

Circuit Court for Baltimore County
Case Nos. 0C00459557, 6C00459556, 5C00459555

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2700

September Term, 2018

ANNA BORKOWSKI

v.

STATE OF MARYLAND, et. al.

Graeff,
Nazarian,
Arthur,

JJ.

Opinion by Graeff, J.

Filed: October 29, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In March 2018, Anna Borkowski, appellant, filed in the District Court of Maryland for Baltimore County applications for a statement of charges, alleging that Matthew Chanin, Christopher Convers, and David Lyskawa (“the Defendants”), engaged in unconsented-to sexual acts with her while she was incapacitated by alcohol and/or other drugs. On March 23, 2018, the charges were dismissed. The court subsequently denied appellant’s motion to vacate the dismissal of the charges and her initial notice of appeal.

After filing another appeal, Ms. Borkowski presents the following questions for this Court’s review, which we have rephrased slightly, as follows:

1. Did the District Court err by dismissing the assault charges against the Defendants?
2. Did the District Court err by denying Ms. Borkowski’s initial appeal?
3. Did the District Court err by not considering Ms. Borkowski’s rights under Title 11 of the Criminal Procedure Article of the Maryland Code?
4. Did the District Court err by declining to vacate the dismissal of charges against the defendants on May 3, 2018?

Appellees, the State and the Defendants, filed motions to dismiss Ms. Borkowski’s appeal.

For the reasons set forth below, we shall grant the motions with respect to the first issue and dismiss the appeal relating to the initial dismissal of the charges. Otherwise, we shall affirm the judgment of the District Court.

FACTUAL AND PROCEDURAL BACKGROUND¹

Ms. Borkowski asserts that, on October 19, 2017, she and a friend met the Defendants at a bar in Towson, Maryland. At approximately 1:00 a.m. on October 20, 2017, the women told the men that they were leaving, and they invited them to the friend's apartment.

In the Application for Statement of Charges, Ms. Borkowski stated that the Defendants "engaged in unconsented-to sexual acts" with her, and she "was incapacitated by alcohol and/or drugs at the time of the assault and could not consent to the acts."² She stated that, at some point, she "blacked out, either from alcohol or drugs placed in [her] drink without [her] consent."

When Ms. Borkowski and her friend woke up, they went to Towson University police to report that they had been sexually assaulted. The Towson University police then contacted Baltimore County police. Both Ms. Borkowski and her friend were given a SAFE Exam and spoke to several police officers.³

¹ Because this case did not go to trial, the facts are taken from the application for statement of changes, statements taken by the police, and statements made in the pleadings.

² Ms. Borkowski filed a separate application of charges against each Defendant, but the allegations were similar.

³ SAFE exams are "conducted by doctors who are SAFE trained and when there is a concern of sexual abuse or assault." *McClanahan v. Washington Cty. Dep't of Soc. Serv.*, 445 Md. 691, 713 n.1 (2015). SAFE stands for sexual assault forensic examination. *Id.* at 695 n.3.

On October 20, 2017, Officer Hines, a member of the Baltimore County Police Department, met with Ms. Borkowski and her friend. Ms. Borkowski also spoke with Detective Hummel. She gave him the names of the three men and showed him a photograph of them.

Ms. Borkowski told the police that, although she blacked out shortly after returning to the apartment, she had several patchy memories of the night, including that all three of the men engaged in sexual activities with her and her friend. Her friend did not remember anything that occurred after returning to her apartment, except that everyone went outside on the balcony.

On November 15, 2017, Detective Burrows and Detective Thomas interviewed all three men at a Chick-fil-A. The men all gave a similar account of the events on October 19-20, 2017, indicating that a sexual encounter occurred, but describing a consensual encounter. Mr. Chanin stated that he was surprised by Ms. Borkowski's allegations because "she was very enthusiastic about the sexual encounter." Mr. Convers stated that Ms. Borkowski texted him the next day and said "no one can find out about what they all did together that night because her ex-boyfriend Jamie would be mad."⁴

On November 20, 2017, Detective Burrows spoke with Ms. Borkowski and her mother. He advised that the State's Attorney's Office would not be pursuing criminal

⁴ Ms. Borkowski also told Detective Hummel that she had texted Mr. Convers, asking him what happened the previous night, and he responded: "Who the fuck knows. Never speak of it ever." Ms. Borkowski responded: "What," and Mr. Convers stated: "We are never bringing it up again. Lol."

charges against the three men because, after reviewing the facts of the case, they had determined that it “did not meet the elements for a crime.”

On March 14, 2018, Ms. Borkowski filed an Application for a Statement of Charges for the Defendants with a District Court Commissioner in Catonsville, Maryland. Ms. Borkowski asserted, in her subsequent Memorandum in Support of Victim’s Motion to Vacate Dismissal of Charges and [Expungement] and to Enforce Victim’s Rights, that the Commissioner made her stand in the hall while he called the State’s Attorney’s Office and “one of the ‘SVU Detectives’ at the Baltimore County Police Department,” and they advised that “they were not pressing charges and the case was closed.” Based on this information, the Commissioner denied Ms. Borkowski’s application for a statement of charges.⁵

On March 20, 2018, Ms. Borkowski filed another Application for a Statement of Charges at the Commissioner’s Office in Towson.⁶ Ms. Borkowski stated: “The defendants acted together as a team to commit these acts by passing me between them.” The Commissioner found probable cause to charge all three men with fourth degree sex offense, second degree assault, first degree rape, perverted practice, and third degree sex

⁵ The record extract contains a letter from Lisa Dever, an Assistant State’s Attorney, confirming that she had talked with the Commissioner and advised that the State’s Attorney’s Office had declined to file charges. The letter states that Ms. Borkowski’s lawyer called her that same day, and she advised that the State would dismiss any charges that were filed.

⁶ Ms. Borkowski again filed three separate applications, but they all contained similar allegations.

offense. Ms. Borkowski then received a subpoena to testify as a complainant in the trial, scheduled for May 4, 2018.

On March 22, 2018, two days after charges were filed against the Defendants, Detective Burrows and two other officers went to Ms. Borkowski's house. They were asked to go there by the State's Attorney's Office to tell Ms. Borkowski "to stop going to the commissioner and filing charges." When they arrived, Ms. Borkowski was not there; she was at work.

On the morning of March 23, 2018, a paralegal from the District Court Division of the State's Attorney's Office sent an email to the court asking to have the three cases "set for the PH docket today to be dismissed." The email advised that the cases "were just charged on 3/20 and the State has already agreed we were not going to charge and/or go forward." The paralegal attached a document entitled "State's Motion," with a signature line for Lisa Dever, which listed the three cases against the Defendants and stated: "Please have the above-named cases scheduled for today, March 23, 2018, to be dismissed. The State does not want to proceed on any of these cases."

On March 23, 2018, the charges were dismissed. The record contains a transcript, which Ms. Borkowski represented to be a portion of the transcript relevant to the dismissal at issue, where the following occurred:

[THE STATE]: You should have those files.

THE COURT: I do, I was made aware of that earlier today that you would be asking for dismissals on those cases.

[THE STATE]: Your Honor, at this time, because we believe, we are asking that the matters be expunged. I know the process takes some time. I'm going to hand up, if the [c]ourt is okay, with a line for that.

There is no order attached at this point in time. I can certainly attach an order later. But to begin the expungement process for all three cases.

THE COURT: Okay, I'll make sure – they'll get clocked in and expungement fees will be waived.

The line filed by the State provided:

This case has been screened by Lisa Dever, Assistant State's Attorney of the State's Attorney's Office. The State's Attorney's Office has decided not to go forward with prosecution.

1. This office has set this case in on Friday, March 23, 2018 for dismissal of all charges.
2. Please expunge the record of these charges and waive the cost of the expungement.⁷

The Defendants were not served with their summonses prior to the dismissal. On the day the charges were dismissed, the court mailed Ms. Borkowski a notification of the dismissal of the charges. Additionally, the Baltimore County Police called her and left a voicemail.

In addition to the transcript, there is in each case a District Court preprinted form with two sections: (1) "THE COURT ON THE DATE SHOWN BELOW," with a list of actions that can be checked; and (2) "THE STATE'S ATTORNEY," with a list of actions that can be checked. Under the court section, the forms in the Defendants' cases all have

⁷ The State advised in its brief that the court "did not take action on the expungement."

a check in the box under the court section “Dismissed all charges,” and for two of the defendants, the court wrote in under the State’s Attorney section, “voluntarily dismissed.”⁸ On the “Defendant Trial Summary” form for each defendant, all charges were listed as “dismissed.”

On April 11, 2018, Ms. Borkowski filed a Motion to Vacate Dismissal of Charges and Expun[gement], and to Enforce Victim’s Rights and Request for Hearing, arguing that the charges were improperly and unlawfully dismissed and expunged. On April 23, 2018, she filed a notice of appeal of the court’s dismissal of the charges, stating that she was not provided with the victim’s rights pamphlet required by Maryland Code (2018), § 11-104(b) of the Criminal Procedure Article (“CP”) and was not consulted regarding the hearing.

On May 3, 2018, the District Court denied Ms. Borkowski’s Motion to Vacate and her April 23, 2018, notice of appeal. The court wrote on the Notice of Appeal: “Appeal Denied. There is no authority for a victim to appeal a prosecutorial decision to dismiss. CP 11-103(b) does not apply since no Order was entered.”

On May 31, 2018, Ms. Borkowski filed another notice of appeal, seeking review of: (1) the dismissal of the criminal charges; (2) the denial of her motion to vacate; and (3) the

⁸ The notation was “Vol Dism,” which the parties agree means voluntarily dismissed.

denial of her April 23, 2018, notice of appeal. After some delay, the record was transmitted to this Court.⁹

MOTIONS TO DISMISS

Before considering the substantive issues presented in this case, we first address the motions to dismiss. As appellees note, the right to appeal must be granted by the General Assembly. *Pack Shack, Inc. v. Howard Cty.*, 371 Md. 243, 247 (2002). Generally, an appeal is limited to a party. *See* Maryland Code (2019) § 12-301 of the Courts and Judicial Proceedings Article (“CJP”) (“a party” may appeal a final judgment). A victim, however, is not a party to a criminal prosecution. *See Griffin v. Lindsey*, 444 Md. 278, 281 (2015).

The parties agree that, because Ms. Borkowski was not a party to the case below, she has a right to appeal only if it is permitted pursuant to CP § 11-103(b), which limits the basis for appeal. CP § 11-103(b) provides:

Although not a party to a criminal or juvenile proceeding, a victim of a crime for which the defendant or child respondent is charged may file . . . an appeal to the Court of Special Appeals from a final order that denies or fails to consider a right secured to the victim by subsection (e)(4) of this section, § 4-202 of this article, § 11-102 or § 11-104 of this subtitle, § 11-302, § 11-402, § 11-403, or § 11-603 of this title, § 3-8A-06, § 3-8A-13, or § 3-8A-19 of the Courts Article, or § 6-112 of the Correctional Services Article.

The appellees argue that Ms. Borkowski does not have a right to appeal pursuant to CP § 11-103(b) for either of two reasons. First, they assert that there must be a court order

⁹ The District Court initially sent the case to the Circuit Court for Baltimore County. Ms. Borkowski subsequently filed a motion to correct the record and have her appeal sent to this Court. The circuit court remanded the case to the District Court, and the record reflects that, on September 26, 2018, Ms. Borkowski filed a line with the District Court to transmit the record to the Court of Special Appeals.

that denies or fails to consider a right secured to the victim, and there was no order subject to appeal in this case because the case was dismissed based on the action of the prosecutor entering a nolle prosequi of the charges. Second, they assert that, even if the nol pros was an order of the court, the appeal rights of § 11-103(b) do not apply because they do not “relate to the entry of a nolle prosequi or a motion to vacate a dismissal.”

In addressing the motions to dismiss, we note that there are several actions at issue. The first is the dismissal of the charges on March 23, 2018. Second, there is the court’s action on May 3, 2018, denying the motion to vacate the dismissal and the denial of the motion to appeal. We will address those actions, in turn.

I.

March 23, 2018 Dismissal of Charges

The key dispute between the parties regarding the appealability of the dismissal of the charges on March 23, 2018, is whether the charges were dismissed by: (1) court order; or (2) the State entering a nolle prosequi of the charges. “A nolle prosequi is simply the prosecution’s abandonment of a charging document, count or part of a count.” *See Hooper v. State*, 293 Md. 162, 168 (1982). Ms. Borkowski does not dispute that a nol pros by the State is not an appealable decision.

Ms. Borkowski argues, however, that the charges here were not nol prossed. Rather, she contends that the court entered three orders on March 23, 2018, dismissing the charges against the Defendants, and because these orders denied or failed to consider a right secured

to the victim, i.e., her right to receive a pamphlet describing her rights as a victim or her right to be given notice of the hearing, the appeal is permitted pursuant to CP § 11-103(b).

To address this issue, some further discussion of a *nolle prosequi*, or *nol pros*, is required. The decision whether to dismiss charges, or *nol pros* a case, is “uniquely within the State’s broad prosecutorial authority.” *State v. Ferguson*, 218 Md. App. 670, 680 (2014). It is free from “judicial control and not dependent upon the defendant’s consent.” *Id.* (quoting *Ward v. State*, 290 Md. 76, 83 (1981)). *Accord Mora v. State*, 123 Md. App. 699, 722 (1998) (“Provided it is in open court, the State has an absolute right, without court approval, to enter a *nolle prosequi* to charges.”), *aff’d on other grounds*, 355 Md. 639 (1999); Md. Rule 4-247(a) (“The State’s Attorney may terminate a prosecution on a charge and dismiss the charge by entering a *nolle prosequi* on the record in open court. The defendant need not be present in court when the *nolle prosequi* is entered[.]”).

The prosecutor does not need to use specific language, or even use the words “*nolle prosequi*,” to effectively *nol pros* a case; the substance of the action controls. *See Hooper* 293 Md. at 168 (*nolle prosequi* occurred where prosecution abandoned charges at oral argument). *Accord State v. Moulden*, 292 Md. 666, 673 (1982) (*nolle prosequi* where there was “election” not to prosecute); *Mora*, 123 Md. App. at 704 n.1 (*nolle prosequi* where charges were dismissed).

Here, at the March 23, 2018, hearing, the prosecutor filed a Line with the court to dismiss the charges against the defendants. As indicated, the Line stated:

This case has been screened by Lisa Dever, Assistant State's Attorney of the State's Attorney's Office. The State's Attorney's Office has decided not to go forward with prosecution.

1. This office has set this case in on Friday, March 23, 2018 for dismissal of all charges.
2. Please expunge the record of these charges and waive the cost of the expungement.

Although the Line used the word dismissal, it is clear from the language, "[t]he State's Attorney's Office has decided not to go forward with prosecution[,]” that this action constituted a nolle prosequi of the charges. To the extent that the court, in its preprinted form, checked the box indicating that the case was dismissed, it was merely reflecting the decision of the prosecution not to go forward with the case, i.e., to dismiss, or nol pros, the case. Although it would have been preferable for the court to check the box providing that the State's Attorney entered a nolle prosequi, its failure to do so does not change the fact that the State nol prossed the charges, as it was authorized to do.

We agree with the conclusion reached by the District Court when it “denied” Ms. Borkowski's Notice of Appeal: “[t]here is no authority for a victim to appeal a prosecutorial decision to dismiss. CP 11-103(b) does not apply since no order was entered.” Accordingly, because there is no authority for Ms. Borkowski to appeal the State's decision to nol pros the charges, we dismiss the portion of the appeal challenging the dismissal of the charges.

II.

May 3, 2018 Orders

Ms. Borkowski next appeals the District Court's May 3, 2018, orders denying: (1) Ms. Borkowski's motion to vacate dismissal of charges; and (2) her April 23, 2018, notice of appeal of the dismissal of charges. These clearly are court orders, as opposed to the State's decision to nol pros the charges. Appellees contend, however, that CP § 11-103(b) gives crime victims limited appeal rights, and none of them apply in this case.

CP § 11-103(b) provides twelve specific circumstances when a victim is authorized to file an appeal. These circumstances include: (1) CP § 11-103(e)(4), involving the failure to consider, or the improper denial of, restitution; (2) CP § 4-202, involving the victim's rights regarding transfer of criminal cases to juvenile court; (3) CP § 11-102, involving the victim's right to attend proceedings; (4) CP § 11-104, addressing notification to the victim of court proceedings and the duty to provide the victim with a pamphlet regarding their rights; (5) CP § 11-302, involving the right to be present at trial or a delinquency hearing; (6) CP § 11-402, involving the inclusion of a victim impact statement in a presentence investigation; (7) CP § 11-403, involving the right of a victim to address the court during sentencing; (8) § 11-603, involving the right to restitution; (9)-(11) CJP § 3-8A-06, § 3-8A-13, or § 3-8A-19, involving juvenile delinquency matters; and (12) § 6-112 of the Correctional Services Article, involving the presentence investigation report.

The only two provisions that arguably apply in this case are CP § 11-102 and § 11-104.¹⁰ CP § 11-102(a) states:

If practicable, a victim or victim's representative who has filed a notification request form under § 11-104 of this subtitle has the right to attend any proceeding in which the right to appear has been granted to a defendant.

CP § 11-104(b) states:

On first contact with a victim or victim's representative, a law enforcement officer, District Court commissioner, or juvenile intake officer shall give the victim or the victim's representative the pamphlet described in § 11-914(9)(i) of this title.

Ms. Borkowski contends that the court erred in denying the motion to vacate the dismissal and her initial notice of appeal because she was not given the requisite pamphlet, and she was denied the right to be notified of, and to attend, the hearing that took place on March 23, 2018. Ms. Borkowski's appeal of the May rulings is permitted pursuant to CP § 11-103(b). Accordingly, we deny the motion to dismiss the appeal in this regard, and we will address Ms. Borkowski's claim on the merits.

DISCUSSION

We begin with the claim that the District Court erred when it "denied" Ms. Borkowski's initial notice of appeal. We agree that the court erred in this regard. As the Court of Appeals has made clear, a lower court may not preclude appellate review of its decision for a reason relating to the merits of the appeal. *See Comm'rs of Carroll Cty v.*

¹⁰ Ms. Borkowski also mentions CP § 11-302, which address the victim's right to be present at trial. Because there was no trial in this case, this provision clearly does not apply.

Carroll Craft Retail, Inc., 384 Md. 23, 42 (2004). Because this Court has addressed the issue presented in that appeal, however, the error by the District Court when it “denied” the initial notice of appeal is harmless or moot, and we need not discuss it in any more detail.

With respect to the denial of the motion to vacate the dismissal of charges, Ms. Borkowski contends that the court erred because she was not provided, as required, with the victim’s rights pamphlet, and therefore, she was not given the opportunity to request notice of proceedings or to be present at the proceedings when the charges were dismissed. Appellees argue that there was no violation of CP § 11-102(a), and even if there was a violation, of either § 11-102(a) or § 11-104, any error was harmless error because there was no remedy the District Court, or this Court, could provide.

As indicated, CP § 11-102(a) provides that the victim has the right to attend any proceeding in which the defendant has a right to appear, if practicable and if the victim has filed a request to be notified. The State asserts, among other things, that because the Defendants had not been served with the charges, they did not have the right to appear at the proceedings on March 23, 2018, and therefore, neither did Ms. Borkowski. Ms. Borkowski does not dispute this assertion, nor does she cite any authority for the proposition that a victim must be notified of a hearing, days after the charges are filed, where the State nol prosses the charge. There was no violation of CP § 11-102.

With respect to CP § 11-104(b), Ms. Borkowski alleges that she was not given the victim’s pamphlet, and therefore, she was not given the opportunity to request notification

of the March hearing. Appellees do not dispute that Ms. Borkowski was not given the pamphlet, but they argue that the failure to receive the pamphlet did not affect the dismissal of the charges.

The Defendants argue that the pamphlet contains information about “the Complaint number, Officer, Badge No., and Contact telephone number for the investigating police officer,” all of which Ms. Borkowski already had, and it gives “general information on victims’ rights,” but none of the information would have alerted Ms. Borkowski to the dismissal of the charges. The State asserts:

[S]ince the proceeding at issue related to dismissal of the charges by the entry of a nolle prosequi, Ms. Borkowski’s presence was irrelevant. She was not entitled to provide input or give a statement to the court. The entry of a nolle prosequi is within the sole discretion of the prosecuting attorney without any need for court approval or consent from the victim.

We agree that the failure to provide the pamphlet did not impact the result of the State’s nol pros of the charges. The State had the absolute right to dismiss the charges, and Ms. Borkowski would not have had any way to prevent that if she was present at the hearing. Indeed, Ms. Borkowski’s attorney had talked to the prosecutor prior to the hearing, and this did not change the State’s decision to nol pros the charges.

This opinion should not be read to suggest that the rights given to victims are not important. They are important, and courts, prosecutors, and other members of the justice system should work hard to ensure that the statutory rights of victims are satisfied. Under the circumstances of this case, however, the District Court did not err in denying the motion to vacate the dismissal of the charges.

**APPELLEES' MOTION TO DISMISS THE
APPEAL REGARDING THE MARCH 2018
DISMISSAL OF CHARGES GRANTED.
JUDGMENT OF THE CIRCUIT COURT FOR
BALTIMORE COUNTY OTHERWISE
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**