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Recent Developments: Ellison v. Maryland: Convicted and Sentenced Criminal Defendant When Called as Non-Party Witness May Invoke Privilege against Self-Incrimination

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tion to the Court of Appeals of Maryland: "Under an automobile insurance policy covering Maryland insureds, is a provision in that policy requiring physical contact between the insureds' vehicle and the phantom vehicle lawful and enforceable under Maryland law where the accident occurs outside the State of Maryland?" *Lee v. Wheeler,* 810 F.2d 303, 304 (D.C. Cir. 1987).

In answering "no" to the question, Judge Adkins reviewed the principle in *State Farm* and expanded it to encompass accidents happening outside Maryland involving Maryland insureds.

In *State Farm,* the Maryland Automobile Insurance Fund (MAIF) sought a declaration that an insurance policy requiring, as a prerequisite to coverage, physical contact between an insured's vehicle and a phantom vehicle violated the uninsured motorist provision of Md. Ann. Code art. 48A, § 541(c) (1957, 1986 Repl. Vol.) which mandates that "[i]n no case shall the uninsured motorist coverage be less than the coverage afforded a qualified person under Md. Ann. Code art. 48A §§ 243H and 243-I." *Id.* at 237, 528 A.2d at 914.

Section 243H(a)(1) allows claims for the death of or personal injury to qualified persons "arising out of the ownership, maintenance or use of a motor vehicle in this State where the identity of the motor vehicle and of the operator and owner thereof cannot be ascertained...." Claims against MAIF are authorized without any distinction between impact and non-impact phantom drivers. *State Farm,* 227 Md. at 604, 356 A.2d at 562.

Pennsylvania General argued that, due to the "in this state" language, "§ 541(c) contains an implied territorial limitation when read in harmony with § 243H(a)(1)." 310 Md. at 238, 528 A.2d at 915.

The court explained that "[t]he primary purpose of the § 541(a) uninsured motorist coverage requirement is to assure financial compensation to the innocent victims of motor vehicle accidents who are unable to recover from financially irresponsible uninsured motorists." 310 Md. at 238, 528 A.2d at 915 (quoting *Pennsylvania Nat'l Mut. v. Gartelman,* 288 Md. 151, 157, 416 A.2d 734, 737 (1980)).

Hesitant to imply exclusions or recognize exclusions beyond those expressly enumerated by the legislature, the court observed that no territorial exclusion or limitation is evident within the two express exclusions from mandatory minimum uninsured motorist coverage found in § 541(c)(2). Furthermore, the language on which Pennsylvania General relied deals with claims against MAIF rather than with mandatory motor vehicle liability insurance. Due to the legislative history of the sections, there is

> a functional continuity of purpose in the present MAIF provisions that militate against reading § 243H as in any way qualifying § 541(c)(2)....The provision for compulsory automobile insurance, plus the creation of MAIF as a liability insurer of last resort, demonstrate the dramatic change in state policy with respect to protection of the public from the economic harm produced by automobile accidents.

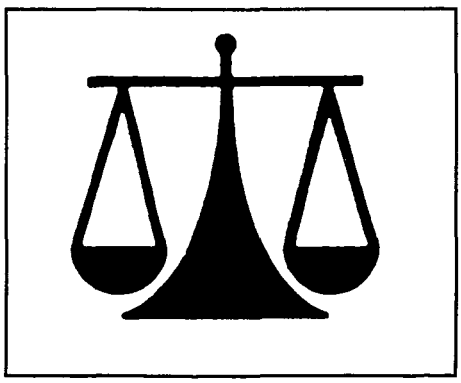
310 Md. at 240, 528 A.2d at 916.

Judge Adkins went on to say that "[t]o insert exclusions by implication or recognize exclusions not expressly prohibited by the statute has the dangerous potential of seriously frustrating the policies behind compulsory automobile liability insurance." *Id.* at 242, 528 A.2d at 917. To allow such exclusions "would fly in the face of the broadly-protective public policy" established through recent case law. *Id.* at 243, 528 A.2d at 917.

The court declined to express an opinion on whether Maryland law prohibits a physical contact requirement in uninsured motorist coverage in commercial policies as opposed to personal policies. 310 Md. at 235-36 n. 1, 528 A.2d at 913.

The Court of Appeals of Maryland expanded the principle of *State Farm* by finding an uninsured motorist provision, limiting coverage to situations in which there is physical contact between the insureds' vehicle and the phantom vehicle, unenforceable against public policy under Maryland law even when the collision occurs outside the State of Maryland. By upholding the primary purpose of the uninsured motorist coverage requirement, this ruling assures financial compensation to the innocent victims of motor vehicle accidents who are unable to recover from financially irresponsible uninsured motorists.

—Glen P. Smith



Ellison v. Maryland: CONVICTED AND SENTENCED CRIMINAL DEFENDANT WHEN CALLED AS NON-PARTY WITNESS MAY INVOKE PRIVILEGE AGAINST SELF-INCRIMINATION

In *Ellison v. Maryland,* 310 Md. 244, 528 A.2d 1271 (1987), the Court of Appeals of Maryland held that one who has been convicted and sentenced in a criminal proceeding may invoke the fifth amendment privilege against self-incrimination when called to testify as a non-party witness in a subsequent proceeding provided that the thirty-day time limit for taking an appeal or requesting a sentence review has not expired. The Court of Special Appeals of Maryland had similarly held the privilege applicable but had based their decision on a rationale which the court of appeals found to be unsupported by precedent.

Clinton Ellison and Tyrone Little, inmates at the Maryland Penitentiary, were charged in the Circuit Court for Baltimore City with the robbery and first degree murder of fellow inmate Charles Sneed. Additionally, Ellison and Little were charged with lesser included substantive offenses and the state filed notices of intent to seek the death penalty.

The defendants were tried separately, with the first case against Little. After closing arguments, but before a jury verdict was returned, the state and Little entered into a plea agreement. Little agreed to plead guilty to second degree murder in return for the state's promise to nol pros the first degree murder charge as well as the robbery and lesser charges. The state also agreed to recommend a twenty-five year jail sentence to be served concurrently with Little's prior sentence. The agreement was carried out as proposed and Little was sentenced on June 18, 1984. At that time the trial court advised Little that he had thirty days in which to request either an appeal of his conviction to the court of special appeals or a review of his sentence by a three judge panel of the circuit court.

Ellison's trial began on June 25, 1984, seven days after Little had been sentenced. During the course of the trial, and before Little's thirty-day period in which to request an appeal or sentence review had expired, Little was called by Ellison to testify as a witness for the defense. Little invoked the fifth amendment privilege against self-incrimination and refused to testify. The trial court upheld Little's invoking of the privilege and Ellison was subsequently found guilty of first degree murder and robbery. He was sentenced to life imprisonment for the murder and

received a consecutive ten year sentence for the robbery.

Ellison took his appeal of right to the court of special appeals on two grounds. He first argued that Little's claim of the privilege against self-incrimination should have been rejected because he had already been convicted and sentenced on the murder charge and the state had nol prossed the robbery and lesser offenses. In opposition, the state argued that under the court of appeals decision in *Smith v. State*, 283 Md. 187, 388 A.2d 539 (1978), *cert. denied*, 439 U.S. 1130 (1979), Little's claim of privilege was justified because of the potential for reversal on appeal followed by a new trial on the same charges.

The court of special appeals stated that the issue was "[a]t what point on the continuum is the process of incrimination sufficiently complete that the risk of incrimination is relegated to the past tense?" *Ellison v. State*, 65 Md. App. 321, 329, 500 A.2d 650, 654 (1985). The court ultimately held that "the risk of incrimination terminates at the moment the sentence is pronounced." *Id.* at 338, 500 A.2d at 658. In its analysis, the court reasoned that testimonial privileges are disfavored and in a close case the court should lean toward rejecting the privilege. *Id.* at 327, 500 A.2d at 653. The court of special appeals further reasoned that sentencing is the "logical termination point" beyond which the privilege may not be used because the potential for future sanctions then becomes a "mere remote possibility" which is "beyond the contemplated pale of the constitutional privilege." *Id.* at 344, 500 A.2d at 661-62.

Despite the facially logical analysis posited by the court of special appeals, the court of appeals nonetheless found it unpersuasive. The court of appeals instead accepted the position that the state argued, that under *Smith v. State*, Little was entitled to claim the privilege because of the potential for reversal on appeal followed by a new trial on the same charges.

In *Smith*, like the present case, two Defendants were arrested together but tried separately. One Defendant, Montgomery, entered into a plea bargain with the State and was convicted. Before sentencing he was called to testify as a witness at the trial of the other Defendant, Smith. Montgomery invoked the privilege against self-incrimination and the trial court sustained his request. The court of special appeals affirmed the trial court, relying on language in *McClain v. State*, 10 Md. App. 106, 268 A.2d 572, *cert. denied*, 259 Md. 733 (1970), where it was held that a witness may invoke the privilege against self-incrimination where "the criminal action against him is still pending, as where an appeal is outstanding." *Id.* at 114, 268 A.2d at 576. The court of special appeals in *Smith* agreed with the lower court and held that while "the general rule [is] that the privilege against self-incrimination with respect to particular charges is not available to a witness whose prosecution on those charges has terminated by a guilty verdict and sentence," *Smith*, 283 Md. at 190, 388 A.2d at 540 (citing *United States v. Gernie*, 252 F.2d 664, 670 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958)), "a witness whose time for appeal had not expired was deemed to fall within an exception to the general rule" and was therefore entitled to invoke the privilege. *Ellison*, 310 Md. at 251, 528 A.2d at 1274 (1987); *see Mills v. United States*, 281 F.2d 736, 741 (4th Cir. 1960) (distinguishing *Gernie*).

In response to the court of special appeals' continuum theory, the court of appeals again referred to *Smith* where it was held that it was "not necessary that the testimony will with certainty lead to further criminal conviction. Rather, there must only be a 'reasonable cause to apprehend danger.'" *Smith*, 283 Md. at 193, 388 A.2d at 542 (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)). Additionally, the court of appeals stated that "a criminal defendant's chance of overturning a verdict or sentence on appeal certainly does not fall into the category of a mere remote possibility." *Ellison*, 310 Md. at 257, 528 A.2d at 1277 (1987). The court noted that of thirty-two recent criminal appeals in Maryland only fifteen were affirmed in their entirety, while six had verdicts affirmed but sentences vacated; three had verdicts affirmed in part and reversed in part; and eight resulted in judgments being reversed or vacated. *Id.* at 258, 528 A.2d at 1277-78. Also, defendants seeking a sentence review run the risk that their sentence could be increased as a result of information which may come to light if they are compelled to testify.

Thus, it was apparent to the court of appeals that until the thirty-day time limit for filing an appeal or requesting a review of sentence had expired, Little was entitled to invoke the privilege against self-incrimination in the state's proceedings against Ellison.

Ellison's second ground for appeal was that the lower court erred in accepting the state's position that Little was entitled to invoke the privilege against self-incrimination because his testimony might lead the state to charge him with additional crimes, such as conspiracy to commit murder. Conversely, it was Ellison's contention that Little's position was unfounded because the state would be precluded from bringing additional charges by the prior plea bargain or by principles of double jeopardy. The court of special appeals accepted the state's position, however the court of appeals declined review of that argument in light of its determinative holding on Ellison's first ground for appeal.

The Court of Appeals of Maryland has thus held in this case that, until the thirty-day time period for taking an appeal or requesting a sentence review has expired, the very real possibility of reversal on appeal or imposition of an augmented jail term is sufficient to justify a non-party witness' use of the fifth amendment privilege against self-incrimination.

—Steven E. Sunday