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RECENT DEVELOPMENT

NASH V. STATE: JURY NOTE EXPRESSING CONCERN ABOUT MOTIVES BEHIND A JUROR'S VOTE TO CHANGE HER ORIGINAL VOTE OF VERDICT AND NOT RETURN. THE JUDGE IMMEDIATELY READ THE NOTE TO COUNSEL FOR BOTH PARTIES AND NASH SUBSEQUENTLY MOVED FOR A MISTRIAL.

By: Nadya Cheatham

The Court of Appeals of Maryland held that a note from a jury, containing allegations that a juror would change her original voting position if it meant she could go home earlier, did not raise a presumption of prejudice and therefore did not require the trial judge to conduct *voir dire sua sponte*. *Nash v. State*, 439 Md. 53, 94 A.3d 23 (2014). Additionally, the court held that the trial judge did not abuse her discretion when she chose to release the jurors and remind them of their duties under oath, rather than directly assuring the impartiality of the jurors. *Id.* The court further held that there was no abuse of discretion in the trial court when she chose to release the *Allen* instruction. *Id.* Furthermore, the court held that the trial judge's discretion in the trial court when she chose to release the jury violated Maryland Rule 4-326(d). *Id.*

On December 17, 2009, Troy Nash (the trial judge's discretion in the trial court when she chose to release the jury violated Maryland Rule 4-326(d).) informed them of their duties on the fourth day of trial, the jury spent approximately six to seven hours each day in the courthouse. On the fourth day of trial, the judge received a note from the jury foreman (the when she chose to release the jury violated Maryland Rule 4-326(d).) and the judge's decision to change her original vote of verdict and not return. The judge immediately read the Note to counsel for both parties and Nash subsequently moved for a mistrial.

Rather than granting the request for mistrial, the judge chose to release the jury for the three-day weekend, advising them to return on the following Tuesday morning to continue their deliberations. The court also issued additional instructions to the jury to not discuss the case with anyone and to not do any independent research relating to the case. Nash requested that the court give a modified *Allen* charge, however, the court denied this request.

On September 6, 2011, the trial resumed. After approximately one hour of deliberations, the jury found Nash guilty of first degree murder. Nash again renewed his motion for a mistrial and stated his intent to file a motion for a new trial. The court reserved ruling on the motion for a mistrial and scheduled a hearing for the motion for a new trial.

On October 28, 2011, a hearing was held on Nash's motion for a new trial, where the court denied both the motion for mistrial and new trial. On appeal, the Court of Special Appeals of Maryland affirmed the lower court's ruling for a mistrial and scheduled a hearing for the motion for a new trial. The Court of Appeals of Maryland granted.

The Court of Appeals of Maryland began its analysis by examining the standard of review for a motion for mistrial. *Nash*, 439 Md. at 66, 94 A.3d at 31. Under the abuse of discretion standard, a trial judge is given wide discretion in making a decision, and such decision should not be overruled simply because the appellate court would not have come to the same conclusion. *Id.* at 67, 94 A.3d at 31.

The court then examined whether the trial judge had a duty to conduct *voir dire sua sponte*, prior to ruling on Nash's motion for mistrial (2012)). *Nash*, 439 Md. 69-70, 94 A.3d at 33. When a motion for mistrial is based on juror misconduct, a trial judge is required to conduct *voir dire sua sponte* in two circumstances: (1) when the juror misconduct is egregious and raises a presumption of prejudice, which must be rebutted before the motion can be denied, and (2) when a relevant and material fact, regarding the juror's misconduct, is unknown to the court and must be determined before the trial judge has 'sufficient information to determine whether the presumption of prejudice attached to the alleged misconduct. *Id.* at 69, 94 A.3d at 32 (quoting *Dillard v. State*, 415 Md. 445, 457, 3 A.3d at 403, 410 (2010)). Despite these two, limited, circumstances, Nash proposed that the court recognize a third circumstance, in which the absence of *voir dire* by the trial judge constituted reversible error for failing to receive the jurors' assurance that they could render a fair and impartial verdict. *Nash*, 439 Md. at 69-70, 94 A.3d at 32-33.

The court ultimately held that the presumption of prejudice did not apply to the case *sub judice* for two main reasons. *Nash*, 439 Md. at 76-77, 94 A.3d at 37. First, the court determined that the Note constituted "otenti misconduct," rather than actual misconduct. *Id.* at 77, 94 A.3d at 37. The court explained that in cases where the juror misconduct has already occurred, the trial judge is limited to the use of *voir dire* to attempt to cure any prejudice that resulted from the misconduct. *Id.* Here, because the Subject Juror never acted on the alleged statement, the trial judge had the capability of preventing any prejudice from actually occurring to Nash. *Id.* Second, the court found that the statement made by the Subject Juror did not concern any of the evidence or witnesses in the case, and therefore, did not even concern the jury's deliberations," as juror contact to a witness, party to the case or third party would. *Id.* The court further noted that because the presumption of prejudice did not apply, Nash carried the burden to request *voir dire* to obtain assurance of impartiality from the jury. *Id.* at 79, 94 A.3d at 38.

The court then addressed Nash's claim that the trial court abused its discretion by failing to conduct *voir dire* to obtain sufficient information about the juror misconduct, prior to ruling on the motion for mistrial. *Nash*, 439 Md. at 80, 94 A.3d at 39. When a party moves for a mistrial based on alleged juror misconduct, but fails to request *voir dire*, the trial judge must conduct *voir dire sua sponte* if he or she lacks sufficient factual information regarding the juror's misconduct, which is needed to determine whether a presumption of prejudice arises or whether a motion for mistrial should be

denied. *Id.* at 84, 94 A.3d at 41. The court held that the trial judge had sufficient facts to rule on the motion for mistrial because the few facts that were left unresolved did not concern factual information that was ‘of central importance to what the jury ultimately had to decide’ in deliberations. *Id.* at 85, 94 A.3d at 42 (quoting *Johnson v. State*, 423 Md. 137, 153, 31 A.3d 239, 249 (2011)).

The court then turned to Nash’s next challenge that the trial judge abused her discretion in failing to receive assurances from the jury that the verdict would be fair and impartial, prior to ruling on the motion for mistrial. *Nash*, 439 Md. at 86, 94 A.3d at 42. The court reemphasized the flexibility in the abuse of discretion standard, which grants the trial judge a wide range of discretion in ensuring fairness and impartiality of the jury. *Id.* The court found that the trial judge had more than one h grants the dence to rule on the motion. deliberatio, and stated that it was not the court’s job to weigh which option is better. *Id.* at 86-87, 94 A.3d at 43. Additionally, the court held that the trial judge did not abuse her discretion when she decided to release the jurors for the weekend, with curative instructions, rather than directly assessing the jury’s impartiality. *Id.* at 87, 94 A.3d at 43.

Furthermore, the court held that the trial judge did not err in denying Nashas not founto give the jury a modified *Allen* charge. *Nash*, 439 Md. at 94, 94 A.3d at 47. The court stated that although an *Allen* charge had been allowed in at least one context that was not deadlock, it did not follow that the trial court erred when it refused to automatically apply it to yet another context. *Id.* at 92-93, 94 A.3d at 46 (citing *Kelly v. State*, 270 Md. 139, 310 A.2d 538 (1973)). Finally, the court held that the trial judge has the ultimate discretion in deciding whether to give an *Allen* charge. *Id.* at 94, 94 A.3d at 47.

The court further rejected Nash’s position that the trial judge violated Maryland Rule 4-326(d), based on the judgesition that thto the jury note. *Nash*, 439 Md. at 96, 94 A.3d at 48. The court determined that the trial judge’s response, excusing the jurors for the three-day weekend and reminding them to remain impartial, was consistent with the plain language of the rule. *Id.* Furthermore, the contents of the Note “did not pose a question from the jury regarding applicable law that required specific clarification,” rather, the trial judge surmised the Note to be a result of juror fatigue and frustration. *Id.* at 96, 94 A.3d at 48 (quoting *State v. Baby*, 404 Md. 220, 263, 946 A.2d 463, 488 (2008)).

The dissent argued that the trial judge should have conducted further inquiry into the note before denying the mistrial. *Nash*, 439 Md. at 98, 94 A.3d at 49 (McDonald, J., dissenting). The dissent also argued that the majoritynducted furtheiated from its previous decisions, where further inquiry was conducted under circumstances where the juror misconduct was not as substantial and “central to the decision-making process” as the case *sub judice*. *Id.* at 97, 94 A.3d at 49 (McDonald, J., dissenting).

In *Nash*, the Court of Appeals found that a note from the jury alleging juror misconduct was insufficient to generate any presumption of prejudice,

and thus did not require the trial judge to conduct *voir dire sua sponte*. Although Maryland courts are reluctant to grant mistrials for every allegation of juror misconduct, practitioners should be mindful of the courts' continual efforts to achieve a balance between judicial economy and preserving a defendant's due process rights within the criminal justice system. Interestingly, the *Nash* majority expressed concern that the Note was troublesome, but still found that it was not egregious enough to prejudice the defendant. Going forward, the court will need to offer more guidance on a bright line rule regarding the degree of egregious juror misconduct needed to overcome the defendant of egregious juror misconduct