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Arthur M. Frank

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Judicial Highlights: Maryland

by Arthur M. Frank

CRIMINAL LAW — Right to a Speedy Trial

In *Epps v. State*, No. 236, Term 1974, the Maryland Court of Appeals freed a defendant who was convicted two years ago of robbery with a deadly weapon because he had been denied a speedy trial as guaranteed by federal and state constitutions. Judge O'Donnell held that "a delay in affording a criminal defendant a 'speedy trial' because of overcrowded dockets and scheduling problems, the responsibility for which rests upon both courts and prosecutors, cannot be classified as wholly 'neutral' and must be included within the period of delay in determining whether there has been a denial of this constitutional right."

Mr. Epps, arrested in August of 1972, was not tried until August of 1973. Alibi witnesses were unavailable to testify as a result of the delay. The Cause of delay included the illness of the arresting officer and lack of available jury dates. Mr. Epps did not even want a jury trial; however, the state wanted to jointly try the present defendant with two other co-defendants.

This was the first case in which the Court of Appeals of Maryland ordered a criminal defendant free since the United States Supreme Court, in *Barker v. Wingo*, 407 U.S. 514 (1972), set out a balancing test (in which the conduct of both the prosecution and the defendant are weighed) to determine whether a speedy trial has been denied allowing one to go "absolutely" free. The court in *Barker v. Wingo* rejected the "demand-waive" rule as being too rigid. Justice Powell outlined four factors to

consider in this balancing process:

1. Length of delay,
2. Reason for the delay,
3. The defendant's assertion of his right, and
4. Prejudice to the defendant, in order to:
 - a. prevent oppressive pretrial incarceration,
 - b. minimize anxiety and concern of the accused, and
 - c. limit the possibility that the defense will be impaired.

The Court of Appeals for Maryland is to be commended for its well-reasoned opinion. The court took proper cognizance of the Fifth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." It should be noted that in *Barker v. Wingo*, the Supreme Court held that Barker was *not* deprived of his due process right to a speedy trial. The Supreme Court could just not bear to let a "criminal" go free. In *Barker v. Wingo*, the Court stated that length of delay is to be considered, though five years was not enough in that case; that the "demand-waiver rule" was rejected, yet held to be persuasive in Barker's case; and that cause of delay is significant, but not considering that the state has the burden of bringing the accused to trial in a speedy manner.

The Maryland courts are not bound by U.S. Supreme Court standards (at least how that Court applies them) to the letter, as long as they give substantial due process as defined by that Court. But Maryland may maintain stricter standards to insure the accused "adequate" due process (more than "substantial"?) And it seems that Maryland, as shown by *Epps* is broadening the due process right to a speedy trial.

EVIDENCE — Impeachment of Witness

In *Yowell v. State*, No. 18, Term 1975 — filed October 3, 1975, the Court of Special Appeals of Maryland held that "refusal to permit cross-examination based on witness' alleged prior inconsistent statement foreclosed the trial tactic of impeachment and de-

nied the Appellant a fair and impartial trial."

Michael Dale Yowell was convicted of rape, assault and perverted sexual practice by a jury. At trial, defense counsel showed the prosecutrix a statement she made earlier to a public defender's investigator on cross-examination. The court refused to allow cross-examination as to the alleged prior inconsistent statement in the report because the statement was not given under oath.

The Court of Special Appeals held the substantive issue was procedurally before the court in light of Maryland Rule 1085 (review being limited to questions decided by the lower court), since the defense did make an effort to lay a foundation for impeachment, but was frustrated in making a proffer due to the judge forbidding same because the statement was not made under oath.

Turning to the substantive issue, the court held that prior inconsistent statements for impeachment purposes need not be under oath. "It is enough that the statement, oral or in writing, be made prior to the giving of the challenged testimony, and that it be material to the facts at issue and not merely collateral or irrelevant." The court noted its prior ruling in *Sanders v. State*, 1 Md. App. 630, 232 A.2d 555 (1967): "Provided a proper foundation has been laid, the credit of a witness may be impeached by showing he has made statements which contradict his testimony in respect to material facts... To lay the foundation for such evidence, the witness must be first interrogated as to the time, place and person to whom contradictory statements were made." This was attempted by defense counsel in the present case. The court notes that in *Sanders*, nothing was mentioned to the effect that the prior inconsistent statement had to be under oath. The present case now affirmatively extends *Sanders* to statements not made under oath.

As a result of the judge's denial of the use of the prior inconsistent statement, Yowell was denied a fair and impartial trial guaranteed under the United States Constitution and the Maryland Declaration of Rights, and therefore, the judgment was reversed.