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Recent Developments: Criminal Procedure Maryland Rule 782 (C) May Not Be Used by Prosecution as a Plea Bargain Substitute - State v. Limbo, an Imaginary Opinion by the Court of Appeals of Maryland

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CONCLUSION

One basic premise found in all recent decisions adopting an implied warranty of habitability is the contention that the doctrine of caveat emptor cannot stand, even on its own terms, in today's leasing transactions. The theoretical meaning of a lease has no relevancy in the modern leasing situation and should be replaced with realistic concepts. Indeed, the rights of tenants have been broadened, the courts are now viewing leases in the light of caveat venditor.

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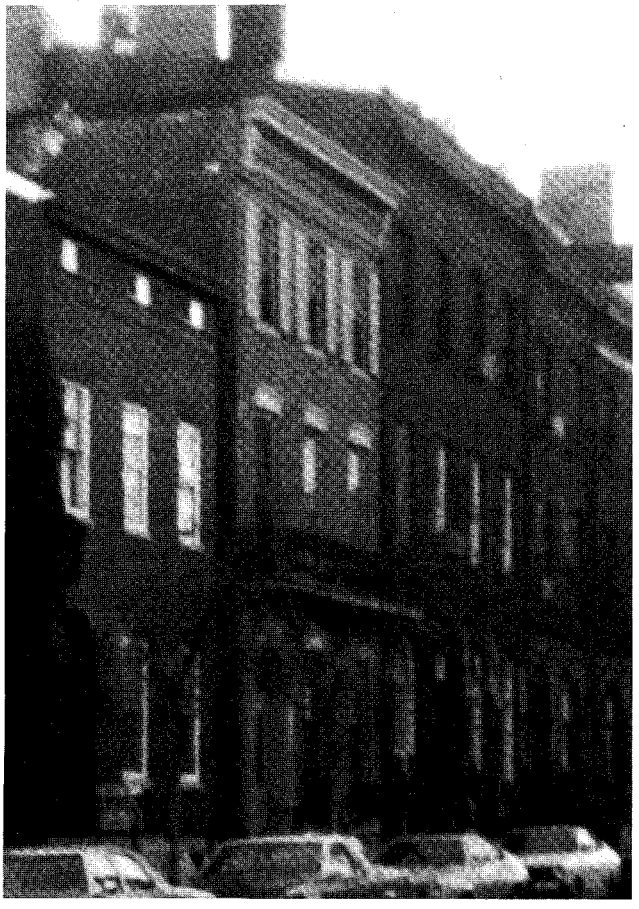

Note: On the weekend of March 15, 1981, a representative group of women employees of the United Nations in New York, dressed in black, appeared to present their complaint that about 80% of them had been harassed with demands for sexual favors in return for promotion or continued employment. Kurt Waldheim's response was that he would have preferred to have seen them dressed in pink.

CRIMINAL PROCEDURE

MARYLAND RULE 782 (c) may not be used by prosecution as a plea bargain substitute — State v. Limbo, An Imaginary Opinion by the Court of Appeals of Maryland

By Harold D. Norton

Opinion by Forthright, J.

We granted certiorari in this case to examine a long standing procedure which, while serving a legitimate role in the criminal justice system in some instances, may lack sufficient procedural safeguards to prevent its use as a tool of prosecutorial oppression. The issue, whether Maryland Rule 782(c) might allow the state to place a charge on stet[1] in return for a defendant's cooperation in an investigation, and later reinstitute the charge regardless of the defendant's subsequent conduct, has not yet been addressed by this court.

In MD.R.P. 782(c) Disposition by stet is explained. "Upon motion by the State's Attorney, the court may postpone trial indefinitely upon a charging document by marking the case 'stet' on the docket."

When a case is stetted, all further action is held in abeyance. Outstanding warrants which would lead to arrest or detention of the defendant are recalled or revoked. MD.R.P. (d). At the request of either party a stetted case may be rescheduled for trial within one year of the stet and thereafter only by court order for good cause shown. MD.R.P. 782(c).

The state candidly admits the facts as stated by petitioner, Limbo. Limbo was indicted for receiving stolen goods[2] on July 2, 1978. The prosecuting attorney proposed, through defense counsel, that Limbo cooperate with the police by "identifying certain members" of a fencing operation. In return for this cooperation, the prosecutor promised to place the theft indictment on stet docket. The stet was entered in open court on October 3, 1978. The defendant was not advised that he had waived his right to a speedy trial (in the event the charges were rescheduled) by accepting the stet. *See Fowler v. State,* 18 Md. App. 37, 350 A.2d 20 (1973). Judicial inquiry into the reason a case is being placed on stet docket is not required by MD.R.P. 782(c) and none was made.

The defendant was not present at the hearing. Nor was he required to be by Rule 782(c). The rule requires only that notice be sent to the defendant and his counsel of record.

Within the next nine months, the police had successfully infiltrated the fencing operation. The state maintained that their success was due to independent investigation although Limbo had given the police "a few

names". On October 2, 1979, the stetted charge against Limbo was rescheduled. Limbo was subsequently found guilty and sentenced to ten years imprisonment pursuant to MD. ANN. CODE art. 27 §466.

At trial the state explained that the charge was stetted on the docket because information was to be supplied by Limbo and the prosecution needed the threat of reinstitution of the charge as an incentive. Had the state *nolle prosequied* the charge instead, the indictment would have been cancelled. *Brady v. State,* 26 Md. App. 283, 374 A.2d 613 (1977). In MD.R.P. 782(a) a State's Attorney may terminate a prosecution on a charging document and dismiss the charge at his discretion, by entering a *nolle prosequi* on the record in open court, with a statement of the reasons. The defendant need not be present. Notice will be sent to defendant and his counsel.

When *nolle prosequi* has been entered all pretrial release conditions are terminated and bail posted by the defendant on those charges shall be released. MD.R.P. 782(b).

The state contended that Limbo could not complain because he voluntarily accepted the risk that the state might reschedule the charge at its discretion within one year. While we realize that Rule 782(c), in its present form, allows the state to reschedule a stetted charge within one year, we are convinced that this procedure violates the requirement of fundamental fairness assured by the Maryland Constitution, Article XXIII, and The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

A plea bargain was not used under Rule 733 because the state wished "to keep [its] options open."

Traditionally a "plea bargain" requires a plea of guilty or *nolo contendre* to one or more charges upon the condition that the state make some concession in regard to those or other pending charges. *Gray v. State,* 38 Md. App. 343, 380 A.2d 1071 (1974). When a prosecutor makes a promise that serves as consideration or inducement for a plea, that promise must be fulfilled and may be specifically enforced by the defendant. *Kisamore v. State,* 286 Md. 654, 409 A.2d 719 (1980). The standard to be applied is one of fair play and equity under the facts and circumstances of the case, and where an agreement has been reached, it would be a grave error to permit the prosecution to repudiate its promises where the defendant is willing to perform, but because of some action taken by the prosecution, is unable. *State v. Brockman,* 277 Md. 687, 698-99, 357 A.2d 376, 383-84 (1976); *see generally* 9 U. Balt. L. Rev. 295 (1980), on plea bargain. We see no constitutional significance between a traditional plea bargain and the case at hand.

The stet procedure may be used as an inducement for investigatory cooperation. A prosecutor may promise not to reschedule a stetted case so long as the defendant cooperates with the authorities. The defendant's fear that a charge may be rescheduled acts to insure his cooperation. In light of the standards imposed by other existing procedures and the need for the state to appear open and fair in its dealings with defendants, we believe that Rule 782 (c) cannot stand in its present form.

We first note that Rule 733 provides a detailed procedure that must accompany a plea agreement involving a plea of guilty or *nolo contendre.* The judge must be advised of the terms of the agreement, which he may accept or reject, and, most importantly, all proceedings pursuant to the agreement must be stated on the record. MD.R.P. 733(c). Therefore, when a question arises concerning the obligations of either party, MD.R.P. 733(d) acts as a plea bargain "Statute of Frauds", with the agreement reduced to a writing.

No similar safeguards exist under MD.R.P. 782(c). Entry of stet requires a *pro forma* motion by the state; the trial judge need not be made aware of any underlying agreement; the state may unilaterally reschedule the charge for trial at any time within one year without explanation; only after a year is "good cause" required to reschedule. Rule 782(c) seems to provide a presumption that neither party is prejudiced by rescheduling a stetted charge within one year. We see in this case, however, that circumstances other than passage of time may prejudice a criminal defendant to the extent that it would be unfair to reinstitute the charge, *e.g.,* production of self-incriminating evidence or witnesses. In addition, the in-

tegrity of the judiciary is injured whenever the state is seen as promising that which it need not deliver.

Because of these shortcomings, MD.R.P. 782 would be amended by this court to provide the following safeguards when a charge is placed on stet docket with defendant's consent: first, that the defendant be present; second, that the trial judge be fully advised of the reasons for the entry of the stet; third, that the trial judge consent; fourth, that the defendant be told that by accepting the stet, he waives his right to a speedy trial; fifth, that the proceeding fully appear on the record to the same extent as MD.R.P. 733; and last, that the state be required to show "good cause" whenever a stetted charge is sought to be rescheduled.

CONVICTION VACATED: CASE REMANDED FOR HEARING IN ACCORDANCE WITH THIS OPINION

Concurring opinion by Dictum, J.

I can foresee no situation which would require the use of a stet, instead of other existing procedures. In my opinion, the stet procedure is too unpredictable and indefinite to be used in criminal prosecutions where less suspect means are available to achieve similar ends.

For example, where a busy prosecutor has a defendant before a court and is unable, for one reason or another, to proceed, he may ask that the case be stetted. At first this seems perfectly reasonable since the defendant may still request that the case be tried. Where the defendant is present, stet may not be entered, under Rule 782(c), without his consent. As a practical matter, the state would then be forced to either *nolle prosequi* the charge or ask for postponement. Where postponement is proper, the state would be forced to prepare its case. Where postponement would not be allowed, a *nolle prosequi* would provide a final determination of the charge. In both instances, the merits of the charge are more strictly scrutinized, and a final determination assured. If a charge cannot be proven, society's interests are vindicated through the *nolle prosequi.* If a charge can be proven, but at a later time, society's interested are vindicated by a trial on the merits. Remove the option of stetting the case and something more is precluded: the possibility that a guilty person may never be tried or that an innocent person be subject to "the cloud of an unliquilated criminal charge" for one year's time. *Klopfer v. North Carolina,* 386 U.S 213, 226-227 (1966) (concurring opinion). The solution to a large number of valid charges being entered *nolle prosequi* is not to allow the prosecutor to act as a judge and set the case on the back burner, but to put a greater emphasis on being ready with the case the first time. For these reasons, I have no reservation in striking down Rule 782, in its present form, as an anachronism which has outlived its usefulness.

[1] *See* MD.R.P. 782 (1980).

[2] MD. ANN. CODE art. 27 §466 (1976 Repl. Vol. & Supp. 1978), recodified as MD. ANN. CODE art. 27 §342 (1976 Repl. Vol. & Supp. 1980).