IN THE

Court of Appeals of Maryland

SEPTEMBER TERM 2012

No. 100

GREGORY HALL, *et al.*

Appellants

v.

PRINCE GEORGE'S COUNTY DEMOCRATIC CENTRAL COMMITTEE, *et al.*

Appellees

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS
On Appeal from the Circuit Court
For Prince George's County
THE HONORABLE C. PHILIP NICHOLS, JR.

TIFFANY T. ALSTON'S REPLY BRIEF

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ARGUMENT

Although not all convictions are final, all *sales* are final when made in the context of a binding plea agreement. Having sold Delegate Alston a bill of goods that included a final disposition of probation before judgment, the State should not be permitted to deprive her of the benefit of this bargain. Yet, ignoring the terms of its own agreement and the applicable statute, the State claims that the final disposition of these criminal charges resulted in a conviction that disqualifies Delegate Alston from continued public service.

In seeking to remove her from office, the State would not only revise the facts of this case and the terms of its deal, it would revise the language of the Constitution itself. Despite the Attorney General's penchant for a "better interpretation" of Article XV, § 2 (E. 50), this provision does not render all convictions "final" unless reversed on appeal. In fact, the framers of this clause expressly rejected language that would condition an official's removal on the results of the appellate process. Nor did they condition removal on the merits of guilt or procedural "flaws" in the process.

While this provision has since been amended to expand the bases for an official's ouster, the language applicable to this case cannot be expanded to embrace the Attorney General's new and improved interpretation.

I. HAVING AGREED TO A FINAL DISPOSITION OF PROBATION BEFORE JUDGMENT, THE STATE SHOULD NOT BE PERMITTED TO REMOVE DELEGATE ALSTON ON THE BASIS OF A "FINAL CONVICTION"

Unable to force Delegate Alston from office, the State agreed to a resolution which would "have the effect of wiping the criminal slate clean." *Jones v. Baltimore City Police*, 326 Md. 480, 488, 606 A.2d 214 (1992). According to their agreement, the State agreed to "striking the guilty conviction and granting Ms. Alston probation before judgment" upon her completion of certain terms. (E. 213-14 ¶ 2)

Although the parties agreed that "[t]he State shall remain silent and the Court agrees to bind itself to striking the guilty conviction and granting Ms. Alston probation before judgment" (E. 214 ¶ 2), the State has only broken its silence to deny the binding nature of this deal. *See* State Defendants' Brief at 18 n.7. Failing to address the effect of such dispositions, or to make any mention the "PBJ" statute, the State Defendants merely dropped a footnote questioning the relevance of its own agreement. *Id.*

Had the State read the statute before reaching this deal, it would have found that the discharge of Delegate Alston's conviction "is a final disposition of the matter," "shall be without judgment of conviction and is not a conviction for the purpose of any disqualification or disability imposed by law because of conviction of a crime." MD. CRIM. PROC. CODE ANN. § 6-220(g). Having consented to Judge Harris' discharge of the conviction and to the entry of probation before judgment, the State cannot legitimately deny the application of a statute governing this very disposition.

This statute precludes the use of the discharged conviction regardless of the sequence in which it is applied. *See* MD. CRIM. PROC. CODE ANN. § 6-220(g)(3). Although the Attorney General concedes that Delegate Alston would not have been removed from office if Judge Harris entered this disposition earlier, State Defendants' Brief at 18, his consent to the entry of probation *before* judgment remains subject to the same statutory limitations. Having agreed to discharge this conviction in the underlying criminal case, the State cannot change its position in this case, ignore the statute, and use it as a basis for disqualifying Delegate Alston from legislative duties.[1]

Notwithstanding the State's alarming protest, giving Delegate Alston the benefit of her bargain would not undermine the finality of all convictions. *Cf.* State Defendants' Brief at 17 ("No Conviction Could Ever Be "Final."). This Court need not slide down the State's slippery slope in Delegate Alston's case.

Unlike the post-conviction pleas of a convict hoping that a judge would relent on an earlier judgment, Delegate Alston sought only to finalize the judgment rendered in her

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[1] To some extent, a "probation without conviction is a legal fiction" regardless of when it is entered. *Skinker v. State*, 239 Md. 234, 240 n.2, 210 A.2d 716 (1965), *quoting* Sutherland, *The Position in the United States with Regard to Probation and Conviction*, 19 Canadian Bar Review 522 (1941). While Judge Harris entered "probation before judgment" *after* sentencing, this legal fiction was expressly set forth in the State's own plea agreement. One cannot create a legal fiction one day and resort to reality the next. Yet, this is precisely what the State wishes to do by depriving Delegate Alston of the benefits of this disposition. *See WinMark Ltd. P'ship v. Miles & Stockbridge*, 345 Md. 614, 693 A.2d 824 (1997) (prohibiting a position inconsistent with that taken in a prior case); *Kramer v. Globe Brewing Co.*, 175 Md. 461, 2 A.2d 634 (1938).

case. In fact, when her counsel presented Judge Harris with a motion to discharge any conviction at the very start of the October 9, 2012 hearing, the prosecutor verified that the request comported with the plea agreement and that the "State agrees with it." (E. 294) Expressing his own approval, Judge Harris confirmed the court's agreement "to bind itself to striking that conviction" and assured Delegate Alston that "it will transition into a probation before judgment" upon her completion of certain conditions. (E. 313, 329-30) As his acceptance carried "the force of law" and became an "inviolate" part of his October 9, 2012 disposition, *Dotson v. State*, 321 Md. 515, 523, 583 A.2d 710, 714 (1991); Maryland Rule 4-243(c)(3) (judgment embodies "the agreed ... disposition, or other judicial action encompassed in the agreement"); *Chertkov v. State*, 335 Md. 161, 172, 642 A.2d 232 (1994) ("disposition it contemplates must be embodied in the court's judgment"), the State cannot legitimately characterize this interim conviction as final.[2]

II. UNDER THE MARYLAND CONSTITUTION, AN OFFICIAL'S REMOVAL IS NOT CONTINGENT ON THE APPELLATE PROCESS

Contrary to the Attorney General's "better interpretation" of Article XV, § 2, all convictions are not "final" unless successfully appealed. Rather than condition an

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[2] While Delegate Alston's motion has been described as a request for "reconsideration" or "modification" (E. 294, 334), there was nothing to reconsider, modify or revise. Once Judge Harris pledged to honor the parties' agreement (E. 281, 313, 329-30), he was bound to follow it. *State v. Poole*, 321 Md. 482, 497, 583 A.2d 265 (1991). As Delegate Alston had every right to enforce Judge Harris' agreement to discharge her conviction, her motion effectively finalized the required disposition. *See Banks v. State*, 56 Md. App. 38, 47, 466 A.2d 69 (1983).

official's status on appellate decisions, this provision does not authorize the removal of an official unless her conviction became final "after judicial review or otherwise." Despite Judge Harris' entry of probation before judgment, and the State's express agreement to this "final disposition," the Attorney General lends no credence to the decisions of a trial judge and insists that appeals be taken instead.

Despite his preference for appellate decisions, Article XV, § 2 does not distinguish between a conviction that is discharged by an appellate judge or by a trial judge. Lacking any language to support this reading of Article XV, § 2, or any public policy that would differentiate between levels of court, the Attorney General would reinstate Delegate Alston if her original conviction were vacated on appeal, but oust her where, as here, it was stricken by the very same judge that imposed it.

In so doing, the Attorney General draws a distinction that the framers of this provision rejected. Although the initial version of Article XV, § 2 would have removed a convicted official "notwithstanding any appeal which may be taken," Senate Bill 671 (1974), a later amendment made an official's status contingent on the "exhaustion of any appeal as a matter of right." Maryland Senate Journal, Vol. II at 1914 (1974). But, rather than focus on appellate dispositions, the voters removed this distinction and ratified a broader version of the bill which would only require removal if a conviction "becomes final, after judicial review or otherwise." Maryland House Journal, Vol. II at 4365 (1974); *see also* MD. CONST. ART. XV, § 2. Because the conviction at issue was "otherwise"

stricken by the trial court, it provides no constitutional basis for removal.

Considering the process of drafting this provision, the Attorney General is "aware that the 1974 legislative history of Article XV, § 2 provides some support for the view Ms. Alston espouses, namely, that the term 'judicial review' is broader than 'appeal.'" (E. 128). Although he "acknowledge[s] that this history could be seen as evidence that the Legislature intended to make a distinction between an 'appeal' and 'judicial review,' as Ms. Alston contends" (E. 128), he nonetheless regards them as synonyms. Lacking any legislative history or public policy to support this view, the Attorney General cites *appellate* opinions to find, quite predictably, that the term "judicial review" frequently arises in the context of an appeal. As trial courts may undertake a judicial review of prior convictions, or reconsider earlier rulings, this hardly exempts their decisions from the scope of this constitutional provision.

This is particularly true where, as here, Article XV, § 2 does not only refer to "judicial review," but would only authorize the removal of an official whose conviction becomes final after "judicial review *or otherwise*." MD. CONST. ART. XV, § 2. While the Attorney General would limit this broad phrase to the appeals process, his fails to cite any support for his exceedingly narrow construction of an extraordinarily broad phrase.

By limiting this phrase to appellate remedies, the Attorney General also fails to give effect to all of its words. *Pirner v. State*, 45 Md. App. 50, 411 A.2d 135 (1980), *citing American Ice Co. v. Fitzhugh*, 128 Md. 382, 388 (1916). Where a single term "is

followed by the phrase 'or otherwise,'" "there is no enumeration of specific words so as to indicate any establishment of a class to which 'otherwise' is restricted" and no basis for narrow constructions. *State v. W. Tin Yan*, 44 Haw. 370, 377-78, 355 P.2d 25 (1960). Lacking greater legislative history, "we presume that the [Legislature] thought that a less specific version would ensure a broader application, and avoid ... interpretations ... that might preclude certain remedies not specifically named." *Handley v. Ocean Downs*, 151 Md. App. 615, 637, 827 A.2d 961 (2003). As "there is no indication in the legislative history as to why the House of Delegates altered the language of Article XV, § 2," State Defendants' Brief at 21, there is no basis for precluding remedies imposed by a trial judge.

Nor is there any sound basis for the Attorney General's insistence that convictions must somehow be "reversed" or "overturned" on appeal. Although reversals are remedies which are typically applied by appellate courts under Rule 8-604(a), "overturned" is not listed among the dispositions available either in this Court or in the Court of Special Appeals. Hardly a precise term of art, the word is not even defined in Black's Law Dictionary.

Understandably, appellate decisions often speak of "overturning" judgments below. But there are more than ample references to overturning decisions made at the

trial level as well.[3] In fact, the most relevant reference to "overturning" convictions appears in a statute dealing with the reinstatement of convicted physicians. Under the Maryland Medical Practice Act, the license of a doctor who has been convicted of crimes involving moral turpitude may only be reinstated if "the conviction or plea subsequently is overturned at any stage of an appeal *or other postconviction proceeding*." MD. HEALTH. OCC. CODE ANN. § 14-409(c) (emphasis added).

Creative definitions aside, the Attorney General's "better interpretation of the constitutional provision" is nothing more than a bid for better language. There is simply no language requiring a reversal on appeal, or language requiring substantive or procedural flaws in the process. Though the Attorney General would undoubtedly prefer such narrow language, this Court cannot add it here. "Whether we agree that such a rule would be beneficial is immaterial — we are not a legislative body and we are not permitted to engraft a strained or artificial interpretation upon a statute to achieve a result that comports with our idea of societal needs." *Jones*, 326 Md. at 489, *citing Simpson v. Moore*, 323 Md. 215, 223-28, 592 A.2d 1090 (1991). As this applies equally to the Office of the Attorney General, his "better" view provides no basis for improving or

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[3] *See, e.g., Wernsing v. General Motors Corp.*, 298 Md. 406, 414, 470 A.2d 802 (1984) ("circuit judge emphasized that he would not permit jurors to overturn their verdicts"); *Montgomery Ward v. Keulemans*, 23 Md. App. 81, 85, 326 A.2d 45 (1974) (JNOV motion sought the "overturn of every verdict"); *Morris v. State*, 418 Md. 194, 210, 13 A.3d 1206 (2011) ("trial court would not have ... overturned the jury's finding of guilt"); *Shirazi v. Maryland Bd. Of Physicians*, 199 Md. App. 469, 482-83, 23 A.3d 269 (2011) ("the conviction or plea is overturned" at trial or on appeal).

expanding the law.

CONCLUSION

Taking the law as written and as applied to the facts of this case, there is no basis for rescinding the State's agreement or for adopting its self-serving effort to improve upon constitutional language. Accordingly, Appellant Tiffany T. Alston respectfully requests that this Court reverse the judgment of the Circuit Court for Prince George's County and enable her to take her seat in the General Assembly when the legislature reconvenes next week.

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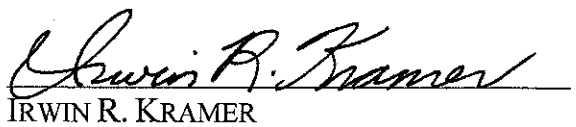

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