



2016

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Recommended Citation

Shields, Kristin E. (2016) "Recent Development: Counts v. State: Absent the Defendant's Consent, the State May Not Amend the Charging Document if the Amendment Changes the Character of the Offense," *University of Baltimore Law Forum*: Vol. 46 : No. 2 , Article 5.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol46/iss2/5>

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RECENT DEVELOPMENT

COUNTS V. STATE: ABSENT THE DEFENDANT’S CONSENT, THE STATE MAY NOT AMEND THE CHARGING DOCUMENT IF THE AMENDMENT CHANGES THE CHARACTER OF THE OFFENSE.

By: Kristin E. Shields

The Court of Appeals of Maryland held that amending a charge from theft of property “with a value of less than \$1,000” to theft of property “with a value of at least \$1,000 but less than \$10,000” without the defendant’s consent changed the character of the offense. *Counts v. State*, 444 Md. 52, 55, 118 A.3d 894, 895 (2015). Therefore, the court held that such action was prejudicial per se because it interfered with the defendant’s right to defend himself by not giving notice of the exact charges against him, thereby violating Maryland Rule 4-204. *Id.* at 66, 118 A.3d at 902.

Derrick Counts (“Counts”) was arrested for burglary of an apartment in Columbia, Maryland. Items stolen included a television, laptop, gaming system and games, and a vacuum cleaner. After an investigation, police discovered the vacuum cleaner as well as Counts’ identification in his wife’s home. Counts was indicted for the burglary. Count Four of the five count indictment charged him with theft of property with a value of less than \$1,000.

On the first day of trial in the Circuit Court for Howard County, the prosecutor informed the court that the State sought to amend the charging document from theft of “less than \$1,000” to “theft of at least \$1,000 but less than \$10,000.” The State reasoned that this amendment was not substantive because the potential penalty was the only item that changed, not the elements of the crime itself. Despite objection from defense counsel, the court allowed the State’s amendment and the case proceeded. The jury found Counts guilty of fourth degree burglary, which is theft of goods with a value of at least \$1,000, as well as theft of goods with a value of under \$100.

Counts appealed only the amendment to Count Four of the original indictment. In the Court of Special Appeals of Maryland, Counts argued that the trial court erred in allowing the amendment. The court of special appeals affirmed the conviction. The Court of Appeals of Maryland issued a writ of certiorari to review the affirmation.

The issue before the court was whether the State’s amendment to Count Four, which raised the alleged value of the stolen goods and changed the offense from a misdemeanor to a felony, altered the character of the offense charged. *Counts*, 444 Md. at 58, 118 A.3d at 897. If it did, amendments to the charging document would be impermissible without Counts’ consent. *Id.* Counts argued that the value of stolen property is an element of the offense for the purposes of a felony theft charge. *Id.* at 60, 118 A.3d at 898-99.

The charge against Counts arose out of the consolidated theft statute in Maryland, which combines a number of related crimes into a single statutory offense of theft. *Counts*, 444 Md. at 58-59, 118 A.3d at 897 (citing *Jones v. State*, 303 Md. 323, 326-37, 493 A.2d 1062, 1063 (1985)). Within the statute, theft offenses are divided into two levels of misdemeanor theft and three levels of felony theft, which depend on the value of the stolen goods. *Counts*, 444 Md. at 58-59, 118 A.3d at 897-98.

Amendments to charging documents are determined by Maryland Rule 4-204, which states that a charging document may be amended unless it “changes the character of the offense charged,” thus requiring the consent of the parties. *Counts*, 444 Md. at 57, 118 A.3d at 896-97 (citing Md. Rule 4-204). The court noted Article 21 of the Maryland Declaration of Rights states that the accused have the right to know the exact accusation against them. *Id.* at 57, 118 A.3d at 897 (citing Md. Dec. of R. art. 21). Accordingly, accused persons must be allowed to defend themselves, be protected from future prosecutions of the same offense, prepare for trial, provide a legal basis for challenging the charging document, and inform the court of the appropriate sentence based on the crime charged. *Id.* at 57-58, 118 A.3d at 897 (citing *Ayre v. State*, 291 Md. 155, 433 A.2d 1150 (1981)).

The State argued the value of stolen property is not an element of the crime because it “does not require proof of a different or additional act” from the originally charged offense. *Counts*, 444 Md. at 60, 118 A.3d at 898. The State based its argument on an earlier case in which the court of appeals stated the exact value was not as important to the outcome as whether the stolen item has at least “some value.” *Id.* at 65, 118 A.3d at 901 (citing *Jupiter v. State*, 328 Md. 635, 616 A.2d 412 (1992) (emphasis in original)). In light of this, the State maintained that amending the charging document did not change the character of the offense. *Id.* at 60, 118 A.3d at 898.

The court of appeals rejected the State’s interpretation. *Counts*, 444 Md. at 60, 118 A.3d at 899. Instead, the court clarified its intent in *Jupiter* – increasing the charge from a misdemeanor to a felony changes the character of the offense. *Id.* at 65-66, 118 A.3d at 901 (citing *Johnson v. State*, 358 Md. 384, 749 A.2d 769 (2000)). The mere fact that both the original and amended charges fall under the same consolidated theft statute does not mean the value of the stolen property is not an element of misdemeanor versus felony theft. *Id.* at 61, 118 A.3d at 899 (citing *Hagans v. State*, 316 Md. 429, 440, 559 A.2d 792, 797 (1989)).

By way of reinforcement, the court reiterated that while the offenses may be under a single statute, the value of the property is determinative of whether it is a felony or misdemeanor offense, which are two different crimes in Maryland. *Counts*, 444 Md. at 62, 118 A.3d at 900 (citing *Spratt v. State*, 315 Md. 680, 681, 556 A.2d 667, 667 (1989)). As such, the value of the stolen property is a separate and additional element that the State must prove to the jury. *Id.* at 64, 118 A.3d at 901.

The court stated that defendants have the right to a finding by jury as to whether the stolen property is above or below this threshold. *Counts*, 444 Md. at 62, 118 A.3d at 900 (citing *Spratt*, 315 Md. at 686, 556 A.2d at 670). Without requiring the State to prove the additional element following the amendment of the charging document, the trial court violated Maryland Rule 4-204, thus rendering its decision prejudicial per se. *Id.* at 66, 118 A.3d at 902 (citing *Johnson*, 358 Md. at 392, 749 A.2d at 773).

In *Counts*, the Court of Appeals of Maryland concluded the amendment to the charging document, which changed the alleged crime from misdemeanor theft to felony theft, was prejudicial per se because it changed the character of the offense without Counts' consent. In addition, the court of appeals provided clarity to the misconception that sentencing bears little impact on the trial itself. Rather, the decision strengthened the rights of accused persons when it comes to the constitutionally guaranteed right to defend themselves against an action and their right to know the penalty they face. Now, practitioners can be sure that the value of property stolen is an element of theft, and making substantive changes to the character of the offense requires consent of the accused well before the start of trial. This holding is critical to prosecutors, because it reinforces the need to prove the value of the property in order to urge the court to impose the proper penalty. It is also equally important to defense counsel because it could allow them to potentially bring evidence against the State's assertion of the value of stolen property as a means of lowering the charges against their client. Finally, this case serves as a model for judges when it comes to making amendments to charging documents, essentially requiring them to ensure that defendants are given ample notice of their potential penalty prior to allowing any such amendment.