



1984

Casenotes: Criminal Procedure — Right to Counsel — Premature Verdict Rendered before Summation, Even if Stricken, Amounts to a Denial of Right to Assistance of Counsel. *Spence v. State*, 296 Md. 416, 463 A.2d 808 (1983)

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Recommended Citation

Arnovits, Stuart H. (1984) "Casenotes: Criminal Procedure — Right to Counsel — Premature Verdict Rendered before Summation, Even if Stricken, Amounts to a Denial of Right to Assistance of Counsel. *Spence v. State*, 296 Md. 416, 463 A.2d 808 (1983)," *University of Baltimore Law Review*: Vol. 13: Iss. 2, Article 11.
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol13/iss2/11>

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CRIMINAL PROCEDURE — RIGHT TO COUNSEL — PREMATURE VERDICT RENDERED BEFORE SUMMATION, EVEN IF STRICKEN, AMOUNTS TO A DENIAL OF RIGHT TO ASSISTANCE OF COUNSEL. *Spence v. State*, 296 Md. 416, 463 A.2d 808 (1983).

Defendant was tried and convicted of robbery, burglary, assault, and theft in a non-jury trial.¹ He moved for a judgment of acquittal at the conclusion of his case.² The trial judge denied the motion and immediately announced the guilty verdicts on all counts.³ The defendant's counsel objected to his lack of opportunity to present closing argument prior to the court's rendering of the verdicts, and moved for a mistrial.⁴ The judge struck the verdicts, denied the motion, and permitted defense counsel to present his closing argument.⁵ The judge then adopted all his previous findings and again found the defendant guilty on all counts.⁶ The Court of Special Appeals of Maryland, which affirmed the judgments, characterized the initial denial of the right to summation as inadvertent and ultimately non-prejudicial.⁷ In a close decision, the Court of Appeals of Maryland reversed and remanded for a new trial, holding that a closing argument, made after a judge has announced the verdict and, even if stricken, is a denial of the accused's constitutional right to the assistance of counsel.⁸

1. *Spence v. State*, 296 Md. 416, 419, 463 A.2d 808, 809 (1983).

2. Defendant was renewing his previous motion for acquittal that he had made at the conclusion of the state's case. *Id.* at 418, 463 A.2d at 809.

3. The court recessed for the day after *Spence* renewed his motion. The following morning, the judge ruled on the motion and announced the verdicts. *Spence* was sentenced to 15 years for burglary, 10 years for robbery, 10 years for assault, and 18 months for theft. *Id.* at 419, 463 A.2d at 809.

4. *Id.*

5. The following colloquy ensued between the judge and defense counsel:

. . . .
MR. FRIEDMAN [defense counsel]: Your Honor, I'll formally move for a mistrial at this time.

THE COURT: I'll strike the verdicts. I'll be glad to hear from you sir.

MR. FRIEDMAN: Well, Your Honor, I don't feel that if I argue the case at this time that I could possibly convince Your Honor contrary to what you have already explained. . . . That's like saying go back to the jury and argue your case now after they have rendered verdicts of guilty.

THE COURT: Mr. Friedman, I'm not a jury and I note that I can be persuaded by argument and that I'm — if I am persuaded, it wouldn't be the first time

Id. at 426-27, 463 A.2d at 814-15. The judge denied counsel's motion for a mistrial. Defense counsel continued his objection, but did go forward with his argument to avoid forfeiting the right to summation. *Id.*

6. *Id.* at 419, 463 A.2d at 809.

7. *Spence v. State*, 51 Md. App. 359, 364, 443 A.2d 648, 651 (1982), *rev'd*, 296 Md. 416, 463 A.2d 808 (1983).

8. *Spence v. State*, 296 Md. 416, 423-26, 463 A.2d 808, 812-13 (1983) (4-3 decision). The court could not conclude beyond a reasonable doubt that the error did not influence the verdict. *Id.* at 425, 463 A.2d at 812; *see Chapman v. California*, 386 U.S. 18 (1967) (establishing beyond a reasonable doubt standard for deeming harmless errors involving constitutional guarantees).

The right to make a closing argument⁹ is a basic element of the right to the assistance of counsel in criminal trials.¹⁰ Closing argument aids the trier of fact by clarifying the issues for resolution, and gives the defense a final chance to convince the trier of fact of the defendant's innocence.¹¹ Furthermore, it assists the decision-making process by providing the fact finder with the stimulus of opposing viewpoints.¹²

The usual practice under English common law of allowing a criminal defendant the opportunity to sum up his case in a closing argument¹³ was subsequently recognized in the United States.¹⁴ Until recently, however, a few jurisdictions forbade summation as a matter of right in non-jury cases, and instead permitted it within the discretion of the trial judge.¹⁵ It is now clear that a right to closing argument is

9. The terms "closing argument," "argument," "final argument," and "summation" are used interchangeably in this note.
10. *See* *Herring v. New York*, 422 U.S. 853, 858 (1975). The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The sixth amendment right to the assistance of counsel applies to state criminal proceedings through the due process clause of the fourteenth amendment. *See* *Gideon v. Wainwright*, 372 U.S. 335 (1963); *see also* *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending this right to a criminal defendant in a misdemeanor prosecution). The right to counsel is also incorporated in the due process requirement of the fifth amendment. *See* *Powell v. Alabama*, 287 U.S. 45, 66-68 (1932). In Maryland, the right to the assistance of counsel is set forth in MD. CONST. art. 21. *See also* *Yopps v. State*, 228 Md. 204, 207, 178 A.2d 879, 881 (1962) (recognizing the right to summation as inherent in the right to counsel). For a general discussion of the right to counsel, *see* C. WHITEBREAD, *CRIMINAL PROCEDURE* §§ 25.01 to .06 (1980 & Supp. 1982).
11. *Herring v. New York*, 422 U.S. 853, 862 (1975); *see* J. STEIN, *CLOSING ARGUMENT* §§ 1-11 (1982 & Supp. 1983); 3 C. TORCIA, *WHARTON'S CRIMINAL PROCEDURE* §§ 521-534 (12th ed. 1975 & Supp. 1983) (general discussion of the law of closing argument).
12. *United States v. King*, 650 F.2d 534, 536 (4th Cir. 1981).
13. One legal scholar described the typical English criminal trial in the sixteenth and seventeenth centuries as a series of arguments between the defendant and several counsel for the Crown. *See* 1 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 326 (1883). Procedural reforms in the eighteenth century such as the right to counsel, the right to confrontation, and the right to call witnesses, shifted the primary function of argument to summation of the evidence at the close of trial. *Herring v. New York*, 422 U.S. 853, 860-61 (1975). The right of an English criminal defendant to make a closing argument was codified in the Criminal Procedure Act of 1865 and is still the law in England. *See* 11 HALSBURY'S *LAWS OF ENGLAND* 295 (4th ed. 1976).
14. *See, e.g.,* *Lynch v. State*, 9 Ind. 541, 541-42 (1857) (recognizing right to summation in jury trial under Indiana Constitution); *Olds v. Commonwealth*, 10 Ky. (3 A.K. Marsh.) 465, 467-68 (1821) (right to summation in non-jury trial under federal Constitution); *Stewart v. Commonwealth*, 117 Pa. 378, 381, 11 A. 370, 370 (1887) (right to summation in jury trial under Pennsylvania Constitution); *Anselin v. State*, 72 Tex. Crim. 17, 18, 160 S.W. 713, 714 (1913) (right to summation in bench trial under Texas Constitution); *Word v. Commonwealth*, 30 Va. (3 Leigh) 743, 755-57 (1831) (right to summation in jury trial despite introduction of clear and unimpeached evidence).
15. *See, e.g.,* *People v. Don Carlos*, 47 Cal. App. 2d Supp. 863, 866-67, 117 P.2d 748, 750 (1941) (when trial judge decides he is sufficiently informed he may terminate

inherent in the defendant's sixth amendment right to counsel¹⁶ and is equally applicable whether the case is tried before a jury or judge.¹⁷ Therefore, intentional denial of closing argument by the trial judge is clearly reversible error.¹⁸

The right to closing argument is not without qualifications. It remains subject to the wide discretion of the trial judge, who may reasonably control its duration¹⁹ and scope.²⁰ Courts note that a judge must avoid any display of bias or impatience until completion of the argument, as this is generally considered equivalent to an actual denial of summation.²¹ The defendant may expressly waive his right to closing

argument under California Constitution); *People v. Manske*, 399 Ill. 176, 178, 77 N.E.2d 164, 170 (1948) (where argument would not significantly aid the trial court, court may decline to hear it in its discretion); *see also* *State v. Tereau*, 304 Minn. 71, 74, 229 N.W.2d 27, 29 (1975) (recognizing right to argument but holding where evidence against defendant is strong, no prejudicial error in refusing to hear it).

A New York statute gave the trial judge in a non-jury criminal trial the power to deny both parties the opportunity to make a summation. N.Y. CRIM. PROC. LAW § 320.20(3)(c) (McKinney 1971). This law was found unconstitutional in 1975. *Herring v. New York*, 422 U.S. 853, 864-65 (1975).

16. *Herring v. New York*, 422 U.S. 853, 857-58 (1975); *see also* *United States v. King*, 650 F.2d 534, 536 (4th Cir. 1981) (violation of sixth amendment right to counsel when trial judge renders guilty verdict before summation and state's argument will not change the result); *Grigsby v. State*, 333 So. 2d 891, 892 (Ala. Crim. App.), *cert. denied*, 333 So. 2d 894 (Ala. 1976) (denial of assistance of counsel in contravention of sixth amendment when trial judge refuses to hear argument).
17. *See Herring v. New York*, 422 U.S. 853, 858-59 (1975) (striking statute vesting trial judge with discretion to deny closing argument in non-jury trials); *see also* *United States ex rel. Wilcox v. Pennsylvania*, 273 F. Supp. 923 (E.D. Pa. 1967) (recognizing right to summation as part of due process in non-jury trial); *People v. Thomas*, 390 Mich. 93, 210 N.W.2d 776 (1973) (denial of due process and assistance of counsel when verdict rendered by judge before summation); *Commonwealth v. McNair*, 208 Pa. Super. 369, 222 A.2d 599 (1966) (terming summation a critical stage of the proceedings in non-jury trial).
18. *See United States v. King*, 650 F.2d 534 (4th Cir. 1981); *United States v. Walls*, 443 F.2d 1220 (6th Cir. 1971). *See generally* Annot., 38 A.L.R. 2d 1396, 1401-06 (1954) (discussing cases holding trial judge's denial of argument by counsel to be prejudicial in jury and non-jury cases).
19. *See Butler v. United States*, 317 F.2d 249, 256 (8th Cir.), *cert. denied*, 375 U.S. 838 (1963). The time limitation depends on the facts of the particular case, with the following factors being particularly relevant: (1) the number of witnesses; (2) the nature and complexity of the issues; and (3) the gravity of the offense involved. J. STEIN, *supra* note 11, § 8. *See generally* Annot., 6 A.L.R. 3d 604 (1966 & Supp. 1983) (discussing propriety of time limitations for summation imposed by courts).
20. *Toone v. State*, 144 Tex. Crim. 98, 161 S.W.2d 90 (1942) (trial court properly refused to allow argument where proposed argument was beyond the scope of the issues). For a discussion of the scope of permissible argument, *see* J. STEIN, *supra* note 11, § 12.
21. *See United States ex rel. Wilcox v. Pennsylvania*, 273 F. Supp. 923 (E.D. Pa. 1967) (writ of habeas corpus granted to defendant because trial judge interrupted defense counsel's closing argument and rendered guilty verdict without hearing the summation); *see also* *People v. Diaz*, 1 Ill. App. 3d 988, 275 N.E.2d 210 (1971) (trial judge interrupted testimony before argument three times to announce guilty verdict). *But cf.* *Commonwealth v. Owens*, 444 Pa. 521, 281 A.2d 861 (1971)

argument²² and, in most jurisdictions, the waiver may be implied from a failure to assert the right at the proper time.²³ Thus, the burden usually rests with the defense counsel to inform timely the court of his desire to present a final argument.²⁴

Maryland was one of the first jurisdictions to recognize the defendant's constitutional right to present summation in a non-jury trial.²⁵ Consistent with the majority view, this right may be waived in Maryland simply by failing to assert it in a timely fashion.²⁶

In *Spence v. State*,²⁷ defendant's counsel made an objection to the court's denial of summation.²⁸ Thus, the issue of first impression presented to the court of appeals did not involve a waiver of the right, but rather whether the opportunity to present a summation after a verdict was rendered and then stricken satisfied the defendant's constitutional right to the assistance of counsel.²⁹ Writing for the majority, Judge Cole held that the striking of the verdict, followed by a reopening of the record, could not cure the initial error of rendering the verdict before summation.³⁰ The *Spence* court reasoned that it would be impossible to recreate the same stage or atmosphere of fairness by al-

(judge not prejudiced even though he was prepared to decide case after ruling on state's motion for continuance, but before asking for closing arguments).

22. *State v. Mann*, 361 A.2d 897, 904-05 (Me. 1976).

23. *Casterlow v. State*, 256 Ind. 214, 267 N.E.2d 552 (1971); *State v. Rojewski*, 202 Neb. 34, 272 N.W.2d 920 (1979); *State v. Weippert*, 237 N.W.2d 1 (N.D. 1975).

24. *See People v. Manning*, 120 Cal. App. 3d 421, 174 Cal. Rptr. 625 (1981); *Covington v. State*, 282 Md. 540, 386 A.2d 336 (1978); *cf. City of Columbus v. Woodrick*, 48 Ohio App. 2d 274, 357 N.E.2d 58 (1976) (requiring an express waiver of closing argument).

25. *See Yopps v. State*, 228 Md. 204, 178 A.2d 879 (1962). The right is inherent in the right to counsel in MD. CONST. art. 21. *See also Herring v. New York*, 422 U.S. 853, 859-60 (1975) (discussing *Yopps*).

26. *See Covington v. State*, 282 Md. 540, 386 A.2d 336 (1978). Maryland Rule 522(b), made applicable to criminal cases through Rule 725(f), generally requires that counsel object at the time of the court's ruling to preserve appellate review of reconsideration by the trial court. *See also Rome & Modo v. State*, 236 Md. 583, 204 A.2d 674 (1964) (untimely announcement of verdict not prejudicial since no request was made to argue); *accord Hewitt v. State*, 242 Md. 111, 218 A.2d 19 (1966) (errors of constitutional dimension may be waived in the absence of a timely objection at trial); *cf. Baines v. State*, 37 Md. App. 505, 509, 378 A.2d 177, 179 (1977) (no waiver of summation where defense counsel rested case but asked to be heard).

27. 296 Md. 416, 463 A.2d 808 (1983).

28. *Id.* at 417, 463 A.2d at 808.

29. *Dougherty* was modified on other grounds in *People v. Manning*, 120 Cal. App. 3d 421, 174 Cal. Rptr. 625 (1981), which placed a burden on counsel to request argument to preserve the right to appellate review. *Dougherty* was ordered deleted from the California Appellate Reports on direction of the Supreme Court of California on August 14, 1981. *See* 102 Cal. App. 3d 270 (1981). *Dougherty's* status as valid California law is now uncertain. *But see Spence*, 296 Md. at 422 n.1, 463 A.2d at 811 n.1 (majority following *Dougherty* as precedent insofar as the judge's premature verdict being prejudicial).

30. *Spence*, 296 Md. at 423, 463 A.2d at 811-12.

lowing argument after the announcement of a premature verdict.³¹

A strong dissent, authored by Chief Judge Murphy, emphasized the inadvertency of the denial of summation before verdict and added that a meaningful opportunity to argue was subsequently afforded to the defendant.³² The dissent stressed that the verdicts were stricken, and the judge's good faith willingness to consider the defense counsel's argument.³³ In addition, the dissent viewed defense counsel's objection as untimely and therefore an implied waiver of the right to summation, since he waited until the end of an extended series of findings by the court before objecting.³⁴

The dissenting opinion is both better reasoned and more congruent with existing law. Many of the decisions cited by the majority involved either an intentional denial of summation,³⁵ or a statement by the trial judge tending to dissuade counsel from presenting summation.³⁶ *Spence* though is distinguishable from these cases because the trial judge in *Spence* made a good faith effort to correct the procedural deficiency.³⁷ The majority opinion seemingly adopts a per se rule, requiring a new trial whenever a verdict is announced before the defendant has either made or waived closing argument.³⁸ Such a rigid rule does not achieve a proper balance between the defendant's right to a fair trial and the state's interest in promoting judicial economy.

The majority in *Spence* would not allow the trial court to correct its error under any circumstances, thereby implying that a judge can never listen to a post-verdict argument with an open mind.³⁹ On the contrary, a judge's professional expertise permits a reasonable pre-

31. *Id.* at 424, 463 A.2d at 812.

32. *Id.* at 432, 463 A.2d at 815 (Murphy, C.J., dissenting). Judges Smith and Rodowsky joined in the dissenting opinion.

33. *Id.* at 437, 463 A.2d at 818. The trial transcript indicated that the trial judge listened to the argument, questioned defense counsel on various points, and then rendered the verdicts. *Id.* at 431, 463 A.2d at 815.

34. *Id.* at 436, 463 A.2d at 817-18.

35. *See, e.g.*, Grigsby v. State, 333 So. 2d 891 (Ala. Crim. App.), *cert. denied*, 333 So. 2d 894 (Ala. 1976) (judge rendered guilty verdict and refused defense counsel's request for argument); Yopps v. State, 228 Md. 204, 178 A.2d 879 (1962) (trial judge pronounced guilty verdict and refused to allow argument); People v. Thomas, 390 Mich. 93, 210 N.W.2d 776 (1973) (*per curiam*) (defense filed a motion of acquittal; judge did not rule on the motion but found defendant guilty and declined to hear counsel's argument); Commonwealth v. McNair, 208 Pa. Super. 369, 222 A.2d 599 (1966) (defense requested and was refused the right to summation).

36. *See, e.g.*, United States v. King, 650 F.2d 534 (4th Cir. 1981) (magistrate found defendant guilty and unequivocally stated that defense counsel could present argument, but that it would not change verdict); United States v. Walls, 443 F.2d 1220 (6th Cir. 1971) (judge reopened record after pronouncement of verdict but stated that argument would be futile).

37. *Spence*, 296 Md. at 437, 463 A.2d at 818 (Murphy, C.J., dissenting); *see supra* note 5 (transcript of the trial judge's actions).

38. *Spence*, 296 Md. at 426, 463 A.2d at 813 (Murphy, C.J., dissenting).

39. *Id.* at 437, 463 A.2d at 818.

sumption that a judge can properly perform his duties in such an instance.⁴⁰ Indeed, the ability of a trial judge to perceive certain situations differently from a jury composed of laymen was expressly recognized by the court of appeals in *State v. Hutchinson*.⁴¹ In *Hutchinson*, the trial judge, sitting as the trier of fact, erroneously admitted a confession obtained in violation of the *Miranda* rule.⁴² Upon discovering the error, the judge indicated he would completely disregard the confession in his pre-verdict deliberation.⁴³ In upholding the guilty verdict, the court of appeals reasoned that the trial judge's legal training and unique position in the legal system enabled him to interpret the nuances of the law and exclude any prejudices from his deliberations.⁴⁴ Therefore, the *Spence* majority ignores precedent by giving scant deference to a trial judge's legal professionalism.

The arguments advanced by the *Spence* dissent find further support in *Commonwealth v. Cooper*,⁴⁵ a case factually identical to *Spence*. In *Cooper*, the Superior Court of Pennsylvania ruled that a new trial was not mandated because the denial of summation was unintentional, the verdict was vacated upon discovery of the error, and the final judgment was free from bias and prejudice.⁴⁶

As in *Cooper*, the trial judge's error in *Spence* was one of miscommunication and misunderstanding, not one of intentional unfairness.⁴⁷ The right to a summation in non-jury trials is often not asserted as a matter of trial strategy.⁴⁸ Therefore, it was not unreasonable for the trial judge to have assumed that *Spence* waived his right to summation.⁴⁹ While the result in *Spence* could have been avoided if the trial judge inquired whether counsel desired to present argument, the bur-

40. *Id.* at 437-38, 463 A.2d at 818. The trial judge in *Spence* indicated that a distinction exists between a judge and a jury listening to an argument after previously taking a position. *Id.* at 430, 463 A.2d at 815.

41. 260 Md. 227, 271 A.2d 641 (1970).

42. *Id.* at 229, 230, 271 A.2d at 642-43. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966) (delineating rights accorded to an arrestee before interrogation or a voluntary confession).

43. *Hutchinson*, 260 Md. at 230, 271 A.2d at 643.

44. *Id.* at 233, 271 A.2d at 644.

45. 229 Pa. Super. 52, 323 A.2d 255 (1974).

46. *Id.* at 55, 323 A.2d at 257.

47. *Spence*, 296 Md. at 437, 463 A.2d at 818 (Murphy, C.J., dissenting).

48. See *Casterlow v. State*, 256 Ind. 214, 218, 267 N.E.2d 552, 553 (1971). The right to summation is frequently waived in non-jury trials because of the simplicity of the case or the knowledge and experience of the judge. Where argument is made it is almost always less formal than in a jury case, often in the nature of a discussion with the court rather than a one-sided argument. *Cooper*, 229 Pa. Super. at 54-55, 323 A.2d at 257.

49. Moreover, the court recessed after the defense's motion for acquittal and resumed with the ruling on that motion the following day. Defense counsel, however, did not request time for argument until after the verdicts were announced. *Spence*, 296 Md. at 418-19, 463 A.2d at 809. Furthermore, the dissent noted that counsel ultimately raised the same points in his closing argument that he made in his initial motion for acquittal. *Id.* at 432, 463 A.2d at 815 (Murphy, C.J., dissenting).

den should nevertheless rest on counsel to request time for argument.⁵⁰

By not adopting a case-by-case determination of whether the denial of pre-verdict argument was prejudicial, Maryland appears to have gone further than any other jurisdiction in safeguarding this right.⁵¹ While the impact of *Spence* remains to be seen, it would now be advisable for judges in non-jury trials to obtain sua sponte a waiver of argument, if counsel's intentions are unclear. Attorneys, however, should be conscientious and explicitly reserve the right to argument when resting their case.⁵² Although the precise issue in *Spence* does not arise with alarming frequency,⁵³ affirmative steps could easily be taken by both the bar and the judiciary to ensure that such superfluous litigation and costly retrials are avoided.

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50. See *People v. Dougherty*, 162 Cal. Rptr. 277, 283 (1980) (Brown, J., dissenting) (deleted from California Appellate Reports on direction of the Supreme Court of California by order dated August 14, 1981. 102 Cal. App. 3d 270 (1981)).

51. See *Spence*, 296 Md. at 435, 463 A.2d at 817 (Murphy, C.J., dissenting).

52. It is not uncommon for trial judges in non-jury cases to assume mistakenly that the defense counsel does not wish to deliver closing argument. See *Grigsby v. State*, 333 So. 2d 891 (Ala. Crim. App.), cert. denied, 333 So. 2d 894 (Ala. 1976); *People v. Daniels*, 5 Ill. App. 3d 545, 366 N.E.2d 1085 (1977); *Casterlow v. State*, 256 Ind. 214, 267 N.E.2d 552 (1971); *Commonwealth v. Cooper*, 229 Pa. Super. 52, 323 A.2d 255 (1974). The preferable way to rest one's case and preserve the right to summation is to simply say, "The defense rests, and I'd like to be heard." See *Baines v. State*, 37 Md. App. 505, 507, 378 A.2d 177, 178 (1977).

53. *Spence* was followed by the court of special appeals in *Jones v. State*, 55 Md. App. 695, 466 A.2d 55 (1983), which held that a judge who renders a premature verdict is not qualified to consider the remaining arguments and defendant must be granted a new trial. The judge, however, did not expressly strike the verdict as in *Spence*, nor did he offer assurance that he could be persuaded to reconsider his finding. See also *Myers v. State*, 297 Md. 4, 464 A.2d 1067 (1983) (reversing conviction and ordering a new trial in light of *Spence*).