



10-1976

Casnote: Recent Maryland Decisions

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Recommended Citation

Fenzel, Jerry (1976) "Casnote: Recent Maryland Decisions," *University of Baltimore Law Forum*: Vol. 7 : No. 1 , Article 8.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol7/iss1/8>

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The Court qualified its conclusion by stating: "we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. *Id.* at 2808.

Justice Brennan, joined by Justices Stewart and Marshall, concurred in the Chief Justice's judgment, but stated he would hold that with respect to criminal proceedings in particular, prior restraints on freedom of the press are not permis-

sible under the Constitution. "Discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors." *Id.* at 2809. Justices White and Stevens, in concurrences, implied agreement to Justice Brennan's position. However, the holding as delivered by the Chief Justice was somewhat limited to the facts of the case:

"We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings

held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met and the judgment of the Nebraska Supreme Court is therefore reversed." *Id.* at 2808.

Recent Maryland Decisions

by Jerry Fenzel

Federal Government Lacks Standing to Enjoin Maryland Health Officials' Practices Absent National Emergency.

In a case filed on July 8, 1976 in the U.S. District Court for the District of Maryland, the Attorney General of the United States brought suit on behalf of the United States to enjoin certain Maryland health officials' practices and policies which allegedly deprive mentally retarded residents of Rosewood State Hospital of their constitutional rights under the Eighth, Thirteenth and Fourteenth Amendments of the Constitution. *United States v. Solomon*, 45 U.S.L.W. 2039, (U.S. July 8, 1976)

The defendants filed a Motion to Dismiss on the ground that the Attorney General had no authority or standing to bring this action. Chief Judge Edward S. Northrup granted the defendants' Motion to Dismiss stating that the executive branch of the government does not extend to bringing such a suit absent a showing by the United States of a situation of national emergency.

In a lengthy opinion, Judge Northrup presented the plaintiffs' contentions from constitutional, statutory, and common law standpoints, but in each instance emphatically concluded that the government lacked standing. The court did not express an opinion on the merits of the underlying issue regarding the care and treatment of the mentally re-



tarded in Maryland. The conclusion simply means that lawsuits aimed at protecting these individuals' rights must be brought by the proper plaintiffs.

This case brought considerable attention from other states. Texas and Pennsylvania filed amicus curiae briefs in support of the defendants' position. The government appealed Judge Northrup's decision, arguing its case before

the Fourth Circuit Court of Appeals on September 8, 1976.

Maryland's Mechanic's Lien Law Upheld—Or Was It?

Maryland's two hundred-year-old mechanic's lien statute came within inches of being declared void by the Maryland Court of Appeals in *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976). *Barry v. Fick* was the first known case in Maryland which dealt with the constitutionality of the mechanic's lien law and the applicability thereto of the due process clauses of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the U.S. Constitution.

Fick Brothers Roofing Company (Fick) filed a bill of complaint to enforce a mechanic's lien against the property of Barry Properties, Inc. (Barry). Fick complied with the applicable Maryland statutes and the Maryland Rules of Procedure in filing, and the lower court rendered a decision in its favor, from which Barry appealed on the ground that the Maryland mechanic's lien law deprives the owner of property without procedural due process. The law authorizes the lien to be imposed without notice or an opportunity for a prior hearing.

The appellant's case emanated from, and is analogous to, four recent Su-

preme Court decisions, each of which addresses the question of whether certain statutory prejudgment creditor remedies are consonant with the due process clause of the Fourteenth Amendment. The court in its majority opinion by Judge Eldridge, attempted to review *Barry v. Fick* in light of these recent decisions, but somehow arrived at a different conclusion.

The court held that for the mechanic's lien statute to meet the requirements of due process, two prerequisites must exist: (1) there must be state action, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974), and (2) the imposition of the lien under the Maryland statute must constitute a significant taking of property.

In response to the first prerequisite, the court reasoned that since the liens are created, regulated, and enforced by the State, then they are considered state action. The second prerequisite was met by the rationale that even though the property owner still had possession, he did not have unfettered title, as in this case, where the appellant was unable to obtain the balance on its construction loan. Since both of the prerequisites were met, the court concluded that the mechanic's lien law is incompatible with both Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment.

The final issue to be decided was whether, considering the unconstitutionality of the lien law, all or part of the statute should be abrogated. In deciding this issue the court looked to the legislative intent of the General Assembly in enacting the mechanic's lien statutes. The intent was to insure, by means of a mechanic's lien, that the persons who have contributed labor or materials to a construction project would be compensated for their contributions. Applying the legislative intent to the facts, the court decided that notwithstanding the unconstitutionality of the statute, the appellant was afforded due process in that *Barry* had been provided with notice of the hearing.

Judge Levine agreed with the majority's reasoning, but strongly disagreed with the result. He could not imagine

how a statute rendered facially unconstitutional and violative of the Fourteenth Amendment could be constitutional in its application to a given case.

Even though *Barry v. Fick* did not conclusively abrogate Maryland's mechanic's lien law, the court placed it in a tenuous position, leaving the law subject to immediate review by the General Assembly.

Further Application of *Mullaney v. Wilbur*

The Maryland Court of Special Appeals, in two recent decisions, expanded the State's burden of proof requirement in a trial for murder, but arrived at different conclusions in respect to the trial judge's failure to instruct the jury that the burden of negating mitigation in a murder charge was on the State.

In *Garland v. State*, 29 Md. App. 27, 349 A.2d 374 (1975), the defendant was convicted by a jury of second degree murder. During the trial, the defendant contended that he killed his victim in a "hot-blooded response to a legally adequate provocation in the course of mutual combat." Evidence produced by the defendant and the State was enough to generate a jury issue on the subject of mitigation due to provocation, which, if found, would reduce the crime from second degree murder to manslaughter.

The court followed *Evans v. State*, 28 Md. App. 640, 349 A.2d 300 (1975), which placed the burden on the State to prove the absence of a defensive issue once the issue, such as mitigation, has been fairly generated by the evidence.

Since the defendant raised the issue of mitigation, the onus was on the State to negate the defensive issue and the responsibility was on the trial judge to instruct the jury that the State had the burden; if the jurors were not persuaded by the State beyond a reasonable doubt, the verdict would be manslaughter. The court held that the trial judge failed to properly instruct the jury. His incomplete instructions did not pass the constitutional muster recently set forth by the

Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Conversely, in *Dorsey & Wilson v. State*, 29 Md. App. 97, 349 A.2d 414 (1975), the court decided that the failure of the trial judge to instruct the jury of the State's burden to negate mitigation was harmless error and would not upset the conviction of first degree murder.

The facts which differentiated *Dorsey* and *Garland*, producing different results, were as follows: The defendants in *Dorsey* were accused of first degree murder and the defense did not raise the issue of mitigation. On the other hand, in *Garland* the defendant was convicted of murder in the second degree and the defense had raised the issue of mitigation. The court held that the State need not negate mitigation and that the trial judge need not instruct the jury accordingly, if the jury convicts the defendant of first degree murder. By rendering a first degree murder conviction, the jury decided that there was premeditation on the part of the defendant, with the presumption of malice, thus relieving the State of its burden of proving a lack of mitigation. In *Garland*, however, the verdict of second degree murder did not include the malice presumption, since evidence of mitigation was introduced by the defense and was not negated by the State.

Right to a Jury Trial at the Circuit Court Level

In *Thompson v. State*, 278 Md. 41, 359 A.2d 203 (1976), the defendant prayed a jury trial for adjudication of charges of driving while intoxicated, driving while impaired, and spinning wheels. When the case came before the Circuit Court, the Assistant State's Attorney entered a nolle prosequi on the driving while intoxicated charge. The State then contended that the remaining charges were petty and as such, the defendant was not entitled to a jury trial. Further, the State alleged that the case should be returned to the District Court. The Court of Special Appeals affirmed the Circuit Court's decision in denying a jury trial. *Thompson v. State*, 26 Md. App. 442, 338 A.2d 411 (1975). After granting cer-

tiorari to determine Thompson's right to a jury trial or whether the charges should have been returned for trial in the District Court, the Court of Appeals held that the District Court rule, relied on by the lower court, which prevents a defendant from praying a jury trial on petty offenses, no longer applies when a case gets to the Circuit Court.

Rule 741 of the Maryland Rules of Procedure is applicable in Circuit Court, where all defendants, without exception as to petty offenses, are entitled to a trial by jury. The Court further stated that if the General Assembly wants to qualify

the rule it may do so, but until then the *Thompson* case applies.

In *Howard v. State*, 32 Md. App. 75, A2d 568 (1976), the defendant was charged with disturbing the peace, assault, and obstructing a police officer. The defendant was to be tried in District Court, which had concurrent jurisdiction with the Circuit Court. However, the defendant prayed a jury trial under the provisions of the Cts. & Jud. Proc. Art. §4-302 (d)(2). The issue was whether the demand for a jury trial on the latter two offenses also deprived the District Court of its original exclusive jurisdiction

over the petty offense, i.e., disturbing the peace.

Under the *Thompson* ruling, the Court of Special Appeals decided that the trial court in *Howard* erred by severing the petty charges from the other two charges for which a jury trial was prayed. The court stated that the Circuit Court properly acquired jurisdiction over all the offenses with which the defendant was charged and that the defendant was entitled to a jury trial on all charges, including the petty charges when joined originally with charges falling under C.J. §4-302.

Drugs: Recent Decisions

by Peter H. Meyers

(Reprinted, with permission, from *The Leaflet*, A publication of the National Organization for the Reform of Marijuana Laws)

U.S. SUPREME COURT LIMITS ENTRAPMENT DEFENSE

How much help can police agents give in the commission of a crime and still be able to prosecute successfully afterwards? That question recently split the U.S. Supreme Court three ways in a case that has narrowly defined the limits of entrapment and other related defenses.

The case, *Hampton v. United States*, 44 U.S.L.W. 4542 (April 27, 1976), involved an undercover DEA agent who had supplied Hampton with heroin and then arranged for him to sell it to other DEA agents. After Hampton made two sales, he was arrested and convicted for distributing heroin.

A five-Justice majority of the Supreme Court, in affirming Hampton's conviction, limits the defense of entrapment to

situations where government agents "implant" the criminal design in the mind of an innocent person. Entrapment cannot be claimed when government agents encourage or act in concert with an individual who was "predisposed" to commit an offense, as Hampton's attorney had conceded he was.

However, entrapment is not the only defense which can be raised when police participate in the commission of a crime. Two justices who voted to affirm Hampton's conviction—Powell and Blackmun—indicated in a separate opinion that they would bar the prosecution of a "predisposed" defendant when "police overinvolvement in the crime [reached] a demonstrable level of outrageousness," based upon due process principles or the Court's supervisory powers. The three dissenting justices—Brennan, Stewart, and Marshall—agreed that outrageous police involvement would bar prosecution, forming a slender five-justice majority for this principle. The dissenters would have gone further, and reversed Hampton's conviction in this case because of the police involvement, stating that in their view:

"The Government's role has passed the point of toleration . . . The Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary."

The other three justices who voted to affirm Hampton's conviction—Rehnquist, White, and Chief Justice Burger—indicated in a separate opinion

that they did not recognize any defense beyond entrapment, and would not bar the prosecution of a "predisposed" defendant no matter how outrageous the government's involvement was in the commission of a crime. Justice Stevens did not participate.

This decision is binding only on the federal courts, and not the states. A number of state courts have adopted more liberal tests for entrapment.

U.S. SUPREME COURT REJECTS "FREE EXERCISE OF RELIGION" MARIJUANA DEFENSE

The U.S. Supreme Court has rejected for the second time the defense of members of a large communal group claiming a right under the Free Exercise of Religion clause of the First Amendment to cultivate marijuana for use in religious practices. In 1971, four members of the group, including its spiritual leader, Stephen Gaskin, were arrested and convicted for cultivating marijuana. All four admitted growing marijuana, but argued that marijuana was an integral part of the religious practices at "the farm" a self-sufficient spiritual community of about 800 individuals located in Summertown, Tennessee.

After these convictions were affirmed by the Tennessee Supreme Court, the U.S. Supreme Court summarily dismissed an appeal "for want of a substantial federal question" in 1973, *Gaskin v. Tennessee*, 414 U.S. 886. The four indi-