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Recent Developments: *Ogundipe v. State*: A Verdict Sheet Does Not Constitute the Final Verdict; A Verdict Sheet Is Not a Communication within Maryland Rule 4-326(d) Requiring Disclosure of Its Contents to the Parties Prior to Dismissal of the Jury

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RECENT DEVELOPMENT

OGUNDIPE V. STATE

By: Cassondra A. Zaleski

A VERDICT SHEET DOES NOT CONSTITUTE THE FINAL VERDICT; A VERDICT SHEET IS NOT A COMMUNICATION WITHIN MARYLAND RULE 4-326(d) REQUIRING DISCLOSURE OF ITS CONTENTS TO THE PARTIES PRIOR TO DISMISSAL OF THE JURY.

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OGUNDIPE V. STATE: A VERDICT SHEET DOES NOT CONSTITUTE THE FINAL VERDICT; A VERDICT SHEET IS NOT A COMMUNICATION WITHIN MARYLAND RULE 4-326(d) REQUIRING DISCLOSURE OF ITS CONTENTS TO THE PARTIES PRIOR TO DISMISSAL OF THE JURY.

In a case of first impression, the Court of Appeals of Maryland held that a jury verdict sheet is not the final verdict rendered. *Ogundipe v. State*, 424 Md. 58, 33 A.3d 984 (2011). Accordingly, a verdict sheet is merely a tool to aid the jury in reaching their decision. *Id.* at 72-73, 33 A.3d at 992. The court also held that a verdict sheet is not the type of communication contemplated under Maryland Rule 4-326(d) that requires disclosure of its contents before dismissal of the jury. *Id.* at 61, 33 A.3d at 985-86.

Washington County police arrested Olusegan Ogundipe ("Ogundipe") following an incident on July 23, 2006, and charged him with first and second-degree murder, attempted first and second-degree murder, three counts each of first and second-degree assault, use of a handgun in the commission of a crime of violence, and wearing, carrying, and transporting a handgun. Prior to deliberations, the judge instructed the jury to answer the questions on the verdict sheet, and if they found Ogundipe not guilty of the first-degree charges, they should consider his guilt on the second-degree charges. The jury found Ogundipe guilty of first-degree murder, attempted first-degree murder, two counts of first-degree assault, and both handgun offenses.

The foreman announced the verdict in open court and the court clerk hearkened the verdict and polled the jury.

After the trial, Ogundipe's counsel obtained the verdict sheet and discovered that rather than leaving the second-degree offenses blank when the jury found Ogundipe guilty of the first-degree offenses, they marked not guilty. Ogundipe appealed to the Court of Special Appeals of Maryland arguing that the trial court erred in failing to read the verdicts for the lesser included offenses, and that the verdict sheet comprised an inconsistent verdict. The Court of Special Appeals affirmed, holding that the verdict sheet did not constitute the verdict, and the verdict was valid because the jury polling reflected a unanimous decision. The court also held that the verdict sheet was not a communication, and there is no requirement to disclose it to the parties. The Court of Appeals of Maryland then granted Ogundipe's petition for a writ of certiorari.

The Court of Appeals of Maryland rephrased Ogundipe's question for review, asking whether the trial court must disclose a signed verdict sheet to a defendant or his counsel before discharging the jury. *Ogundipe*, 424 Md. at 60, 33 A.3d at 985. The court separated this question into two distinct issues, which were whether a verdict sheet constituted the jury's verdict and whether a verdict sheet is a communication

that the court must disclose under Maryland Rule 4-326(d). *Id.* at 68-69, 33 A.3d at 990.

To address the first issue, the court looked to Maryland precedent and then other jurisdictions to determine whether a verdict sheet constitutes the final verdict. *Ogundipe*, 424 Md. at 69, 33 A.3d at 990-91. The court distinguished this case from a previous Maryland case where the Court of Appeals of Maryland reversed a guilty verdict because the trial court sentenced the defendant for a count on which the jury did not orally announce the verdict. *Ogundipe*, 424 Md. at 69, 33 A.3d at 990 (citing *Jones v. State*, 384 Md. 669, 676, 866 A.2d 151, 155 (2005)). The court stated that a verdict is not valid until it is orally announced in open court and either polled or hearkened. *Ogundipe*, 424 Md. at 69, 33 A.3d at 990 (citing *Jones*, 384 Md. at 678, 866 A.2d at 156). The return of a jury verdict consists of at least two parts: First, the foreman's oral announcement of the verdict in open court, and second the hearkening of the jury to formally announce the verdict is recorded. *Ogundipe*, 424 Md. at 69-70, 33 A.3d at 990 (citing *Jones*, at 384 Md. at 682-84, 866 A.2d at 159-60). The verdict may also contain a third part, a polling of the jury, if the defendant elects to exercise that right. *Ogundipe*, 424 Md. at 69-70, 33 A.3d at 990. The failure to poll or hearken a jury is a fatal flaw and renders the verdict defective and null. *Id.*

(citing *State v. Santiago*, 412 Md. 28, 41-42, 985 A.2d 556, 563 (2009)).

Turning to other jurisdictions, the court analyzed two cases from the Appellate Division of the Supreme Court of New York that addressed this exact issue. *Ogundipe*, 424 Md. at 71-72, 33 A.3d at 991. In both cases, the Supreme Court of New York held that a verdict sheet did not constitute the verdict where the jury inadvertently marked not guilty next to a lesser-included offense for which the jury found the defendant guilty. *Id.* at 71-72, 33 A.3d at 991-92 (citing *People v. Clark*, 293 A.D.2d 624, 625 (N.Y. App. Div. 2002); *People v. Boatwright*, 297 A.D.2d 603, 604 (N.Y. App. Div. 2002)).

In the present case, the Court of Appeals of Maryland relied on the fact that the foreman announced the verdict in open court and the clerk hearkened the verdict and then polled the individual jurors, to hold that only what was put on the record constituted the final verdict. *Ogundipe*, 424 Md. at 73, 33 A.3d at 992. The court explained that any questions from the verdict sheet not announced orally in court by the jury could not be considered verdicts. *Id.* The court concluded that a verdict sheet is purely a tool used to aid the jury in reaching its verdict and it does not bind the jury or the court to its contents. *Id.* The court also noted that the verdict sheet did not evidence any confusion about the charges because the judge

only asked the jury to consider, not completely pass over, the lesser-included offenses if they found Ogundipe not guilty of the greater offenses. *Id.* The instruction implied, but did not require, the jury to skip the lesser-included charges, leaving room for the jury to misinterpret the instruction. *Id.* at 66, 33 A.3d at 988. If there was any confusion, the individual jurors could have voiced their objections during the hearkening or polling processes, but all remained silent. *Id.* at 73, 33 A.3d at 992.

To address the second issue regarding whether a verdict sheet is a communication requiring disclosure under Maryland Rule 4-326(d), the court looked to the plain language of the rule. *Ogundipe*, 424 Md. at 73, 33 A.3d at 992-93. The court stated that the purpose of Rule 4-326(d) is to ensure that all parties have the opportunity to provide input and discuss what action should be taken before a court responds to a communication to assure fairness and avoid error. *Id.* at 74, 33 A.3d at 993 (citing *Perez v. State*, 420 Md. 57, 64, 21 A.3d 1048, 1053 (2011)). A court must disclose any communication from the jury only if it pertains to the action. *Id.* at 74, 33 A.3d at 993. Ogundipe argued that the court violated his right to be present at every part of the action until the jury reached its verdict or was discharged because the contents of the verdict sheet were part of the action. *Id.* (citing *Denicolis v.*

State, 378 Md. 646, 656, 837 A.2d 944, 950 (2003)). The court rejected his argument because the court considered only communications up until the jury reached a verdict as action requiring disclosure, not any that followed. *Ogundipe*, 424 Md. at 77, 33 A.3d at 994. The court distinguished a jury note and a verdict sheet, concluding that the former requires action from the court, while the latter is merely a tool used to aid the jury's decision and does not require disclosure or action. *Id.* at 75, 33 A.3d at 994.

The dissent disagreed with the majority's holding that a verdict sheet was not a communication. *Ogundipe*, 424 Md. at 84, 33 A.3d at 999 (Bell, C.J., dissenting). Using the dictionary definition of the word "communication," the dissent determined that a verdict sheet is a communication that falls under Maryland Rule 4-326(d). *Id.* at 86, 33 A.3d at 1000 (citing MERRIAM WEBSTER DICTIONARY 100 (3d ed. 2005)). The dissent also relied on the absence of any limitation in the rule that addresses communications to conclude it does not clearly exclude jury verdicts. *Ogundipe*, 424 Md. 87, 33 A.3d at 1000 (Bell, C.J., dissenting).

In *Ogundipe*, the Court of Appeals of Maryland announced the minimal importance of a verdict sheet in a criminal case. The court balanced the concerns of an inconsistent verdict with the need for finality in the criminal justice system, to hold that a

verdict sheet is not the final verdict and failure to disclose it does not violate a defendant's right to be present at every stage of the trial. The court concluded that only what is orally announced in open court would constitute the final verdict, rather than the contents of the verdict sheet.

Maryland practitioners should be advised that this ruling makes it clear that Maryland appellate courts will not invalidate a verdict on the sole basis that inconsistencies in a verdict sheet are discovered after dismissal of the jury. A party must allege more than mere discrepancies between the verdict sheet and the orally announced verdict in order for the court to question its validity.