus it was dicta), considering the trial judge found as fact that one of the elements had not been explained to the defendant in *Henderson*.

Finally, the Court noted that the Supreme Court's invocation of the precatory terms/phrases "may" and "most cases" implies that such a presumption was not intended to apply all of the time and in every case.

Next, the Court analyzed its decision in *State v. Priet*, 289 Md. 267, 288, 424 A.2d 349, 359 (1981), which considered three consolidated criminal cases. There, we announced that the test to be applied in determining the voluntariness of guilty pleas "is whether, considering the record as a whole, the trial judge could fairly determine that the defendant understood the nature of the charge to which he pleaded guilty." In *Priet*, we, however, also mentioned the "presumption" language from *Henderson*. Yet, with respect to two of the three consolidated cases in *Priet*, application of the *Henderson* presumption was not necessary to our holdings in those cases, and was thus dicta in all but one of the consolidated cases.

The Court addressed the Supreme Court's decision in *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005). Notably, in *Bradshaw*, the Supreme Court did not mention the *Henderson* presumption, and Daughtry argued that its absence signaled a retreat from the presumption as set forth in *Henderson*. The Court, however, held that the Supreme Court's decision in *Bradshaw* did not affect the limited viability of the presumption as set forth originally in dicta in *Henderson*. Although acknowledging that *Bradshaw* did not invoke the *Henderson* presumption, the Court found this "unremarkable, as the Court did not need to employ the presumption, considering that '[i]n Stumpf's plea hearing, his attorneys represented on the record that they had explained to their client the elements of the aggravated murder charge'" Accordingly, "to the extent that a presumption was identified in *Henderson*, it remains unaffected by *Bradshaw*."

Yet, that the limited viability of the *Henderson/Priet* presumption remains intact after *Bradshaw*, however, did not save the day for the State here. The Court re-affirmed the notion that the standard for reviewing the voluntariness of guilty pleas is determining whether the defendant, based on the totality of the circumstances, entered the plea knowingly and voluntarily. The Court stated that employing the *Henderson/Priet* presumption in cases in which the only evidence proffered to show that a defendant is aware of the nature of the charges against him is the fact that he or she is represented by an attorney and that the defendant discussed the plea with his or her attorney undermines the purpose of a "totality of the circumstances test." The Court's conclusion was consistent with Md. Rule 4-242(c), which requires "an examination of the defendant on the record in open court." That is, relying on a mere presumption - and nothing more - to conclude that a defendant "is pleading

voluntarily, with understanding of the nature of the charge," would encourage trial courts to circumvent or give short-shrift to the Rule's requirement that a defendant be examined "on the record in open court."

The Court went on to elaborate on what factors can and should aid a trial court in determining whether to accept a guilty plea. These include: (1) the complexity of the charge, recognizing that the nature of some crimes is readily understandable from the crime itself; (2) the personal characteristics of the accused, recognizing that one with diminished mental capacity is less likely to be able to understand the nature of the charges against him than one with normal mental faculties; and (3) the factual basis proffered to support the court's acceptance of the plea. The Court emphasized further that, in meeting the requirement of on-the-record, in open court, evidence from the plea colloquy that the defendant is aware of the nature of the charges against him, the source or speaker from which such evidence emanates is immaterial, and thus it does not matter whether (1) the defendant informs the trial court that either he understands personally or was made aware by, or discussed with, his attorney the nature of the charges against him, (2) the attorney informs the trial court that he informed his client of the charges against the client, or (3) the trial court itself informs the defendant of the charges against the defendant.

The Court held that none of the aforementioned indicia of voluntariness were present in the case *sub judice*. Accordingly, because applying the *Henderson/Priet* presumption on an otherwise naked record would be contrary to Rule 4-242's requirement that there be an examination "on the record in open court," the Court held that, based on the totality of the circumstances, Daughtry's plea was not entered knowingly and voluntarily, and it must be vacated. Finally, the Court held that by reaffirming the totality of the circumstances test - the law of Maryland for decades - the Court was no in way "overrul[ing] prior law and declar[ing] a new principle of law," and, therefore, the Court's decision must be given full retrospective effect.

Tatem v. State, No. 33, September Term, 2010, Opinion filed on May 20, 2011 by Murphy, J.

<http://mdcourts.gov/opinions/coa/2011/33a10.pdf>

CRIMINAL PROCEDURE - POST-CONVICTION PROCEEDINGS - POST-CONVICTION RELIEF IN THE FORM OF A BELATED MOTION FOR MODIFICATION OF SENTENCE HEARING - MOTION TO CORRECT ILLEGAL SENTENCE: If a plea agreement reached during a post-conviction proceeding results in relief in the form of the defendant's right to a belated motion for modification of sentence hearing before the judge who imposed the sentences that the defendant is serving, the sentencing judge is not "bound" by that agreement. When a post-conviction court grants the defendant only the right to file a belated motion for modification of sentence, unless the judge who imposed that sentence is unavailable to decide the motion, the motion for modification must be presented to the judge who imposed the sentence. If a sentencing judge breaches a plea agreement by imposing a sentence that exceeded the sentence for which the defendant bargained and upon which the defendant relied in pleading guilty, that sentence is "illegal," and may be corrected "at any time" pursuant to Md. Rule 4-345(a).

Facts: As a result of an agreement reached during a post-conviction proceeding in the Circuit Court for Wicomico County, the Post-Conviction Court granted Paul Andrew Tatem, Petitioner, a "re-sentencing" hearing before the judge who had imposed the sentence from which Petitioner was seeking post-conviction relief. At the re-sentencing hearing, Petitioner and the State requested that the sentencing judge impose the agreed upon sentence, but the sentencing judge rejected that request. After the judgments entered by the sentencing judge were affirmed by the Court of Special Appeals, Petitioner appealed arguing that, "because the Post-Conviction Court approve[d] the plea agreement reached by the parties during the post-conviction hearing with respect to the sentence to be imposed at re-sentencing, [it bound the judge] who presided over the re-sentencing."

Held: The Court of Appeals rejected Petitioner's argument and affirmed the judgment of the Court of Special Appeals. The Court found that as a result of the agreement reached during the post-conviction proceeding, Petitioner acquired an enforceable right to a "re-sentencing" hearing before the sentencing judge, as well as to a joint submission of that agreement to the sentencing judge. Petitioner did not, however, acquire an enforceable right to the recommended sentence. The record of both the post-conviction and sentencing hearing was clear - no reasonable person in Petitioner's position would be confused about (1) the limited relief granted by the Post-Conviction Court, or (2) whether the sentencing judge ever indicated that she would agree to modify any of the sentences that she had

previously imposed. The Court also held that when a post-conviction court grants the defendant the right to file a belated motion for modification of sentence, unless the judge who imposed that sentence is unavailable to decide the motion, the motion for modification must be presented to the judge who imposed the sentence.

Thomas W. Marshall v. State of Maryland, No. 9, September Term, 2008. Opinion filed July 27, 2010 by Eldridge, John C. (Retired, Specially Assigned)

<http://mdcourts.gov/opinions/coa/2010/9a08.pdf>

CRIMINAL LAW - PRIVILEGE AGAINST SELF-INCRIMINATION

During closing arguments in this criminal case, the prosecuting attorney commented upon the defendant's decision not to testify in his own behalf. The defense objected, but the prosecution countered that those comments were permissible under the "invited response" doctrine. The Court of Appeals disagreed, holding that the comments infringed upon the defendant's rights under Article 22 of the Maryland Declaration of Right and Maryland Code, § 9-107 of the Courts and Judicial Proceedings Article. The judgment of the Court of Special Appeals in favor of the State was reversed and the case remanded to the circuit court for a new trial.

Facts: Defendant Marshall was tried for several drug-related offenses, including possession of cocaine with intent to distribute. The defense did not present any witnesses during the trial, but rather contended during closing arguments that the State had failed to meet its burden of proof. In the course of his argument, defense counsel stated that the defendant was a "cocaine addict" and alleged that the defendant, when arrested, was purchasing cocaine, not selling it. Defense counsel also attacked the prosecution's contention that the defendant was linked to the house where the drug paraphernalia was found. Attempting to rebut this argument, the prosecuting attorney remarked upon the defendant's decision not to testify, stating "Mr. Marshall did not take the stand so I ask you to take [defense counsel's comments] with a great deal of caution" and "We don't have Mr. Marshall's thoughts but we do have so many other pieces [of evidence]." Additionally, the prosecuting attorney stated that, "The State has presented ample evidence of Mr. Marshall's guilt as to felony possession....There is no doubt in my mind to that...."

Defense counsel moved for a mistrial. He asserted that prosecutor's references to the defendant's election not to testify violated the defendant's right to a fair trial, as well as the prosecutor's attempt to vouch for the credibility of the State's case. The mistrial motion was denied and the jury convicted the defendant of cocaine possession and possession with intent to distribute.

The Court of Special Appeals affirmed the judgment and held that the prosecutor's comments were a satisfactorily tailored "invited response" because they rebutted the defense counsel's

assertion that the defendant was a cocaine addict.

Held: Judgment of the Court of Special Appeals reversed. The Court of Appeals held that the remarks by the prosecutor on the defendant's election not to testify violated his rights under Article 22 of the Maryland Declaration of Rights and § 9-107 of the Courts and Judicial Proceedings Article. The comments in this case were even "more direct" than several other cases in which the prosecutor's remarks had required the reversal. Because the prosecutor's statements had attempted to use the defendant's silence as support for the State's case, the prosecutor's argument impinged on the defendant's rights. Although the State did not argue that the comments were proper, they contended that the remarks were permissible under the "invited response" doctrine.

The "invited response" doctrine, or the "fair response" doctrine, provides that where a prosecutor reasonably responds to improper attacks by defense counsel, the prejudice stemming from both arguments may equalize the positions of both sides. The Court of Appeals had not previously addressed whether, under Maryland law, the "invited response" doctrine would allow a prosecutor to comment to the jury about a defendant's decision not to testify at his or her criminal trial. However, in order for the prosecution to invoke the "invited response" doctrine, defense counsel's argument must first be improper. The Court of Appeals rejected the State's contention that the defense's use of term "cocaine addict" in this case was improper. Calling the defendant a "cocaine addict" was a legitimate inference from the State's evidence and, as such, there was no impropriety in defense counsel's closing argument sufficient to warrant the prosecutor's comments on the defendant's decision not to testify.

Kenneth Martin Stachowski, Jr. v. State of Maryland, No. 52, September Term, 2008; Wayne Stockstill v. State of Maryland, No. 16, September Term, 2008. Opinion filed October 22, 2010 by Eldridge, John C. (Retired, Specially Assigned)

<http://mdcourts.gov/opinions/coa/2010/52a08.pdf>

CRIMINAL LAW - REVIEW BY WAY OF CERTIORARI -APPELLATE JURISDICTION

The Court of Appeals considered two otherwise unrelated cases presenting the same jurisdictional issue under § 12-202 of the Courts and Judicial Proceedings Article of the Maryland Code (1974, 2006 Repl. Vol.). The Court held that § 12-202 required that the previously issued writs of certiorari be dismissed.

Facts: Stachowski v. State

Kenneth Stachowski was charged in the District Court with theft by using a bad check and, upon his request for a jury trial, the case was transferred to the Circuit Court. At the same time the bad check case was heard, the Circuit Court also heard three of Stachowski's *de novo* appeals from District Court violation of probation cases involving violations of Maryland's home improvement laws. The Circuit Court judge revoked probation in those three cases. Stachowski pled guilty in the bad check case, and he was sentenced in all of the cases. Even though full restitution had previously been made in the bad check case, as a condition of probation in that case, Stachowski was ordered to make restitution to the home improvement victims.

Stachowski filed in the Court of Special Appeals applications for leave to appeal in all of the cases. Because the Court of Special Appeals has no jurisdiction to review decisions of the Circuit Court when the Circuit Court has exercised its appellate jurisdiction, the three home improvement cases were transferred to the Court of Appeals.

After the Court of Special Appeals transferred the three home improvement cases to the Court of Appeals, Stachowski filed a "supplemental" certiorari petition in the home improvement cases arguing that there was an illegal condition of probation in the bad check case because he was ordered to pay restitution in the otherwise unrelated home improvement cases. Stachowski's petition was initially granted, but after briefing and argument, the writ was dismissed because, as the Court of Appeals explained, a reversal of the Circuit Court order in the home improvement cases would not impact the restitution order in the bad check case.

Meanwhile, Stachowski also filed in the Court of Special Appeals an application for leave to appeal the bad check judgment. The Court of Special Appeals at first denied the application, but,

after reconsideration, granted leave to appeal and transferred the case to its appeal docket without addressing the merits of the case. The Court of Appeals then, on its own motion, issued a writ of certiorari in the bad check case. The briefs and oral argument addressed the validity of the Circuit Court's restitution order, but the Court of Appeals later noticed a jurisdictional issue not previously raised concerning whether the Court has jurisdiction to decide the case on its merits in light of § 12-202 of the Courts and Judicial Proceedings Article, which mandates that a review by way of certiorari may not be granted by the Court of Appeals in a case in which the Court of Special Appeals has denied or granted leave to appeal from a final judgment entered following a guilty plea in a Circuit Court. Reargument was ordered on the jurisdictional issue.

Facts: Stockstill v. State

Wayne Stockstill was convicted of first degree rape and other crimes in 1980 and sentenced to life imprisonment. More than 20 years later, pursuant to Maryland Rule 4-345, Stockstill's sentence was modified, and he was released on supervised probation with the condition that he participate in a mental health program for sex offenders. As part of that program, he submitted to a polygraph examination and revealed that he had violated conditions of his probation. The Circuit Court revoked his probation and reinstated the previously suspended life sentences.

Stockstill filed in the Court of Special Appeals an application for leave to appeal from the Circuit Court order revoking probation. The Court of Special Appeals granted the application for leave to appeal but, prior to that Court addressing the merits of the case, the Court of Appeals *sua sponte* issued a writ of certiorari. The arguments in the Stockstill case concerned whether Stockstill's probation was revoked based on evidence admitted in violation of the psychiatrist-patient privilege. Subsequently however, the Court of Appeals noticed a jurisdictional issue under § 12-202, which states that review by way of certiorari may not be granted by the Court of Appeals in a case in which the Court of Special Appeals has denied or granted leave to appeal from an order of a Circuit Court revoking probation. Reargument was ordered on the jurisdictional issue.

Held: Section 12-202 precluded review by the Court of Appeals in these cases because the Court of Special Appeals had not addressed the merits. Both writs of certiorari were dismissed.

The Court of Appeals is obligated to address *sua sponte* issues related to its jurisdiction. Section 12-202 of the Courts and Judicial Proceedings Article mandates that the Court of Appeals may not review by way of certiorari a case or proceeding "in which the Court of Special Appeals has denied or granted" leave to appeal in

five specific categories. In *Stachowski*, the category presented is "leave to appeal from a final judgment entered following a plea of guilty in a Circuit Court," and in *Stockstill*, it is "leave to appeal from an order of a Circuit Court revoking probation."

Section 12-202 deprives the Court of Appeals of jurisdiction where the Court of Special Appeals simply denies or grants an application for leave to appeal without resolving or deciding any of the legal or factual merits of the application, regardless of whether the Court of Special Appeals places the case on its appeal docket. This construction of § 12-202 is consistent with a long line of cases acknowledging that the limitation upon the Court of Appeals' jurisdiction relates only to the nonreviewability of the decision to grant or deny an application for leave to appeal. Although the Court of Appeals may not review the Court of Special Appeals' exercise of discretion in granting or denying an application for leave to appeal, the Court of Appeals is authorized to review the intermediate appellate court's judgment if the decision is based on the merits of the case.

State of Maryland v. James Earl Goldsberry, Jr., No. 141, September Term, 2008, Filed April 26, 2011, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/141a08.pdf>

CRIMINAL LAW - SIXTH AMENDMENT - RIGHT TO COUNSEL OF CHOICE - DISQUALIFICATION OF COUNSEL

CRIMINAL LAW - FELONY MURDER - COMMON LAW

Facts: Respondent James Earl Goldsberry, Jr., and his co-defendant, James Myers, Jr., were tried jointly before a jury on charges arising from the homicide of Vincent Chamberlain. Prior to that trial, Myers filed a motion to sever his trial from Goldsberry's, on the ground that one of Goldsberry's attorneys, Joseph McKenzie, had interviewed Myers previously and therefore his presence at Myers's trial would be prejudicial. Goldsberry was also represented by Andrew Jezic and John Giannetti.

At the hearing on that motion, Myers's counsel, Janet Hart, informed the court that McKenzie had spoken previously to Myers regarding the facts of the case. Although not certain of the exact date on which the conversation took place, the purpose of the conversation, whether McKenzie by that time had entered his appearance on behalf of Goldsberry, and whether Myers was represented by counsel at the time, Hart alleged that the conversation between her client and McKenzie posed possible violations of Maryland Rules of Professional Conduct 1.18 and 4.2. Hart further explained that McKenzie informed her that, after the conversation with Myers, he called the District Court and learned that there was no line of appearance filed on behalf of Myers. Hart argued to the trial court that McKenzie's actions would affect Myers's decision whether to testify and, for that reason, the motion to sever should be granted.

In response, Jezic explained that McKenzie had not entered his appearance for Goldsberry when he spoke with Myers and McKenzie never represented to Myers that he was a "disinterested person." Jezic also noted that the conversation took place before Myers's preliminary hearing date and, after McKenzie informed Jezic of the conversation with Myers, the two took several actions to mitigate any possible rule violations. First, McKenzie called the District Court and attempted to obtain counsel for Myers. And, second, Jezic and McKenzie never discussed anything said by Myers. McKenzie supplemented Jezic's representations, adding that, although he had discussed the facts of the case with Myers, at no time during the conversation did Myers make any admissions. McKenzie also confirmed Jezic's representation to the court that the conversation with Myers took place prior to the indictments of Goldsberry and Myers.

The trial court denied the motion to sever, instead disqualifying McKenzie as counsel for Goldsberry. Jezic objected on behalf of Goldsberry, arguing that the disqualification violated Goldsberry's Sixth Amendment right to choice of counsel. Apparently persuaded, the trial court modified its ruling, allowing McKenzie to continue his representation of Goldsberry, so long as McKenzie refrained from disclosing to Jezic his conversation with Myers.

At that point, the State brought to the trial court's attention a second potential conflict, one that involved McKenzie and Ms. Tawanna Davis, who was scheduled to testify (although ultimately did not) as a State's witness. Ms. Davis, according to the State, had testified before the grand jury that she was "coached" by Goldsberry and McKenzie. The State advised the court that, if Davis "somehow chang[ed] her testimony from what she had told the grand jury," "there might come a point in time where I'm going to ask her if she was coached by an attorney." The court, on hearing that, disqualified McKenzie, this time overruling Jezic's objection that such action violated Goldsberry's Sixth Amendment right to choice of counsel.

The case proceeded to trial, at which the State presented evidence establishing that Goldsberry and Myers had agreed to rob the victim of his marijuana, and that during that robbery, Myers shot the victim in the head, killing him. At the close of all evidence, and over Goldsberry's objection, the trial court instructed the jury on both first degree and second degree felony murder. Goldsberry was convicted of second degree felony murder, conspiracy to commit second degree murder, attempted robbery with a dangerous weapon, and use of a handgun in the commission of a crime of violence.

Goldsberry noted a timely appeal to the Court of Special Appeals, where he asserted two claims of error relevant to the issues decided by the Court of Appeals. First, Goldsberry argued that the trial court had violated his Sixth Amendment right to counsel of choice by disqualifying McKenzie. And second, Goldsberry contended that the second degree felony murder conviction predicated upon attempted armed robbery was a "non-existent" crime under Maryland law. The Court of Special Appeals rejected Goldsberry's choice of counsel claim, but agreed with Goldsberry that armed robbery can not serve as a predicate for second degree felony murder under Maryland law. Accordingly, the Court of Special Appeals reversed Goldsberry's felony murder conviction without the possibility of retrial. *Goldsberry v. State*, 182 Md. App. 394, 957 A.2d 1110 (2008).

Held: Reversed. The Court of Appeals held that the trial court's disqualification of McKenzie without having first conducted an adequate threshold inquiry rendered the action in violation of

Goldsberry's Sixth Amendment right to choice of counsel. As for the second degree felony murder claim, the Court held that, though it was error for the trial court to have instructed the jury on second degree felony murder where the underlying felony was a predicate for first degree felony murder, Goldsberry could be tried for felony murder on retrial.

With regard to the Sixth Amendment choice of counsel claim, the Court began by noting that the trial court is afforded wide discretion in deciding whether to disqualify a criminal defendant's selection of counsel due to a purported conflict of interest. The Court explained, though, that under *Wheat v. United States*, 486 U.S. 153 (1988), and its progeny, the criminal defendant is afforded a presumption in favor of his or her counsel of choice. That presumption may be rebutted only after the trial court conducts an adequate inquiry into the circumstances underlying the purported conflict to determine whether there is an actual or serious potential for conflict. That inquiry, explained the Court, requires the trial court to conduct a hearing on the matter and to make evidence-based findings that balance the defendant's right to counsel of choice on the one hand, and interests of fairness and maintenance of ethical standards on the other. With that standard in mind, the Court looked to the record before the trial court at the time the decision to disqualify McKenzie was made, and determined that the trial court failed to engage in the analysis necessary to support a finding that a serious potential for conflict existed, as required by *Wheat*.

The Court then considered the second degree felony murder claim. The Court explained that the crime of murder in Maryland remains a common law offense. The Maryland statutes regarding murder merely classify murder into various degrees of culpability, rather than separate crimes. In this regard, Maryland Code (2002 Repl. Vol., Supp. 2009), §§ 2-201 and 2-204 of the Criminal Law Article ("CrL") differentiate first degree from second degree felony murder based on the nature and severity of the underlying felony and the available penalties for each. The Court reasoned that, because the difference is merely one of degree of culpability and resulting punishment, Goldsberry could be retried on a charge of felony murder following his conviction of second degree felony murder, even though the trial court erred by instructing the jury on both first and second degree felony murder despite the alleged underlying felony being one listed by CrL § 201 as a predicate for first degree felony murder.

State of Maryland v. Emanuel Tejada, No. 103, September Term, 2009, Filed April 26, 2011, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/103a09.pdf>

CRIMINAL LAW - TRIAL PROCEDURE - JURY SELECTION - OBJECTION TO JURY SELECTION PROCESS - PRESERVATION FOR APPEAL:

Facts: In October 2007, Respondent Emanuel Tejada stood trial in the Circuit Court for Montgomery County on charges stemming from an attempted robbery of an armored car. At the beginning of the jury selection process, the venire consisted of 60 prospective jurors, of whom 43 remained after the trial court made dismissals for cause. After Respondent, Respondent's co-defendant, and the State each exercised several peremptory strikes, the trial court noted that the parties were "going to run out of jurors," because the parties have "got more strikes than we have jurors left." After a brief discussion, the court announced that it would bring in more prospective jurors later that day. The parties then exercised several more peremptory challenges.

Later that day, however, the court determined that it did not have any other prospective jurors available, at which point it presented the parties with a choice either to wait and bring in additional prospective jurors the following day to complete the jury selection that had already begun, or to begin the whole process anew. The State sought to continue the following day, and Respondent wished to start over the entire selection process. The following day, the court brought in additional prospective jurors in order "to complete the selection process." Respondent objected to continuing the prior day's selection process, and reasserted his desire to start the whole process anew. The court overruled Respondent's objection, and the parties subsequently finished the selection process, including the use of their remaining peremptory challenges. At the end of trial, the jury found Respondent guilty on multiple counts including, inter alia, attempted second degree murder.

On appeal to the Court of Special Appeals, Respondent asserted, among other claims, that the trial court erred in bifurcating the jury selection process. The State argued that the trial court did not err in conducting the jury selection process, and that Respondent failed to preserve his objection to that process. The Court of Special Appeals held that Respondent had preserved his objection for appellate review by noting his objection before the jury was impaneled, and that the trial court erred by conducting a bifurcated jury selection process because it had the effect of denying Respondent his right of informed and comparative rejection. The State filed a petition for writ of certiorari, which the Court of Appeals granted, to decide whether Respondent preserved for appellate review his objection to the jury

selection process.

Held: Affirmed. The Court of Appeals held that Respondent properly preserved for appellate review his objection to the jury selection process. In so holding, the Court rejected each of the State's theories as to why Respondent actually failed to preserve his objection.

First, the Court of Appeals declined to endorse the State's contention that Respondent was required to object to the size of the venire before exercising any peremptory challenges because it was clear by then that there remained an insufficient number of venirepersons to accommodate the parties' exercise of all their allotted peremptory challenges. Citing *King v. State Roads Comm'n*, 284 Md. 368, 396 A.2d 267 (1979), the Court described the general rule that "an objection to the jury-selection process must be made before the jury is sworn." Contrary to the State's theory, the Court held that neither Md. Rule 4-312 nor 4-323 contains, explicitly or implicitly, a timing requirement for objections to the size of the venire prior to the exercise of the peremptory challenge. Nor was the Court persuaded by the State's argument that such an objection must be made at the "earliest practicable opportunity," because, the Court said, such a rule was not supported by applicable case law, and actually contradicted the holding in *King v. State Roads Comm'n*.

Next, the Court of Appeals rejected the State's assertion that Respondent waived appellate review by continuing to exercise peremptory challenges after he and his co-defendant raised the issue of the insufficient venire. The Court determined that the "exercise of peremptory challenges is not inconsistent with a request for a venire containing a sufficient number of jurors." To accept the State's position, the Court explained, would improperly present parties with the dilemma of choosing between their "ancient" and "highly esteemed" right to peremptory challenges and their ability to preserve for appellate review an objection to the jury selection process.

Jerry Smith, et al. v. The County Commissioners of Kent County, Maryland, et al. No. 2, September Term 2010, filed 25 April 2011. Opinion by Harrell, J.,

<http://mdcourts.gov/opinions/coa/2011/2a10.pdf>

ENVIRONMENTAL LAW - CHESAPEAKE AND ATLANTIC COASTAL BAYS CRITICAL AREA PROTECTION PROGRAM - STATE CRITICAL AREA COMMISSION - KENT COUNTY BOARD OF COUNTY COMMISSIONERS - ADMINISTRATIVE FINALITY OF LOCAL GROWTH ALLOCATION AMENDMENT APPROVAL

BECAUSE THE STATE CRITICAL AREA COMMISSION MAY MODIFY, REJECT, DELAY, OR EVEN PRECLUDE THE KENT COUNTY BOARD OF COUNTY COMMISSIONERS' APPROVAL OF A GROWTH ALLOCATION REQUEST, THE COUNTY'S APPROVAL OF A GROWTH ALLOCATION REQUEST IS NOT A FINAL ACTION SUBJECT TO IMMEDIATE JUDICIAL REVIEW.

Facts: Since 1962, Drayton Manor in Kent County, classified as a "Resource Conservation Area" ("RCA") for purposes of the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program ("Critical Area Program"), has been used as a small retreat center to host religious groups. In 2003, however, the owners sought to develop the property into a "Retreat Center, Spa & Conference Center" which would intensify meaningfully the property's use.

Because Drayton Manor was classified as an RCA, and because the proposed use of the tract exceeded the local Critical Area Program's development restrictions for the property, the Developer sought a "growth allocation" amendment request to reclassify the property to an "Intensely Developed Area," which would then permit the Developer to undertake construction of the proposed changes to Drayton Manor. On 27 March 2007, subject to numerous restrictions, the Board of County Commissioners of Kent County approved Drayton Manor's growth allocation request. On 23 April 2007, Petitioners - a group of Kent County residents - filed a petition for judicial review in the Circuit Court for Kent County. Ultimately, on 4 March 2008, the Circuit Court affirmed on the merits the County's decision to approve conditionally the Developer's growth allocation request.

Petitioners appealed timely to the Court of Special Appeals (COSA), and on 30 September 2009, the COSA dismissed Petitioners' appeal on the ground that it was premature to seek judicial review of the County's action, explaining that because the County's decision, under the Critical Area Act, was subject to approval by the State Critical Area Commission (the Commission), the County's approval was not a agency action sufficient to trigger a right to judicial review (assuming such a right was granted by local law). On 18 December 2009, we granted Petitioners' Petition for Writ of Certiorari, *Smith v. Kent County*, 411 Md. 740, 985 A.2d 538 (2009),

to consider the sole question posed: whether "the decision of the County Commissioners of Kent County, Maryland[,] to approve an application for growth allocation [is] a final, appealable decision despite the fact that it was conditioned upon an approval by the Critical Area Commission."

Notwithstanding this timeline with respect to judicial review of the County action, a parallel dimension evolved with respect to the Commission's consideration of the County's approval of the growth allocation. Apparently while consideration of the local growth allocation approval by the County was pending before the Commission, Petitioners filed their judicial review action in the Circuit Court from the County's decision. Eventually, on 4 June 2008, a panel of the Commission recommended to the full Commission that the growth allocation request be approved with various additional conditions.

Petitioners filed, on or about 2 July 2008 in the Circuit Court for Anne Arundel County, a petition for judicial review of the presumed 4 June 2008 approval by the Commission of the County's local program growth allocation amendment for Drayton Manor. The case was transferred ultimately to the Circuit Court for Kent County. The Circuit Court, reasoning that the underlying State governmental proceedings and action were quasi-legislative in nature and, therefore, not subject to scrutiny in a petition for judicial review proceeding, dismissed the action. The Court of Special Appeals has no record of an appeal being taken by Petitioners from this dismissal.

Held: The judgment of the Court of Special Appeals was vacated and the case was remanded to that court with directions to dismiss the appeal, vacate the judgment of the Circuit Court, and to remand to the Circuit Court with directions that it dismiss Petitioners' petition for judicial review.

The Court reaffirmed the notion that "[a] petition for judicial review proceeding in a circuit court must be authorized specially by a legislative enactment, be it a public local law or a State statute." In the present case, however, because there is no provision in the State Critical Area Program regulatory scheme authorizing judicial review of either the local or State decisions to amend a county Critical Area plan or program, the only possible legislative source purporting to supply such special authorization is the Kent County Growth Allocation Policy (the Policy) - adopted by the County and, following local approval, "[a]ny aggrieved person with standing may within thirty (30) days after the decision, appeal to the Circuit Court of Maryland."

Although the Court assumed for purposes of the present case that the Policy constitutes (or is the equivalent of) a public local law or ordinance sufficient to grant authority for a judicial

review action, in a lengthy footnote, the Court emphasized that it did not concede this point necessarily, questioning whether the policy - seemingly adopted by a "resolution" only - may grant a right of judicial review of the assumed (for present purposes) quasi-judicial actions of a local government or administrative agency. That notwithstanding, assuming that the Policy constitutes a public local law or ordinance sufficient to grant authority for a judicial review action, the Court stated its task as determining from what governmental action - local or State - does the Policy grant the right to seek judicial review.

The Court held that under the Policy, Petitioners, at most, had a facial right to seek judicial review of only the final approval action by the Commission. This is so because, at all times, the Policy stated expressly that no local approval action was effective until the Commission gave its approval. Further, the Commission may override ultimately the County's decision to approve a growth allocation request. In effect, the Commission's action may replace and supercede, or at least subsume, the local action where both actions, at their core, represent an approval. Accordingly, the County's approval of the growth allocation request was not a final and "appealable" action, and, thus, the Court of Special Appeals was correct to dismiss Petitioners' appeal.

Finally, the Court noted that Petitioners had but a single statutory avenue of proceeding to pursue: a timely-filed petition for judicial review following the Commission's action. Petitioners pursued such a remedy by filing a petition for judicial review in the Circuit Court for Anne Arundel County, which was transferred ultimately to the Circuit Court for Kent County. The Circuit Court agreed that the Commission's process was quasi-legislative and dismissed Petitioner's case. Because the COSA has no record of an appeal taken by Petitioners, they abandoned the only right to judicial review arguably afforded by the Policy. To allow Petitioners to resuscitate these proceedings in the Circuit Court, the Court noted, "would be to give them an unwarranted additional bite at the proverbial apple," especially where the Commission's approval subsumed the County's approval.

Richard White v. State of Maryland, No. 36, September Term, 2009, Filed April 27, 2011, Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/36a09.pdf>

PUBLIC SAFETY - FIREMAN'S RULE - NEGLIGENCE

Facts: Petitioner Richard White, formerly a police officer for the town of Thurmont, Frederick County, Maryland, brought suit in the Circuit Court for Frederick County, naming as defendants the State of Maryland and a Maryland State Police dispatcher. Officer White sought to recover for injuries he suffered in the course of pursuing a vehicle driven by individuals that he believed, based on the dispatch he had received, to be fleeing from an armed robbery. Officer White alleged that the dispatcher was negligent in issuing the dispatch, and that the State was liable under the theory of *respondeat superior*, negligent hiring/supervision, and negligence in supervising 911 dispatch protocols.

At trial, the evidence established that the dispatcher negligently dispatched the crime as an "armed robbery," when in fact the crime was shop lifting. Based on expert testimony, it was also established that, had the description of the crime been properly dispatched, Officer White never would have engaged in the high-speed pursuit.

At the close of Officer White's case-in-chief, the State moved for judgment, asserting that Officer White's claim was barred by operation of the firefighter's rule and his contributory negligence in conducting the pursuit. The trial court denied the motion. The State moved again for judgment at the close of all evidence, asserting the same grounds as before. This time, the trial court agreed, and granted judgment for the State on both grounds.

Officer White noted a timely appeal to the Court of Special Appeals, arguing that neither the firefighter's rule nor the doctrine of contributory negligence entitled the State to judgment as a matter of law. The Court of Special Appeals affirmed the trial court's ruling, holding that firefighter's rule barred Officer White's claim. *White v. State*, 183 Md. App. 658, 664, 963 A.2d 222, 226 (2008).

Held: Affirmed. The Court of Appeals held that the firefighter's rule barred Officer White's claim.

The Court began by tracing the development of Maryland's common law firefighter's rule to its current form, which the Court noted is based on public policy. The Court explained that the rule generally prevents public safety officers from recovering for injuries attributable to the negligence that requires their assistance. The rule, however, will not bar a safety officer from

recovering for injuries that occur after the initial period of occupational risk. Nor will the firefighter's rule prevent recovery for injuries resulting from intentional misconduct or from pre-existing hidden dangers of which the land owner was aware and had an opportunity to warn.

Turning to the facts at hand, the Court determined that Officer White was injured as a result of the negligently created risk that was the very reason for having engaged in the high-speed pursuit, *i.e.*, the negligent dispatch. The Court rejected Officer White's contention that the firefighter's rule was inapplicable as between fellow public safety officers, noting several cases of other states in which the rule was applied to bar one public safety officer's suit against the other. For those reasons, the Court held that Officer White's claim was barred by the firefighter's rule.

COURT OF SPECIAL APPEALS

U.K. Construction & Management v. Patricia Gore, Case No 2824, September Term 2009. Opinion was filed by Wright, J. on May 26, 2011.

<http://mdcourts.gov/opinions/cosa/2011/2824s09.pdf>

CIVIL PROCEDURE - JUDGMENTS - PRECLUSION AND EFFECT OF JUDGMENTS
- RES JUDICATA

Facts: This appeal arises from an Order of the Circuit Court for Baltimore City granting appellee's petition to compel arbitration regarding a contractual dispute previously heard before an arbitrator.

Appellee entered into a home improvement contract ("Contract") with appellant, a construction company, to renovate her property located at 2200 Brookfield Road, Baltimore, Maryland. Appellee alleged various defects in appellant's work and withheld the "final installment payment." Pursuant to the Contract, the parties brought their dispute before an arbitrator who found in favor of appellant. Nevertheless, appellee continued to withhold payment and filed a petition to compel arbitration in the Circuit Court for Baltimore City, again alleging defective work by appellant. Appellant argued before the court that the issues raised by appellee had already been addressed in the prior arbitration and, therefore, the relitigation of such matters ran contrary to the principle of *res judicata*. The court issued an order denying appellee's motion and further granted Appellant's motion for sanctions. Appellee thereafter filed a motion for reconsideration and, upon reconsideration, the court granted her petition to compel arbitration. This appeal followed.

Held: Reversed. Under the doctrine of *res judicata*, an arbitrator's decision, when issued via procedures akin to a judicial proceeding, is afforded the same preclusive effect as a judicial one. Therefore, the circuit court erred in granting appellee's petition to compel arbitration regarding the matters already adjudicated before the arbitrator.

Kareem Grant v. Stacy G. Kahn, et al., No. 886, September Term, 2008, filed April 27, 2011. Opinion by Woodward, J.

<http://mdcourts.gov/opinions/cosa/2011/886s08.pdf>

CONTRACTS - FINANCING CONTINGENCY IN REAL ESTATE SALES CONTRACT -
CONFESSED JUDGMENT AFTER CONTRACT EXECUTED - DOCTRINE OF
EQUITABLE CONVERSION

Facts: Appellant, Kareem Grant, entered into a contract to purchase residential real estate from Jeffrey Ganz. The contract was contingent on appellant's ability to obtain the necessary financing (the "financing contingency"). After appellant and Ganz entered into the contract, but before settlement occurred and while the financing contingency remained alive, appellees, Stacy G. Kahn and Steven Kahn, filed a complaint for confessed judgment against Ganz, the seller. The Circuit Court for Montgomery County entered a judgment by confession against Ganz.

Thereafter, without any knowledge of the confessed judgment, appellant completed the purchase of the property from Ganz. Appellant tendered the full amount of the purchase price, which came from a loan that was approved on the day of settlement. When appellees' judgment was not paid out of the proceeds of settlement, they requested that the circuit court issue a writ of execution directing the sheriff to levy upon the property. In response, appellant filed a motion to release his property from the judgment levy, which the circuit court denied.

Held: Reversed. The Court held that the doctrine of equitable conversion prevented appellees' confessed judgment against Ganz from becoming a lien on appellant's property.

The Court first observed that equitable conversion by contract applies only if the contract at issue is specifically enforceable. Thus the "central issue" before the Court was "whether the financing contingency in the contract of sale prevented equitable conversion from occurring at the time that the contract was made." The Court determined that the financing contingency benefitted appellant by making the contract contingent on his ability to secure the necessary financing. Conversely, the financing contingency gave Ganz only the power, after the 45-day period following the date of the contract ratification, to impose a time limit for appellant to either remove the contingency or let the contract terminate, without liability. Therefore, the Court reasoned that the financing contingency benefitted only appellant, and because appellant could waive the contingency at any time, the contract was specifically enforceable by appellant.

Next, the Court determined that the financing contingency

created only conditions subsequent. Because neither party took advantage of the conditions permitting termination of the contract, the contract continued in effect. Thus the Court concluded that the financing contingency did not prevent the occurrence of equitable conversion at the time of the execution of the contract.

The Court also stated that appellees' reliance on footnote 7 of the Court's opinion in *Chambers v. Cardinal*, 177 Md. App. 418 (2007) was misplaced. The Court observed that the comments in that footnote were *dicta*, and not a holding as claimed by appellees.

Lastly, the Court determined that sound public policy supported the application of the doctrine of equitable conversion to the contract. The Court reasoned that upholding the circuit court's decision would expose a buyer entering into a contract of sale with a financing contingency to the risk of judgment liens entered against the seller after the execution of the contract. The Court recognized that, in some situations, those liens could affect the sale itself. Such uncertainty, according to the Court, would adversely affect the free transferability of real property.

The United States Life Insurance Company In The City Of New York v. Wilson, No. 2544, September Term 2009, filed April 28, 2011. Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2011/2544s09.pdf>

CONTRACTS - LIFE INSURANCE - REINSTATEMENT OF LAPSED POLICY - ACCEPTANCE OF OFFER TO REINSTATE LAPSED POLICY - ACCEPTANCE BY PAYMENT - TIME OF PAYMENT - PAYMENT MADE BY CHECK REQUESTED IN ON-LINE BANKING DIRECTIVE AND THEN ISSUED ON PAPER AND SENT TO INSURER'S AGENT - "MAIL BOX RULE" - POST-DATED CHECK - LIABILITY ON CONTRACT OF AGENT OF DISCLOSED PRINCIPAL.

Facts: Effective November 15, 1998, Dr. John G. Griffith was insured under a life insurance policy ("the Policy") issued by The United States Life Insurance Company in the City of New York ("US Life") and administered by the AMA Insurance Agency ("AMAIA"), the appellees. Dr. Griffith's semi-annual premium payments were made to AMAIA and were due on May 15 and November 15 each year. Dr. Griffith failed to make his May 15, 2007 premium payment. AMAIA sent him a reminder notice advising that he could make payment within 60 days of the due date of the premium, or by July 14, 2007. At some later point, AMAIA sent Dr. Griffith a lapse notice advising him that he could reinstate the Policy by paying his overdue premium and completing an "Application for Reinstatement of Coverage" within 30 days. On July 23, 2007, Dr. Griffith accessed his on-line bank account with Bank of America and electronically directed that his premium payment be made to AMAIA. A check for the amount of the overdue premium was sent to AMAIA on July 25, 2007, and delivered on July 30, 2007. In the interim, on July 28, 2007, Dr. Griffith was struck by a car and killed while on vacation with his family.

After AMAIA received Dr. Griffith's premium payment, but before it had learned of his death, it rejected the payment and returned it to him with a letter advising that, because it was received outside of the 30-day grace period provided for under the Policy, he was required to complete the "Application for Reinstatement of Coverage" to request reinstatement of the Policy.

Dr. Griffith's widow, Elizabeth Wilson, the appellant, was the primary beneficiary under the Policy. She brought suit in the Circuit Court for Baltimore County for breach of contract against US Life and AMAIA. US Life and AMAIA jointly moved for summary judgment and Wilson filed a cross-motion for summary judgment. After argument, the circuit court granted Wilson's motion for summary judgment and denied US Life's and AMAIA's motions.

Held: Judgment affirmed as to US Life and reversed as to

AMAIA. Under the unambiguous terms of the Policy, the premium payment was due May 15, 2007, but was properly payable during a "grace period" up to 30 days after that date (June 15). The grace period could be extended, however, by written notice to the insured informing the insured of its extension and of the date on which the Policy would lapse. The reminder notice sent to Dr. Griffith extended the grace period until July 14, 2007. Under the Policy, Dr. Griffith could reinstate the Policy within 30 days of the end of the grace period by paying the overdue premium without being required to apply for reinstatement or otherwise provide proof of insurability.

Within 30 days of the end of the extended grace period, Dr. Griffith directed that payment be made and Bank of America sent the check to AMAIA. Time of payment in this situation is determined by the mailbox rule, which is the established convention for pinpointing when an offer is accepted by means of a writing. Payment was made, and reinstatement occurred, therefore, when the check was sent by Bank of America to AMAIA, at which time Dr. Griffith was still alive. The fact that the check was post-dated did not alter this fact. Thus, the Policy was in force when Dr. Griffith died, and US Life breached the contract by failing to pay Wilson \$650,000 in death benefits under the terms of the Policy.

AMAIA, however, was working for a disclosed principal -- US Life -- and was not a party to the insurance contract. Therefore, it was not liable in contract for payment of the benefits owed under the Policy.

State of Maryland v. Christian G. Castellon-Gutierrez, No. 931, September Term, 2010, filed April 29, 2011. Opinion by Woodward, J.

<http://mdcourts.gov/opinions/cosa/2011/931s10.pdf>

CRIMINAL LAW - CORAM NOBIS RELIEF FROM GUILTY PLEA - WAIVER

Facts: Appellant entered a guilty plea to robbery with a dangerous weapon and was sentenced to a suspended period of incarceration and one year of unsupervised probation. After sentencing, appellant was advised that he could apply for leave to appeal to the Court of Special Appeals from the judgment of the circuit court and that he had 30 days from the date of sentencing to do so by filing an application with the clerk of the circuit court. Appellant did not file such application for leave to appeal. Seventeen months later, after he was deported, illegally reentered the United States, was arrested, and pled guilty in federal court to unauthorized re-entry, appellant filed a petition for writ of error coram nobis. Appellant claimed in his petition that he faced significant collateral consequences from his conviction and that his guilty plea was involuntary. After a hearing, the trial court agreed and vacated appellant's guilty plea.

Held: Reversed. The Court of Special Appeals held that appellant had waived his right to file for coram nobis relief, because he had been advised that he had the right to file a petition for leave to appeal his conviction and sentence to the Court of Special Appeals and that he had to do so within 30 days after the date of sentencing. The Court rejected appellant's argument that the advisement had to include the four limited grounds upon which an appeal from a guilty plea could be based. The Court also held that the failure to inform appellant of his appeal rights prior to the entry of his guilty plea had no effect on whether appellant waived the right to file a petition for coram nobis relief challenging the conviction and sentence arising out of a guilty plea.

Kelvin Cousar v. State, No. 2683, September Term 2009, filed April 28, 2011. Opinion by Watts, J.

<http://mdcourts.gov/opinions/cosa/2011/2683s09.pdf>

CRIMINAL LAW - EVIDENCE - RELEVANCE - PRIOR ACTS - CRIMES & WRONGS - MARYLAND RULE 5-404(b)

Facts: A jury in the Circuit Court for Charles County convicted Kelvin Cousar, appellant, of unnatural or perverted sexual practices, third degree sexual offense, reckless endangerment, and wearing, carrying, or transporting a handgun. See Md. Code Ann., Crim. Law ("C.L.") § 3-322 (unnatural or perverted sexual practice); C.L. § 3-307(a)(1) (third degree sexual offense); C.L. § 3-204(a)(1) (reckless endangerment); and C.L. § 4-203 (wearing, carrying, or transporting a handgun). On January 25, 2010, the court sentenced appellant to three years of imprisonment for wearing, carrying, or transporting a handgun, a consecutive five years for reckless endangerment, and a consecutive ten years for third degree sex offense, for a total of eighteen years of imprisonment. The acts for which appellant was convicted consisted of appellant defecating into a woman's mouth, at gunpoint. Upon arrest, appellant advised a law enforcement officer that the defecation was accidental. The State introduced the testimony of a second woman who was the alleged victim in an unrelated case, pending against appellant in a different county. The second woman testified that, on an earlier occasion, during an encounter with appellant, he defecated into her mouth after producing a gun. Both women testified that they did not consent to being defecated upon. Appellant testified that he had consensual sexual activity with the first woman, but the defecation was not for sexual gratification.

At the conclusion of all of the evidence in the case, and prior to closing argument, as to reckless endangerment, the court instructed the jury that: "A person may not recklessly engage in conduct that creates a substantial risk of death or serious physical injury to another." Neither attorney made any exception or objection to the court's instruction as to reckless endangerment.

Appellant contended, on appeal, that the trial court erred in admitting the second woman's testimony in violation of Maryland Rule 5-404(b) and in instructing the jury as to reckless endangerment, by not giving the Maryland Pattern Jury Instruction on the offense.

Held: The Court of Special Appeals affirmed. Maryland Rule 5-404(b) provides: Evidence of other crimes, wrongs, or acts including acts as defined by Code, Courts Article § 3-801 is not

admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. Absence of mistake is listed as an exception to the rule precluding other bad acts evidence. As set forth by the Court of Appeals in Wynn v. State, 351 Md. 307 (1998), in order for the absence of mistake exception to be applicable: (1) the defendant generally must make some assertion or put on a defense that he or she committed the act for which he or she is on trial but did so by mistake or accident, and (2) the crime or bad act allegedly committed by mistake must be the same crime or bad act for which the defendant is on trial. Evidence of prior sexual assaults involving an unrelated complainant may be admissible under the absence of mistake exception where the prerequisites for admissibility set forth in Wynn are met. Under Hurst v. State, 400 Md. 397 (2007), evidence of prior sexual assaults by a defendant does not demonstrate a subsequent complainant's lack of consent, and, therefore, such evidence is generally inadmissible.

Although Hurst postdates Wynn, Hurst is not controlling as to the admission of other crimes evidence in the form of testimony from victims in unrelated offenses under the absence of mistake exception of Maryland Rule 5-404(b), and does not encroach upon the standards set forth by the Court in Wynn. Absence of mistake focuses on the repetitive nature of the defendant's conduct and is fundamentally different from the concept of consent, which involves a subsequent victim or third party's free will. The admissibility of other crimes evidence in the form of testimony of a victim in an unrelated offense is to be determined by application of the factors set forth by the Court of Appeals in Wynn, rather than the reasoning of Hurst.

Other crimes evidence, under the Maryland Rule 5-404(b), absence of mistake exception, is admissible in the prosecution of an unnatural or perverted sexual practices offense where the defendant alleges to have committed the act or offense by mistake or accident.

Giving the statutory definition of the reckless endangerment offense did not constitute plain error.

James Adam Stephens, III v. State of Maryland, No. 2982, September Term, 2009, filed April 28, 2011. Opinion by Woodward, J.

<http://mdcourts.gov/opinions/cosa/2011/2982s09.pdf>

CRIMINAL LAW - MOTOR VEHICLES - TRAFFIC CONTROL DEVICES

Facts: Appellant was driving in the middle lane of a three-lane highway at 3:00 a.m. on March 12, 2009. He was observed by a police officer swerving into both adjacent lanes several times, one time forcing another vehicle to slow down and pull onto the shoulder. The officer stopped appellant's vehicle, and after administering several field sobriety tests to appellant, arrested him for driving under the influence of alcohol. Appellant was also charged with failure to obey a "traffic control device," namely, the marks on the road designating the lanes of traffic. Appellant was convicted of all charges after a bench trial. On appeal, appellant challenged only his conviction for failure to obey a traffic control device.

Held: Affirmed. The question presented to the Court of Special Appeals was whether the marks on the road designating traffic lanes constitute a "traffic control device" within the meaning of Maryland Code (1977, 2009 Repl. Vol.), § 11-167 of the Transportation Article ("T.A."). A "traffic control device" is defined in the statute as a "marking" that "is placed by authority of an authorized public body or official to regulate, warn, or guide traffic." Applying the principles of statutory construction, the Court concluded that lane designation marks on a roadway are "markings" and therefore, "traffic control devices" under T.A. § 11-167. Accordingly, appellant was properly found guilty of failing to obey a traffic control device under T.A. § 21-201(a).

The Court also rejected appellant's contention that, because T.A. § 21-309 forbids unsafe lane changes, a determination that T.A. § 21-201(a) criminalized the same act would render the statutes irreconcilable. The Court held that the two statutes are, in fact, complementary and not irreconcilable.

Laura Jean Moore v. State of Maryland, No. 1151, September Term, 2008, filed May 2, 2011. Opinion by Woodward, J.

<http://mdcourts.gov/opinions/cosa/2011/1151s08.pdf>

CRIMINAL LAW - MULTIPLICITOUS CONVICTIONS - UNIT OF PROSECUTION - MERGER UNDER THE REQUIRED EVIDENCE TEST - APPEALABILITY OF A CONVICTION UPON WHICH THE COURT INTENTIONALLY IMPOSED NO SENTENCE

Facts: Appellant was convicted of 37 criminal offenses relating to the possession and issuance of counterfeit United States currency, theft, forgery, uttering, and making a false statement to a police officer. Appellant was sentenced to a total of 40 years' incarceration, with all but 15 years suspended. On appeal appellant challenged 24 of her convictions on a variety of grounds.

Held: The Court of Special Appeals held, in relevant part:

1. Criminal Law Article ("C.L.") § 8-604.1, which prohibits the knowing possession or issuance of counterfeit U.S. currency, authorizes two separate offenses, and not a single offense that can be proven in alternate ways.
2. The unit of prosecution under C.L. § 8-604.1 is the transaction involving the counterfeit currency, and not the counterfeit bills with different serial numbers, nor the different denominations of such bills.
3. Under the required evidence test, the merger of a conviction for the lesser included offense into the conviction for the greater offense is for sentencing purposes only and results in a single sentence for the greater offense. The conviction for the lesser included offense survives the merger.
4. Because the merger doctrine does not affect the conviction, a trial court's intentional imposition of no sentence on a conviction for an offense subject to merger is the functional equivalent of merging that conviction into the conviction for the greater offense for sentencing purposes.
5. The possession of counterfeit U.S. currency and the issuance of the same currency in a single transaction constitute the same offense under the required evidence test.
6. Under the required evidence test, the crimes of issuing counterfeit U.S. currency and theft are not the "same offense," nor is uttering and attempted theft.
7. For the limited purposes of determining appealability, where the trial court imposes a sentence on one or more, but not

all, convictions and has clearly completed the sentencing process, the intentional imposition of no sentence by the court on a conviction creates a final judgment on that conviction from which a defendant can appeal.

Gimble v. State, No. 133, 2010 Term, filed April 29, 2011.
Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2011/133s10.pdf>

CRIMINAL LAW - RIGHT TO DUE PROCESS OF LAW - DESTRUCTION BY STATE OF POTENTIALLY EXCULPATORY EVIDENCE UNDER *ARIZONA V. YOUNGBLOOD*, 488 U.S. 51 (1988) - BAD FAITH - ENTITLEMENT TO A JURY INSTRUCTION ON DESTRUCTION OF EVIDENCE - EXCEPTIONAL CIRCUMSTANCES UNDER *COST V. STATE*, 417 MD. 360 (2010).

Facts: When a police officer tried to make a traffic stop, appellant, the driver, sped off, overturning and crashing his vehicle in a field. The officer saw items fly out of the vehicle as it crashed, and a dashboard camera in his cruiser showed that as well. Officers at the scene found a backpack in the field near the car that contained baggies of illegal drugs, a digital scale with residue, a cell phone, and personal items. Another cell phone and currency were recovered from the defendant. The backpack was stored in the Sheriff's Office evidence room in accordance with protocol. The illegal drugs were stored separately and the currency was placed with the county financial office, also per protocol. Some of the personal items found at the crash site, including some in the backpack, were returned to the appellant's girlfriend.

There was a delay in charging the appellant because crash injuries necessitated a lengthy hospitalization. More than a year after the incident giving rise to the charges, in a routine annual purge of evidence by the Sheriff's Office, the backpack was destroyed mistakenly because the incorrect name for the seizing officer was entered into the computer, causing the wrong officer to be notified that it was to be destroyed. That officer did not know that the case to which the evidence was tied was still pending.

At trial, the appellant moved to dismiss all charges on the ground that the evidence destruction violated his due process rights. The court denied the motion. It also denied a defense request for a jury instruction informing the jurors they could draw an adverse inference from the destruction of evidence. The court allowed defense counsel to make that argument in closing. The appellant was convicted of several drug possession and distribution crimes.

Held: Affirmed. Destroyed evidence was potentially useful to the defense, not constitutionally material, so the standard for deciding the due process issue was whether the State had acted in bad faith. The facts adduced showed that the backpack and its contents were destroyed negligently, which does not amount to bad faith. On the jury instruction issue, the

circumstances of the destruction were not exceptional so as to mandate a destruction of evidence instruction. The general principle that courts are not required to instruct on factual inferences applied. The court did not abuse its discretion by declining to give the instruction but allowing counsel to argue the inference in closing.

State of Maryland v. Scott Smoot, No. 0634, September Term, 2009, Opinion filed on May 5, 2011 by Sharer, J.

<http://mdcourts.gov/opinions/cosa/2011/634s09.pdf>

CRIMINAL LAW - SENTENCING - PUBLIC SAFETY ARTICLE - POSSESSION OF A REGULATED FIREARM - BINDING PLEA AGREEMENT

Facts: While employed as a clerk in a convenience store, Scott Smoot, appellant, was observed by two police officers to be in possession of a .40 caliber Glock handgun. The gun belonged to the store owner. Smoot carried the weapon at the behest of the store owner who told the police that the store had been robbed several times. Neither Smoot nor the store owner had a "carry permit" for the gun. Smoot had a prior conviction for a domestic-related second degree assault.

Smoot was charged with possession of a regulated firearm under Md. Code (2003, (2010 Supp.), § 5-133(b) of the Public Safety Article (P.S.). The trial court indicated that because Smoot was employed and his prior second degree assault conviction dated from 2006, it was inclined to offer Smoot probation before judgment (PBJ) with two years probation. The trial court recognized that P.S. § 5-133 called for a mandatory five-year sentence without the possibility of parole, but, over the prosecutor's objections, concluded that there was no prohibition against a PBJ. The trial court noted that Md. Code (2008 Repl. Vol., 2010 Supp.), § 6-220 of the Criminal Procedure Article (C.P.) allows for the grant of a PBJ. The trial court thus informed Smoot that if he entered a plea of guilty, the court would accept it, put it aside, and grant him a PBJ.

Smoot accepted the offer and waived his trial rights. The trial court found the evidence sufficient and granted Smoot a PBJ.

Held: Reversed. Although C.P. § 6-220 allows for imposition of a PBJ, it is a general provision. It applies to a broad range of individuals convicted of crimes. In contrast, P.S. § 5-133 is a more specific statute. It requires that the sentence is mandatory and a minimum of five years, none of which may be suspended. The more specific statute is viewed as an exception to the general statute; therefore, the trial court was required to impose a mandatory sentence of five years.

Maryland Code (2002), § 5-622 of the Criminal Law Article (C.L.), prohibits possession of a firearm by a person previously convicted of a felony, but does not require imposition of a mandatory five-year non-paroleable sentence. The rule of lenity does not allow Smoot to avoid the five-year mandatory sentence because the prosecutor has the discretion to charge either of the

firearm possession offenses, where the defendant meets the predicate for both. Moreover, the prosecutor could not have charged Smoot under C.L. § 5-622 because Smoot had not been previously convicted of a felony.

The trial court bound itself to entry of a PBJ upon acceptance of Smoot's guilty plea. Smoot thus entered his guilty plea in reliance on the court's express promise to enter the PBJ. Because Smoot could not obtain the benefit of the bargain under which he entered his guilty plea and waived his rights, the plea agreement was breached and the plea must be vacated.

Daughton v. MAIF, No. 2770, September Term 2009, filed April 28, 2011. Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2011/2770s09.pdf>

INSURANCE - SOVEREIGN IMMUNITY - SECTION 12-202 OF THE STATE GOVERNMENT ARTICLE AUTHORIZING CONTRACT ACTIONS AGAINST THE STATE - AGENCY OR INSTRUMENTALITY OF THE STATE - TIME LIMIT TO FILE SUIT - MAIF ACTING IN CAPACITY OF INSURER OF LAST RESORT - PAYMENT OF PERSONAL INJURY PROTECTION CLAIMS UNDER SECTIONS 19-505 AND 19-508 OF THE INSURANCE ARTICLE.

Facts: In the Circuit Court for Baltimore County, Mary Katherine Daughton, the appellant, sued the Maryland Automobile Insurance Fund ("MAIF"), the appellee, for breach of contract and declaratory judgment, alleging that MAIF failed to pay her Personal Injury Protection ("PIP") benefit claim in 30 days, in violation of section 19-505 of the Insurance Article ("Ins."), and that MAIF then failed to pay interest due on the late payment, in violation of Ins. section 19-508. MAIF moved for summary judgment, arguing, *inter alia*, that the claims against it were barred under section 12-202 of the State Government Article ("SG"). Specifically, MAIF asserted that it was an agency or instrumentality of the State and therefore enjoys sovereign immunity. Under SG section 12-202, its sovereign immunity only was waived in contract if suit was filed within one year and, since Daughton filed outside of that period, her claim was barred.

After an evidentiary hearing on the sovereign immunity issue, the circuit court granted summary judgment in favor of MAIF as to both of Daughton's claims. Daughton appealed, arguing that the circuit court erred in ruling that MAIF was an agency or instrumentality of the State in its capacity as an automobile insurer; that the circuit court erred in concluding that there is no implied private cause of action arising under Ins. section 19-508 for recovery of statutory interest; and that the circuit court erred in concluding that Daughton's claims were barred even though her insurance contract with MAIF was not "completed" within the meaning of SG section 12-202 when she filed suit.

Held: Judgment affirmed. Just as MAIF is an agency of the State when it is acting in its role as successor to the Unsatisfied Claim and Judgment Fund, *see Harrison v. Motor Vehicle Administration*, 302 Md. 634 (1985), it is an agency of the State when it is acting in its other role, as the insurer of last resort for drivers who otherwise would not be able to obtain liability insurance. It therefore enjoys immunity from suit, unless that immunity has been waived, which it has been pursuant to SG section 12-202. That waiver is conditioned, however, upon suit being filed with one year. Because the claim was not filed

within that time, it was barred by sovereign immunity. In addition, the contention that the relevant section of the Insurance Article give rise to a private cause of action not governed by SG section 12-202 lacks merit. Finally, Daughton's claim that the insurance contract was not "completed" and therefore the one-year bar did not apply, was waived and likewise lacks merit.

Joseph Voltolina v. Property Homes, LLC, No. 54, September Term 2010, filed April 29, 2011. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2011/54s10.pdf>

STATUTORY LAW - TAX SALE FORECLOSURE - NOTICE - MARYLAND RULE 14-503

Facts: Appellee filed a complaint to foreclose the right of redemption of property belonging to appellant. Appellee attempted to serve appellant personally with a summons on several occasions, all of which failed. Meanwhile, appellee also posted, mailed, and published notice pursuant to default notice provisions in the Maryland Code and in Rule 14-503(c). Also pursuant to Maryland Code, appellee filed an affidavit attesting to its service efforts, and the court entered judgment foreclosing the right of redemption. Appellant moved to reopen the judgment, and trial court denied his motion.

Held: The Court of Special Appeals affirmed. Appellee served appellant "in accordance with Rule 2-122" and as required by Rule 14-503 because its affidavit of compliance showed that reasonable and good faith efforts to serve appellant personally had failed, and because appellee posted, mailed, and published notice in accordance with the tax sale foreclosure statutes and rules, which notice satisfied all time, content, and manner requirements of Rule 2-122. The fact that the court did not order the substitute service did not establish constructive fraud or deprive the court of jurisdiction over the proceedings. For purposes of Rules 14-503 and 2-122, knowledge of a defendant's address will initially mean that the defendant's "whereabouts" are known, but when reasonable and good faith attempts to serve process at that address fail—and if no other facts provide constructive knowledge of a reasonable way to serve the defendant—then the defendant's "whereabouts" revert to being unknown and the court may order substitute service.

Michael S. Barclay, et al. v. Ports America Baltimore, Inc., No. 2501, September Term 2009, filed April 29, 2011. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2011/2501s09.pdf>

WORKERS' COMPENSATION - RESPONDEAT SUPERIOR - SCOPE OF EMPLOYMENT
- "SPECIAL MISSION OR ERRAND" - NEGLIGENCE - PROXIMATE CAUSATION

Facts: Ports manages and operates the marine cargo facility in Baltimore where Christopher Richardson worked as a stevedore. After completing a twenty-two hour shift, Richardson was driving to his home, approximately forty-five miles from Ports's facility, when his vehicle crossed the center line and collided, head-on, with a vehicle driven by Michael Barclay, causing Barclay grievous injuries and killing Richardson. Barclay filed a complaint naming Briscoe, Richardson's personal representative, as one of several defendants. Briscoe filed cross-claims against the co-defendants, including Ports. Ports moved for summary judgment as to all claims, and the trial court granted that relief and entered final judgment in favor of Ports.

Held: The Court of Special Appeals affirmed. Scope of employment is a question of fact for the jury only if the alleged facts raise the issue as a matter of law. Instead of the "special mission or errand" exception from worker's compensation cases, the law of *respondeat superior* requires "special circumstances" to extend employer liability to employee actions while traveling to or from work. An employee parking lot does not qualify as "special circumstances;" it is merely a convenience offered to those who drive and does not indicate express or implied control over the vehicle as a means of transportation or consent to its use in performing work duties. An employer may have a duty to protect the public from risks that its employees pose, other than that imposed by *respondeat superior*. In cases from other jurisdictions establishing employer liability under similar circumstances, the employers unexpectedly caused their employees to endanger others, thereby placing the employee in a position where he or she could not reasonably mitigate the attendant risks. As such, injury to third parties was a natural and probable consequence of the employers' actions. In this case, the employer's actions were not the proximate cause of the harm its employee caused because the employee was an intervening agent who exercised his right to seek gainful employment of his choosing and made an independent decision to live at a considerable distance, knowing that he could be called on to work long shifts at any given time, and who further chose to drive home at the conclusion of one such assignment.

ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals dated April 25, 2011, the following attorney has been suspended for sixty (60) days, effective May 25, 2011, from the further practice of law in this State:

NORMAN DAVID USIAK

*

By an Order of the Court of Appeals dated April 25, 2011, the following attorney has been suspended for two (2) years, effective immediately, from the further practice of law in this State:

JAMES RUDOLPH BOYKINS

*

By an Opinion and Order of the Court of Appeals dated May 3, 2011, the following attorney has been disbarred from the further practice of law in this State:

GARY FRANCIS STERN

*

By an Order of the Court of Appeals dated May 3, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

DAVID BART GOLDSTEIN

*

By an Order of the Court of Appeals dated May 19, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

THOMAS HENRY BORNHORST

*

By an Order of the Court of Appeals dated May 19, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

STEVEN DAVID PERICONI

*