Circuit Court for Charles County
Case No. 08-K-15-551

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1122

September Term, 2017

---

DARRAYL JOHN WILSON

v.

STATE OF MARYLAND

---

Friedman,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

---

Opinion by Beachley, J.

---

Filed: June 18, 2018

Appellant, Darrayl Wilson, is currently awaiting trial in the Circuit Court for Charles County on charges of first-degree murder, conspiracy to commit first-degree murder, armed robbery, conspiracy to commit armed robbery, and other related offenses. A potential witness at appellant's pending trial is Kearra Bannister, who was appellant's girlfriend at the time of the alleged crimes. Ms. Bannister is now appellant's wife—they married via telephone conference call in February 2017 while appellant was incarcerated pending trial.

On April 12, 2017, the State filed a Motion to Preclude Assertion of Spousal Privilege, seeking to prevent Ms. Bannister from invoking her spousal privilege at appellant's trial. Following a hearing, the circuit court entered an order on July 10, 2017, in which it granted the State's motion, and further declared appellant's marriage to Ms. Bannister invalid. On August 9, 2017, appellant noted an appeal. On August 16, 2017, the circuit court amended its order, declaring the marriage invalid only for the purposes of Ms. Bannister's assertion of spousal privilege in appellant's case. Appellant filed an amended notice of appeal on the same day, and presents us with the following question: Did the circuit court err in ruling that the Wilson-Bannister marriage was invalid?

In its appellate brief, the State filed a motion to dismiss appellant's appeal, arguing that: (1) appellant lacks standing; and (2) the circuit court's order precluding Ms. Bannister from asserting her spousal privilege is not a final judgment, nor is it appealable under the collateral order doctrine. We agree with the State, and grant the motion to dismiss.

## FACTUAL AND PROCEDURAL BACKGROUND

On June 19, 2015, appellant was charged in the Circuit Court for Charles County with first-degree murder, conspiracy to commit first-degree murder, armed robbery, conspiracy to commit armed robbery, and other related offenses. Prior to appellant's arrest, his girlfriend at the time, Kearra Bannister, gave a statement to police that implicated appellant and his co-defendant, Raymond Posey. On February 9, 2017, while appellant was in custody awaiting trial, appellant and Ms. Bannister[1] were married via telephone conference call. A few days later on February 12, 2017, when Ms. Bannister was called to testify in Raymond Posey's trial, she attempted to invoke her spousal privilege. After the trial court informed Ms. Bannister that she did not have a spousal privilege in Posey's case, she proceeded to answer the State's questions. Apparently concerned that Ms. Bannister would also attempt to invoke her privilege at appellant's trial, the State filed a Motion to Preclude Assertion of Spousal Testimony on April 12, 2017.

On May 31, 2017, the circuit court held a hearing on the State's motion. Following the hearing, the State submitted a supplemental motion on June 9, 2017, requesting that the court consider recorded telephone calls that appellant made from the detention center while awaiting trial. The recorded calls suggest that Ms. Bannister and appellant married for the purpose of preventing Ms. Bannister from testifying against appellant. At a hearing on

[1] In or around April 2017, Kearra Bannister changed her surname to Wilson. For the sake of continuity and consistency, we will refer to her as "Ms. Bannister" throughout this opinion.

June 22, 2017, the court opined that appellant's marriage to Ms. Bannister was not valid, and stated that it would prepare an order granting the State's motion.

On July 10, 2017, the circuit court granted the State's motion, confirming its June 22 ruling that appellant's marriage to Ms. Bannister was invalid. On August 9, 2017, appellant noted an appeal from the circuit court's order. On August 16, 2017, the circuit court amended its July 10 order, declaring that the marriage was only invalid for the purposes of Ms. Bannister's assertion of spousal privilege in appellant's case. Appellant filed an amended notice of appeal on the same day.

As noted above, the State has moved to dismiss the instant appeal.

## DISCUSSION

We will grant the State's motion to dismiss this appeal for two independent reasons: (1) appellant lacks standing to appeal the trial court's order because the trial court's order concerns a privilege held solely by Ms. Bannister; and (2) the trial court's order is not a final judgment, nor is it subject to immediate review under the collateral order doctrine.

### I. APPELLANT LACKS STANDING

The spousal privilege is codified at Md. Code (1973, 2013 Repl. Vol.), § 9-106(a) of the Courts and Judicial Proceedings Article ("CJP"),[2] which states that: "The spouse of a person on trial for a crime may not be compelled to testify as an adverse witness unless

[2] Because appellant and Ms. Bannister were not married at the time of the statements at issue, the confidential marital communications privilege contained in CJP § 9-105 is not relevant to this appeal.

the charge involves: (1) The abuse of a child under 18; or (2) Assault in any degree in which the spouse is a victim . . . ." The purpose of this privilege is "to maintain and foster the marital relationship[,]" and "[t]he privilege belongs to the witness spouse, not the defendant spouse, because its purpose only is furthered when the witness spouse is willing to invoke it[.]" *Johnson v. State*, 156 Md. App. 694, 706 (2004). When, for example, a wife is called to testify against her husband, "It is the wife's right alone to decide whether she will testify or invoke the privilege, and *her husband has no ability to claim a denial of her right*." *Stevenson v. State*, 94 Md. App. 715, 730 (1993) (emphasis added). Application of this recognized principle is fatal to appellant's standing to pursue this appeal.

"The proper parties to an appeal are those who are 'directly interested in the subject-matter.'" *State v. Rice*, 447 Md. 594, 614-15 (2016) (quoting *Hall v. Jack*, 32 Md. 253, 263 (1870)). The Court of Appeals' holding in *Rice* is instructive. There, the State sought to compel the immunized testimony of Officer Porter, a Baltimore City police officer, in the trials of five other officers charged with crimes after Freddie Gray's highly publicized death from injuries he sustained while in police custody. *Id*. at 603. After the trial court granted the State's motion to compel in two of the officers' cases but denied it as to the three others, appeals were filed in all five cases. *Id.* at 611, 613. On appeal, the Court of Appeals held that only the witness, Officer Porter, was directly affected by the trial court's ruling on the motion to compel: "In this case, the person who is 'directly interested in the subject matter' of the [c]ircuit [c]ourt's decision whether to compel Officer Porter to testify is Officer Porter himself, rather than the defendants in whose trials Officer Porter will

ultimately testify." *Id.* at 615. Because the privilege against self-incrimination is personal to the witness, the Court held that "the State's appeal is a contest between the State and Officer Porter alone, not Defendants." *Id.* at 616.

Here, because the spousal privilege belongs to Ms. Bannister,[3] appellant has no direct interest in the court's denial of his wife's privilege.[4] In the parlance of *Rice*, "the person who is 'directly interested in the subject matter' of the [c]ircuit [c]ourt's decision . . . is [Ms. Bannister] [her]self, rather than the [appellant] in whose trial[] [she] will ultimately testify." *Id.* at 615. Accordingly, we hold that appellant lacks standing to appeal the circuit court's ruling that Ms. Bannister may not invoke her spousal privilege if called to testify at appellant's trial.

## II. THE CIRCUIT COURT'S RULING IS NOT A FINAL JUDGMENT

Generally, a party may only appeal from a final judgment. *Harris v. State*, 420 Md. 300, 312 (2011). In a criminal case, "no final judgment exists until after conviction and

[3] Ms. Bannister also noted an appeal from the circuit court's order precluding her from asserting her spousal privilege. This Court dismissed her appeal after she failed to file an appellate brief.

[4] To the extent that appellant argues that he is directly interested because the circuit court declared his marriage invalid, we note that the circuit court's initial order was explicitly superseded by its amended order, which declared the marriage invalid only as to Ms. Bannister's assertion of spousal privilege in appellant's case. We express doubt, however, that the circuit court's ruling equates to a final judgment of annulment, as argued by appellant. In that regard, we note that Ms. Bannister was not a party to these proceedings and "a marriage is so 'uniquely personal' that any challenge to the validity of the marriage on a voidable ground, such as fraud, can be brought only by a party to the marriage during the joint lives of the married parties." *Morris v. Goodwin*, 230 Md. App. 395, 408-09 (2016), *cert. dismissed sub nom. Estate of Morris v. Goodman*, 451 Md. 587 (2017).

(continued)

sentence has been determined, or in other words, when only the execution of the judgment remains." *Id.* (quoting *Sigma Reprod. Health Ctr. v. State*, 297 Md. 660, 665 (1983)). However, "There are . . . three well-identified, but infrequently sanctioned, limited exceptions to the final judgment rule." *Falik v. Hornage*, 413 Md. 163, 175 (2010). "Those exceptions are: '[1] appeals from interlocutory orders specifically allowed by statute; [2] immediate appeals permitted under Maryland Rule 2-602[5]; and [3] appeals from interlocutory orders allowed under the common law collateral order doctrine.'" *Harris*, 420 Md. at 313-14 (footnote added and omitted) (quoting *Falik*, 413 Md. at 175-76). Here, although appellant concedes that the trial court's order is not a final judgment, he argues that the third exception—the collateral order doctrine—allows him to pursue an immediate appeal. We disagree.

There are four predicates that must be met before the collateral order doctrine permits the immediate appeal of an interlocutory order: the order must "(1) conclusively determine the disputed question; (2) resolve an important issue; (3) resolve an issue that is completely separate from the merits of the action; and (4) would be effectively unreviewable on appeal from a final judgment." *Id.* at 316 (quoting *Falik*, 413 Md. at 177). Each of these requirements is "very strictly applied." *Id.* "Time after time, this Court's opinions have emphasized that the collateral order doctrine is extremely narrow and that it is applicable only under extraordinary circumstances." *Id.* (quoting *Wash. Suburban*

[5] Maryland Rule 2-602 allows a court to enter final judgment as to "one or more but fewer than all of the claims or parties."

*Sanitary Comm'n v. Bowen*, 410 Md. 287, 296 (2009)). "Moreover, the 'four elements of the test are conjunctive in nature and in order . . . to fall within this exception to the ordinary operation of the final judgment requirement, each of the four elements must be met.'" *Bowen*, 410 Md. at 296 (quoting *Ehrlich v. Grove*, 396 Md. 550, 563 (2007)).

Although there are four separate and distinct predicates for application of the collateral order doctrine, the Court of Appeals has held that "[i]t is unnecessary . . . to consider whether the court's [ruling] would conclusively determine a disputed question or resolve an important issue (the first two requirements of the collateral order doctrine), [when] the ruling at issue does not satisfy the third and fourth requirements." *Stephens v. State*, 420 Md. 495, 503 (2011). In this case, we need not consider whether the first or second prongs of the collateral order doctrine are met because we hold that the circuit court's order precluding Ms. Bannister from asserting her spousal privilege does not resolve an issue that is completely separate from the merits of the action, and would not be effectively unreviewable on appeal from a final judgment.

*A. The Trial Court's Order Does Not "Resolve an Issue Completely Separate from the Merits of the Action."*

In *Harris*, after the defendant Harris's competency to stand trial became an issue, the State obtained a subpoena for Harris's treating physician to appear and testify at the competency hearing. 420 Md. at 308. The State also sought the disclosure of Harris's treatment records. *Id.* Harris filed a motion for a protective order to preclude the testimony of his treating physician, and also opposed the State's request to examine his treatment records. *Id.* at 308-09. After the trial court denied Harris's request for a protective order

and ordered the disclosure of Harris's treatment records, Harris appealed. *Id.* at 309-10. On appeal, the Court of Appeals held that the interlocutory orders, which were related to Harris's competency to stand trial, "were not aimed at resolving an issue entirely collateral to and separate from the merits of the underlying criminal case[.]" *Id.* at 320. The Court reasoned that a competency hearing, although a distinct phase of a criminal trial, was not entirely "separate from" or "collateral to" the trial, but merely "a step toward final disposition of a prosecution." *Id.* Therefore, the Court held that the third requirement of the collateral order doctrine was not satisfied. *Id.*

If an evidentiary ruling pertaining to a determination of competency is not "separate from" or "collateral to" a criminal defendant's trial, we fail to see how the trial court's ruling concerning Ms. Bannister's testimony—which is directly related to the charges against appellant—is completely separate from or collateral to the merits of the case. *See Kurstin v. Bromberg*, 191 Md. App. 124, 150 (2010), *aff'd*, 420 Md. 466 (2011) ("Far from being 'completely separate from the merits,' those matters will be at the very core of . . . the case."). Therefore, we hold that the circuit court's order regarding Ms. Bannister's spousal privilege does not resolve an issue completely separate from, or collateral to, the merits of the case against appellant.

*B. The Trial Court's Order Would Not Be "Effectively Unreviewable on Appeal from a Final Judgment."*

We begin our analysis of the fourth prong of the collateral order doctrine by noting that it is limited to "extraordinary situations" such as double jeopardy claims. *Bunting v. State*, 312 Md. 472, 481-82 (1988); *see also Pub. Serv. Comm'n of Md. v. Patuxent Valley*

*Conservation League*, 300 Md. 200, 207-08 (1984) (holding that extensive probing of the individual decisional thought process of high-level governmental decision makers was not effectively reviewable on appeal at the conclusion of trial, because it would be impossible to cure the harm done to the agency).

In support of his contention that the trial court's ruling would be effectively unreviewable on appeal, appellant argues that Ms. Bannister "will have lost her privilege" and that her adverse testimony "may well do permanent damage to the marriage[.]" We are not persuaded. In *Harris*, defense counsel argued that the trial court's discovery order violated the patient-therapist privilege, and that this violation would be unreviewable on appeal because "[o]nce [Harris's] treatment records and information are disclosed in court, their privileged status can never be fully restored." 420 Md. at 322. The Court rejected this argument, holding that "assuming Mr. Harris is ultimately found competent to stand trial, is convicted, and then appeals his conviction, the issue of whether privileged information was improperly disclosed at the competency determination phase may be addressed at that time." *Id.* at 323. The Court relied heavily on the United States Supreme Court's reasoning in *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009), which considered the potential infringement upon the attorney-client privilege:

> In our estimation, postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

*Harris*, 320 Md. at 323 (quoting *Mohawk Indus, Inc.*, 558 U.S. at 109).

Here, as the State points out, Ms. Bannister has not only provided a statement incriminating appellant to the police, but she has also provided testimony at Raymond Posey's trial that incriminated both Posey and appellant. To the extent that appellant argues "permanent damage" to his marriage, such damage has already occurred. Furthermore, if Ms. Bannister is compelled to testify and appellant is convicted, appellant can obtain effective review of the trial court's ruling by a direct appeal to this Court. Any error in admitting Ms. Bannister's testimony may be remedied by vacating the conviction and remanding for a new trial in which Ms. Bannister's testimony would be excluded. Delaying review until the entry of final judgment would not "imperil a substantial public interest" or "some particular value of a high order." *Id*. at 321 (quoting *Mohawk Indus, Inc.*, 558 U.S. at 107).

## CONCLUSION

For the foregoing reasons, we hold that: 1) appellant lacks standing to appeal from the circuit court's order precluding Ms. Bannister from asserting her spousal privilege at appellant's trial, and, in any event, 2) the circuit court's order is not reviewable under the collateral order doctrine. Accordingly, we grant the State's motion to dismiss.

**STATE'S MOTION TO DISMISS APPEAL GRANTED. COSTS TO BE PAID BY APPELLANT.**