



2000

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Ingrid J. Abbott

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Recommended Citation

Abbott, Ingrid J. (2000) "Recent Developments: Johnson v. State: Maryland Rule 4-204 Requires the Defendant's Consent if the State Makes a Substantive Change to a Charging Document," *University of Baltimore Law Forum*: Vol. 31 : No. 1 , Article 12.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol31/iss1/12>

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Johnson v. State:

Maryland Rule 4-204 Requires the Defendant's Consent if the State Makes a Substantive Change to a Charging Document

By Ingrid Abbott

The Court of Appeals of Maryland held that Maryland Rule 4-204 requires the defendant's consent if the State makes a substantive change to a charging document. *Johnson v. State*, 358 Md. 384, 749 A.2d 769 (2000). The court held that amending information to substitute "cocaine" for "marijuana" was a change of substance rather than form because it changed the character of the offense charged. Moreover, the court held that such an amendment is prejudicial if the defendant does not consent.

On June 20, 1997, Officer Mark Waltrop ("Waltrop") arrested the defendant, Steve Johnson ("Johnson"), after observing Johnson with what appeared to be crack cocaine. Accordingly, police charged Johnson with possession of crack cocaine with intent to distribute, possession of crack cocaine, and possession of a firearm in violation of Md. Ann. Code art. 27, section 281A (1957, 1996 Repl. Vol.).

In August 1997, the State's Attorney filed a five-count criminal information in the Circuit Court for Talbot County. However, instead of charging Johnson with possession of cocaine, count one of the information charged Johnson with possession of marijuana with intent to distribute, and

count two with unlawful possession of marijuana. The other counts were identical with the initial charges. In December 1997, the State moved to amend counts one and two of the information to charge Johnson with possession of cocaine instead of marijuana. Johnson refused to consent to the change. At a January 1998 hearing, Johnson contended that the State's proposed amendment violated Maryland Rule 4-204 because it changed the character of the offense charged and therefore required his consent.

After the circuit court granted the State's motion, Johnson was convicted on all counts and sentenced. The Court of Special Appeals of Maryland affirmed the trial court's decision to grant the motion to amend. The Court of Appeals of Maryland granted certiorari to determine whether the amendment of counts one and two of the charging document violated Maryland Rule 4-204.

The court of appeals observed that under Maryland Rule 4-204, a court may permit an amendment to a charging document, "except that if the amendment changes the character of the offense charged, the consent of the parties is required." *Id.* at 387, 749 A.2d at 770. Next, the court examined the history of Rule 4-204, noting that it was derived from Article 52, section 22 of the 1957

Maryland Code, which allowed the amendment of criminal informations and warrants, if the amendment did not change the character of the offense or crime with which the accused was charged. *Id.* at 388, 749 A.2d at 771 (citing Md. Ann. Code art. 52, section 22 (1957)).

Additionally, in 1961, section 22 of Article 52 was replaced by former Maryland Rule 714 that applied "form versus substance" language to indictments and informations, and "character of the offense" language to warrants. *Id.* Subsequent amendments to Rule 714 alternated between a "character of the offense" and "form versus substance" approach for indictments and informations. *Id.* Rule 714 was renumbered as Rule 713 and amended in 1979 to allow amendments to indictments if the amendments did not "change the substance of the indictment." *Id.* In 1984, the current version of the statute, Md. Rule 4-204, was enacted. *Id.*

Next, the court reviewed its prior decisions that examined whether amendments to charging documents changed the elements of the original crime charged. The court noted that whether it used the "form versus substance" or "character of the offense" test, the controlling factor in its analysis was always whether the

amendment constituted a “matter of form.” *Id.* In *Thanos v. State*, 282 Md. 709, 387 A.2d 286 (1979), the original charge of shoplifting could be committed by altering or removing a label or price tag. *Id.* The amendment substituted “remove” for the word “alter” without the defendant’s consent. *Id.* at 388-89, 749 A.2d at 771 (citing *Thanos*, 282 Md. at 716, 387 A.2d at 290). Here the court applied both tests, and held that the amendment was not “simply a matter of form” where “it is equally clear that the basic description of the offense is indeed changed when an entirely different act is alleged to constitute the crime.” *Id.*

Similarly, in *Brown v. State*, 285 Md. 105, 400 A.2d 1133 (1979), the amendment substituted the words “one Ford Automobile” to “\$5462.80,” thereby changing the identity of the property the defendant allegedly obtained by false pretenses. *Id.* at 389, 749 A.2d at 772. The court held that the amendment constituted a substantive change because it affected the essential facts that would prove whether the defendant had committed a crime. *Id.* (citing *Brown*, 285 Md. at 109, 400 A.2d at 1135-36).

In the case at bar, the court found that the amendment significantly changed the description of the specific act charged. *Id.* at 390, 749 A.2d at 772. Instead of charging the defendant with possession of marijuana, the charge was now possession of cocaine. *Id.* Like the amendments in *Thanos* and *Brown*, the amended information in

Johnson changed the “character of the offense alleged.” *Id.* In so holding, the court rejected the State’s argument that the character of the offense was not changed because both offenses were governed by the same sections of the controlled dangerous substance statute before and after the amendment. *Id.* Moreover, the *Thanos* court recognized that a charging document “may not be amended to charge an act not alleged in the original document...” *Id.* (citing *Thanos* 282 Md. at 715, 387 A.2d at 289).

The court also cited *Cunningham v. State*, 318 Md. 182, 567 A.2d 126 (1989), which held that the legislature intended to regulate each type of controlled substance and to authorize a separate conviction for possession of each substance in sections 286 and 287 of the controlled dangerous substance statute. *Id.* at 391, 749 A.2d at 772 (citing *Cunningham*, 318 Md. at 187-88, 567 A.2d at 128-29). Turning to the case at bar, the court noted that penalties for possession of cocaine with intent to distribute and possession of marijuana with intent to distribute varied significantly. *Id.* Additionally, because identification of a controlled substance must be considered an element of the crime, the State must prove the particular type of substance it has alleged in order to convict. *Id.* at 391-392, 749 A.2d at 773 (citing *Simpson*, 318 Md. at 198-99, 567 A.2d at 133-34).

In the instant case, the court ruled that because the amendment changes the identity of a controlled

dangerous substance, the defendant is effectively charged with a different offense and the amendment is invalid. *Id.* at 392, 749 A.2d at 773. Rejecting the State’s contention that amending the information was not prejudicial, the court opined that the purpose of Rule 4-204 was to prevent any unfair surprise to the defendant, and to allow the defendant and his counsel to adequately prepare for trial. *Id.* Accordingly, the court of appeals determined that the amendment was prejudicial because it changed the character of the offense by substituting “cocaine” for “marijuana” without the defendant’s consent.

The decision in *Johnson* sends a message, loud and clear, that both the letter and intent of Rule 4-204 must be followed. The court has clearly delineated the standard by which amendments to charging documents are to be assessed. If the amendment alters the elements of the crime with which a defendant is charged, the change is substantive. The State must obtain the accused’s or her consent or face the prospect of reversal on appeal. In the future, prosecutors must ensure that the charging document accurately reflects the charges the State intends to prosecute. This ruling preserves the defendant’s right to withhold consent to an amendment that changes the offense charged, and signals defense attorneys to carefully monitor any proposed amendments made by the prosecution once the initial charging document is completed.