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COURT OF APPEALS

ATTORNEYS - MISCONDUCT – INTENTIONAL MISAPPROPRIATION – COMMINGLING OF FUNDS – CLIENT TRUST ESCROW ACCOUNTS – FAILURE TO COOPERATE WITH BAR COUNSEL'S INVESTIGATION

Facts: The attorney received from a client $15,552.00 to hold in trust for the client. He repeatedly invaded his client trust account, reducing the value of the account to $6,259.89, at which point the client asked for the return of his money. The attorney replaced the funds he had removed from the account before returning the funds to the client. He then failed to cooperate fully with the Attorney Grievance Commission investigation of these events.

The attorney previously had been reprimanded and indefinitely suspended, respectively, by the Court in prior cases.

Held: Disbarred. The attorney violated MRPC Rules 1.15, 8.4(b), 8.4(c) and 8.4(d), as well as Maryland Code (1989, 2000 Repl. Vol.), § 10-306 of the Business Occupations and Professions Article, and Maryland Rule 16-607 by intentionally misappropriating client funds held in trust. He also violated MRPC Rule 8.1 by failing to cooperate fully with the Attorney Grievance Commission investigation. Intentional misappropriation is an act infected with deceit and dishonesty and, in the absence of compelling extenuating circumstances justifying a lesser sanction, will result in disbarment in Maryland. There were no such compelling extenuating circumstances in this case.

Attorney Grievance Commission of Maryland v. Dushan S. Zdravkovich, Miscellaneous Docket AG No. 41, September Term, 2002, filed 14 June 2004. Opinion by Harrell, J.

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CRIMINAL LAW - CONFESSIONS - IMPROPER INDUCEMENT OR THREAT - PROMISE TO INFORM THE PROSECUTOR OF A SUSPECT'S COOPERATION

Facts: These two otherwise unconnected cases presented the same legal issue. For that reason they were combined for analysis by the Court of Appeals.

Steven Daniel Sirbaugh was told by police officers that if he cooperated during a custodial interrogation, the interrogating officers would inform the State's Attorney "that when we asked a question he answered it." Sirbaugh then confessed to driving the getaway car in a 29 October 2000 robbery of a convenience store in Owings Mills, Maryland. Although he sought to exclude this confession from coming into evidence at his trial, he failed. Based in large measure on his confession, Sirbaugh was convicted of robbery.

Petitioner Ricky Lee Knight, after being arrested in an unrelated robbery case, provided police with information regarding an unresolved murder in Baltimore City. He was brought to the Homicide Division, where he was asked to repeat his statement regarding the murder so that it could be recorded. During the course of the custodial interrogation leading to the second statement, he was told that his cooperation "would be helpful" and that the State's Attorney would be informed of his cooperation. Knight also was told "down the line, after this case comes to an end, we'll see what the State's Attorney can do for you, with your case, with your charges." Knight's second, recorded statement essentially was identical in content to the first, unrecorded statement. Knight, like Sirbaugh, also sought unsuccessfully to suppress these inculpatory statements. Those statements led eventually to his conviction for the murder.

Held: Affirmed. An interrogating officer's promise to inform a prosecutor of a suspect's cooperation during a custodial interrogation is not an improper inducement. For this reason, there was no improper inducement made to Sirbaugh.

While the same holds for the similar statements interrogating officers made to Knight, the interrogating officers' further promise to "see what the State's Attorney can do for you" was an improper inducement under *Hillard v. State*, 286 Md. 145, 406 A.2d 415 (1979). That promise, however, could not have caused Knight to make his statement because it was made after Knight's initial statement to the police. The content of the recorded statement was identical to the content of the initial statement, which preceded the improper inducement. Because the improper inducement did not cause Knight to make his statements, the recorded statement was not

inadmissible and it was not error for the trial judge to permit its use as evidence at his trial.

Ricky Lee Knight v. State, No. 93, September Term, 2003 and Stephen Daniel Sirbaugh v. State, No. 94, September Term, 2003, filed 7 June 2004. Opinion by Harrell, J.

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CRIMINAL LAW - DOUBLE JEOPARDY - A CRIMINAL DEFENDANT MUST RAISE A DOUBLE JEOPARDY ISSUE IN THE TRIAL COURT OR ELSE IT IS WAIVED WHERE, AS IN THIS CASE, THE DEFENDANT'S RETRIAL FOLLOWED A MISTRIAL.

Facts: In April 2001, Bobby Eugene Taylor was indicted by a Frederick County grand jury on the charges of child abuse, second degree sexual offense and third degree sexual offense based upon alleged incidents involving his stepson's daughter. The jury for Taylor's trial was sworn, opening statements were made and some testimony was taken on September 10, 2001. On September 11, 2001, the Frederick County Commissioners closed all government buildings, including the courthouse building, due to the national emergency caused by the terrorist attacks in New York, Virginia and Pennsylvania. The trial judge announced that the court would be closing and later declared a mistrial in Taylor's case due to his belief that there was manifest necessity.

Prior to the court's actual grant of the mistrial, the trial judge discussed, on the record, the possibility of a mistrial with the State, defense counsel and Taylor. When specifically asked about the mistrial, defense counsel indicated that he had no problem with a mistrial being granted. In fact, defense counsel expressed concerns with keeping the current jury. The State also agreed with the declaration of a mistrial.

Although his counsel had agreed to the mistrial, Taylor asked to address the court. Taylor expressed his desire to continue the trial irregardless of the fact that the courthouse building was closing. He did not appear to comprehend the reasons why the court could not continue. He stated that he wanted the trial to be

finished as soon as possible and that he did not want it to take 10 to 15 years. Soon after Taylor spoke, the trial judge officially declared a mistrial.

Within two months of the September 11, 2001 mistrial, a new jury was sworn and the retrial began on November 7, 2001. The retrial concluded on November 9, 2001 and the jury found Taylor guilty on all three counts of the indictment. Taylor did not raise any double jeopardy issue during the retrial, or in any motion before the trial court.

Taylor filed a motion for a new trial and supplemented it several times, but again failed to include any double jeopardy argument within this motion. In fact, the defense specifically noted the necessity for the mistrial, stating, in a written supplement to the motion for a new trial, that, "The terrorist attack on September 11, 2001, necessitated a mistrial." The trial court subsequently sentenced Taylor to twelve years on the child abuse conviction. In addition, he sentenced Taylor to twenty years of incarceration (with all but twelve years suspended) on the second degree sexual offense conviction and five years of incarceration on the third degree sexual offense, both to be served concurrently with the sentence for the child abuse conviction.

Held: Affirmed. The Court of Appeals held that Taylor waived his double jeopardy rights by totally failing to raise the issue in the trial court. The Court noted that the issue first appeared on appeal as an appellate afterthought following an adverse decision on the merits of the case. As such, the Court of Appeals did not reach the merits of whether manifest necessity existed to declare a mistrial due to the circumstances of September 11, 2001. Additionally, the Court did not reach the issue of whether defense counsel's acquiescence to the trial court's granting of the mistrial, in opposition to his client's wishes, fell within a tactical decision governed by defense counsel. The Court of Appeals, based upon it own reasoning, affirmed the judgment of the Court of Special Appeals.

Bobby Eugene Taylor v. State of Maryland. No. 106, September Term, 2003, filed June 10, 2004. Opinion by Cathell, J.

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INTOXICATING LIQUORS - CONDUCT OF BUSINESS - WHERE LICENSEE SIGNIFICANTLY ALTERED THE MODE OF OPERATION OF HIS ESTABLISHMENT BY OFFERING TOPLESS DANCING ENTERTAINMENT, LICENSEE'S FAILURE TO FIRST OBTAIN LOCAL LIQUOR BOARD APPROVAL FOR THE CHANGE WAS IN VIOLATION OF A LOCAL LIQUOR BOARD RULE AND ARTICLE 2B OF THE MARYLAND CODE.

Facts: In May 2001, Myoung Paek, owner and proprietor of the Lanham Inn, which is located in Lanham, Maryland, sought approval from the Prince George's County Board of License Commissioners (the "Board") to make renovations to his establishment in an attempt to modernize his business. These renovations included the addition of a stage area for the stated purpose of offering "live" entertainment at the Lanham Inn. This request was approved by the Board without a hearing on December 14, 2001.

Paek also sought approval for the creation, by partition, of an additional room on the premises. Before making a determination on this alteration, however, the Board requested that Paek attend a hearing on January 2, 2002 to discuss the proposed new room. At this hearing, Board members inquired as to the types of entertainment Paek was intending to offer at the Lanham Inn. When asked as to whether he had planned to offer adult entertainment, *i.e.*, topless dancing or "go-go girls" at the Lanham Inn, Paek stated that he had not made a final decision in that regard. Board members then stated that no such adult entertainment would be permitted at the Lanham Inn without first being approved by the Board.

On January 9, 2002, only one week removed from the Board hearing, Paek began to offer topless dancing entertainment at the Lanham Inn. Board inspectors went to the premises and witnessed the adult entertainment taking place. Paek was then served with a notice charging him with significantly changing the mode of operation of the premises without Board approval. Paek was thereafter summoned to appear at a hearing before the Board on March 6, 2002, to show cause as to why he should not be found in violation of certain Board rules and a cease and desist order.

On March 14, 2002, subsequent to having heard testimony from Paek, two employees of the Lanham Inn and three Board inspectors who had witnessed the topless dancing, the Board issued a written decision finding that Paek had significantly altered the mode of operation at the Lanham Inn without Board approval. In light of these findings, the Board fined petitioner $5,000.

On April 2, 2002, Paek filed a petition for judicial review of the Board's decision in the Circuit Court for Prince George's County. On October 30, 2002, the Circuit Court issued a memorandum opinion and order reversing the Board's decision. Thereafter, the Board filed an appeal to the Court of Special Appeals. On September 26, 2003, in an unreported opinion, the intermediate appellate court reversed the judgment of the Circuit Court. Paek then filed a Petition for a Writ of Certiorari and, on December 18, 2003, the Court of Appeals granted the petition.

Held: Affirmed. The Court of Appeals held that the Board's action of fining Paek for offering topless dancing at the Lanham Inn was justified where a Board rule requiring that where a "licensee decides to significantly alter the mode of operation" of an establishment licensed to sell alcoholic beverages, "such change must first be presented to the Board for approval," was a lawful rule under Article 2B of the Maryland Code. The Court of Appeals held that Paek's decision to offer adult entertainment at the Lanham Inn did constitute a "significant alteration in the mode of operation," in what was formerly known as a "pizza place." The Court of Appeals rejected Paek's argument that the Board's action of fining him evidenced a *per se* policy disfavoring any form of adult entertainment and held that the decision by the Board to fine Paek as a result of his offering of adult entertainment at the Lanham Inn was neither arbitrary nor capricious.

Myoung Paek, t/a Lanham Inn v. Board of License Commissioners for Prince George's County. No. 100, September Term, 2003, filed June 10, 2004. Opinion by Cathell, J.

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TORTS – NEGLIGENCE – DUTY – SPECIAL RELATIONSHIP

Facts: Sometime during the early morning of 17 June 2000, Robert and Donald Patton arrived at playing fields adjacent to the Annapolis Middle School in Anne Arundel County, Maryland. Robert was to play rugby for the Norfolk Blues Rugby Club. Donald intended to support his son as a spectator. Robert and Donald, along with other participants and spectators, placed their equipment and belongings under a row of trees adjacent to the playing fields.

Rugby matches involving over two dozen teams began at approximately 9:00 a.m. and were planned to continue throughout the day. It was a warm, muggy day. The weather forecast for Annapolis was for possible thunderstorms. At some point prior to the start of the twenty minute match between the Norfolk Blues and the Washington Rugby Football Club, a thunderstorm passed through the area surrounding the Annapolis Middle School. At the start of the match, rain commenced; lightning could be seen and thunder could be heard proximate to the lightning flashes. By this time, the National Weather Service had issued a thunderstorm "warning" for the Annapolis area.

A member of the Potomac Society of Rugby Football Referees, Inc., was the volunteer referee for the match in which Robert Patton was a participant. Under the direction of the referee, the match continued as the weather conditions deteriorated, and the lighting flashed directly overhead. Other matches at the tournament ended. Robert Patton continued to play the match through the rain and lightning and his father continued to observe as a spectator until the match was stopped just prior to its normal conclusion. Upon the termination of the match, Robert and Donald fled the playing fields to the area under the trees where they left their possessions. As they began to make their exit from under the trees to seek the safety of their car, each was struck by lightning. Donald died. Robert Patton sustained personal injuries and was hospitalized, but recovered. Robert and various members of the family filed suit in the Circuit Court for Anne Arundel County alleging negligence against the rugby tournament organizers, the game referee, and related organizations for not taking precautions to avert the incident.

The Circuit Court concluded that the defendants did not owe a duty of care to Robert or Donald Patton. The Patton family members appealed to the Court of Special Appeals. The Court of Appeals, on

its initiative, issued a writ of certiorari before the intermediate appellate court decided the appeal.

Held: Affirmed. The element of dependence and ceding of control by the injured party that is needed to find a "special relationship" is absent in this case. The Court's decision was consistent with its view of narrowly construing the "special relationship" exception so as not to impose broad liability for every group activity. The rugby player and spectator, both competent adults, were free to leave the voluntary, amateur tournament at any time and their movements were not restricted by the tournament organizers. An amateur sporting event is a voluntary affair, and the participants were capable of leaving the field voluntarily if they felt their health or lives were in danger. The changing weather conditions were visible to all competent adults. The spectators and participants could have sought shelter at any time they deemed it appropriate to do so. It is unreasonable to impose a duty on the organizers of amateur outdoor events to warn spectators or adult participants of a weather condition that everyone present is fully able to observe and react to on his or her own. The approach of a thunderstorm is readily apparent and its potential danger from lightning is known to reasonably prudent adults. Therefore, it is every adult's responsibility to protect himself or herself from the weather. There was no "special relationship" and, therefore, no legal duty to protect spectators and participants from the storm.

Patton v. USA Rugby, No. 113, September Term, 2003, filed June 10, 2004. Opinion by Harrell, J.

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COURT OF SPECIAL APPEALS

<u>APPEALS - MISTAKE OR IRREGULARITY UNDER RULE 4-331(b)- JURY INSTRUCTIONS- "MISTAKE OR IRREGULARITY" UNDER RULE 4-331(b) IS NARROWLY DEFINED AND DOES NOT INCLUDE MISTAKES IN JURY INSTRUCTIONS.</u>

<u>Facts</u>: On January 16, 1995, Christopher Westerman died at his home in Gaithersburg after having been shot ten times during an armed robbery. The State presented evidence that appellant participated in the robbery. Westerman was killed by another participant in the robbery.

In appellant's 1996 trial, the judge instructed the jury, *inter alia*, as follows:

> The defendant is charged with a crime of murder of first degree felony murder. In order to convict the defendant of first degree felony murder, the State must prove, first that the defendant or another participating in the crime with the defendant committed a robbery with a dangerous weapon.
>
> Second, that the defendant or another participating in the crime killed the victim. And third, that the act resulting in the death of the victim occurred during the commission of the robbery with a dangerous weapon.
>
> It is not necessary for the State to prove that the defendant intended to kill the victim.

Appellant was convicted of felony murder and conspiracy to commit robbery with a dangerous weapon. He was acquitted of conspiracy to commit robbery with a dangerous weapon and use of a handgun in the commission of a crime of violence.

Minger appealed to the Court of Special Appeals, raising several arguments. His conviction was affirmed in 1997. He then filed a petition for post conviction relief in 1999, which was denied.

On October 7, 2002, appellant filed a Rule 4-331(b) motion requesting that the court exercise its revisory power over his

conviction and grant him a new trial. Appellant argued that the above-quoted instruction was erroneous, even though it was in exact conformity with the Maryland Criminal Pattern Jury Instructions, because it may have misled the jury into believing that they could find him guilty of felony murder even if they believed that he was not guilty of the underlying felony, armed robbery. He also argued that this erroneous instruction amounted to a "mistake or irregularity." The circuit court denied appellant's motion.

Appellant appealed the denial of his Rule 4-331(b) motion and argued that the Court of Special Appeals' decision in *Bates v. State*, 127 Md. App. 678 (1999), demonstrated that "mistake or irregularity" occurred during his trial. In *Bates*, the trial judge gave the following instruction:

> In order to convict the defendant of first degree felony murder, the State must prove that the defendant or another participating in the crime with the defendant committed the murder in question, and that, in fact, the defendant, or another participating in the crime with the defendant, killed the victim in question, Clayton Culbreth, and that the act resulting in the death of Clayton Culbreth occurred during the commission or attempted commission of the robbery with which the defendants have been charged. It is not necessary for the State to prove that the defendants intended to kill the victim.

Held: Affirmed. A mere error in instructions, even if such error results in prejudice to the defendant, does not constitute a "mistake or irregularity" within the meaning of Rule 4-331(b). Under Maryland Rule 4-331(b), "irregularity" means irregularity of process or procedure and "mistake" means jurisdictional error, the same meanings attributed to the terms in Rule 4-331's civil counterpart, Rule 2-535(b). The Rule is subject to a narrow interpretation because otherwise a defendant could delay for years and then bring up perceived trial errors that were neither objected to nor the subject of a direct appeal. Here, appellant failed to allege that any jurisdictional error or irregularity of process or procedure took place in his case and was therefore not entitled to relief under Rule 4-331(b).

Alfonzo Minger v. State of Maryland, No. 3070, September Term, 2002, filed June 1, 2004. Opinion by Salmon, J.

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CRIMINAL LAW - EXTRADITION AND DETAINERS - INTERSTATE AGREEMENT ON DETAINERS

Facts: While in pre-trial confinement in Pennsylvania, appellant Robert Stanley Painter, Jr., was charged in Frederick County, Maryland, with the theft of numerous calves. Appellant waived extradition and was transferred to Maryland to face the Maryland criminal charges. At the conclusion of the trial on the Maryland charges, a jury convicted appellant of theft and theft by continuing scheme.

After his conviction, but before his sentencing, appellant was transferred back to Pennsylvania to face unrelated criminal charges in that state. Maryland authorities subsequently lodged a detainer against appellant, seeking his involuntary return for sentencing. One week later, Pennsylvania returned him for sentencing. At the sentencing hearing, appellant moved to vacate his convictions, arguing that Maryland violated the "anti-shuffling" provision of the Interstate Agreement on Detainers ("IAD"), Md. Code (1999) § 8-402 to 8-411 of the Correctional Services Article, by returning him to Pennsylvania before his sentencing. He further argued that in seeking his return from Pennsylvania for sentencing, Maryland violated the "30-day" rule of the IAD, which requires that "a period of 30 days after receipt by the appropriate authorities before the request [is to] be honored." The circuit court denied appellant's request and sentenced him to fifteen years' imprisonment.

Held: Affirmed. The IAD only applies to prisoners that have "entered upon a term of imprisonment in a penal or correctional institution." It does not apply to those in pretrial confinement, awaiting a disposition of their charges. At no time during these proceedings had appellant entered "a term of imprisonment;" therefore, the IAD did not govern his transfers to and from Pennsylvania.

Moreover, the "anti-shuffling" provision of the IAD, does not require the receiving state to sentence defendants before returning them to the sending state; rather, the receiving state need only conduct a "trial," which, for purposes of the IAD, does not encompass sentencing. Thus, even if the IAD did govern his transfer to Pennsylvania after trial, but before sentencing, Maryland did not violate the "anti-shuffling" provision.

Similarly, there was no error in his return to Maryland for sentencing only one week after Maryland lodged its detainer. As appellant correctly noted, Article IV of the IAD provides that when the sending state receives such a request from the prosecutor in the receiving state, "there shall be," according to that article, "a period of 30 days after receipt by the appropriate authorities before the request [is to] be honored . . . ." Appellant was not, however, subject to that provision. Article IV of the IAD applies only to detainers lodged against a prisoner based on an "untried indictment, information, or complaint." Sentencing detainers do not fall within the purview of the IAD because, as discussed above, the term "trial" in the IAD does not encompass sentencing; therefore, it follows that the IAD would also not encompass detainers to secure prisoners for that purpose.

Robert Stanley Painter, Jr. v. State of Maryland, No. 848, September Term, 2003, filed May 5, 2004. Opinion by Krauser, J.

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CRIMINAL LAW — VIOLATION OF 180-DAY "HICKS" RULE — WHERE THE STATE, AFTER HAVING ITS CONSOLIDATION REQUEST DENIED, ENTERS A NOL PROS FOUR DAYS BEFORE THE RUNNING OF THE 180-DAY PERIOD UNDER MD. RULE 4-271 AND MD. CODE (2001), § 6-103 OF THE CRIMINAL PROCEDURE ARTICLE, AND LATER RE-FILES NEARLY IDENTICAL CHARGES, THE NOL PROS HAS THE PURPOSE OF AVOIDING THE COURT'S ORDER DENYING CONSOLIDATION, AND ITS NECESSARY EFFECT, FOUR DAYS BEFORE THE END OF THE 180 DAY PERIOD, IS TO CIRCUMVENT THE 180-DAY RULE. AS APPELLANT'S TRIAL WAS NOT HELD WITHIN THE 180-DAY PERIOD AND AS THESE REQUIREMENTS ARE MANDATORY, DISMISSAL OF THE CHARGES AGAINST APPELLANT IS REQUIRED.

Facts: Following an altercation with a former girlfriend, Jeffrey Joseph Alther, appellant, was charged in District Court on September 17, 2002, with ten criminal counts (September, 2002

charging document) including: (1) First-degree rape; (2) Second-degree rape; (3) First-degree sexual offense; (4) Second-degree sexual offense; (5) Third-degree sexual offense; (6) Fourth-degree sexual offense; (7) Sodomy, generally; (8) False Imprisonment; (9) Second-degree assault; and (10) Malicious destruction of property, value less than $500.

On October 28, 2002, the State filed a new charging document in circuit court, reducing the charges to six counts and eliminating the first degree rape charge (October, 2002, charging document).

On November 6, 2002, appellant's counsel entered his appearance and a speedy trial was demanded, thus beginning the running of the 180 days by which trial must occur under Maryland Rule 4-271 and Md. Code (2001), § 6-103 of the Criminal Procedure Article. Accordingly, trial had to occur on or before May 5, 2003. Trial was initially scheduled for January 13, 2003.

Following two postponements sought by the State over appellant's objections, trial was rescheduled for May 1, 2003, nearly the last date possible for the trial to take place within the 180-day period.

On or about March 24, 2003, the State informed appellant's counsel that it planned to re-charge appellant with first-degree rape. Thereafter, on March 28, 2003, the State filed a new charging document, containing the first-degree rape charge and related counts, in District Court.

On April 23, 2003, approximately one week before the May 1, 2003, trial date, the State filed the first-degree rape charge in circuit court and moved for consolidation of this charge with the charges contained in the October, 2002, charging document, thus seeking to bring the first-degree rape charge into the May 1, 2003, trial. Appellant opposed this motion. On April 30, 2003, the circuit court denied the State's motion to consolidate and indicated that there would be no postponement of trial. Thus, the trial scheduled for May 1, 2003, was to proceed as planned, but the first-degree rape charge was not included.

On May 1, 2003, the State nol prossed the charges contained in the October, 2002, charging document, leaving only the single count

first-degree rape charge.

The next day the State filed in District Court a new comprehensive charging document, containing ten charges (the May, 2003, charging document), including: (1) Attempted first-degree rape; (2) Second-degree rape; (3) Attempted second-degree rape; (4) First-degree sexual offense; (5) Attempted first-degree sexual offense; (6) Second-degree sexual offense; (7) Attempted second-degree sexual offense; (8) Fourth-degree sexual offense; (9) Second-degree assault; and (10) False imprisonment.

The State then filed the same charges in circuit court (the June, 2003, charging document), planning to proceed on both these charges and the first degree-rape charge, for a total of 11 charges. Trial was set for August 6, 2003.

In June, 2003, appellant filed a motion to dismiss all the charges based on a violation of the Hicks rule,[1] arguing that the nol pros of the replacement charge and the re-filing of the ten count charge was a deliberate attempt to circumvent the 180-day requirement. The State claimed that its action was simply a correction of a "flaw" in the October, 2002, charging document.

On July 30, 2003, the circuit court held that the 180-day rule was not violated. The court stated that it was convinced that the State was prepared to go to trial on May 1, 2003 and could have done so if it was prepared to forego the first degree rape charge and proceed to trial on what it perceived to be an inadequate charging document. Thus, it was clear to the circuit court that the nol pros was entered so that the case could proceed with all of the applicable counts included. The circuit court went on to find that the instant case was similar to State v. Glenn, 299 Md. 464 (1984), wherein the Court of Appeals held that the prosecuting attorney's purpose in nol prossing the charges was not to evade the Hicks Rule. Rather, the charges were nol prossed because of a legitimate belief that the charging documents were defective and because the defendant's attorney would not agree to amendment of the charging documents. The circuit court then concluded that the nol pros was not entered to circumvent the 180 day rule.

[1] The term "Hicks rule" is derived from State v. Hicks, 285 Md. 310 (1979), and is often used as short-hand to refer to the 180-day limit outlined in § 6-103 and Rule 4-271.

The State proceeded to try appellant on the 11 counts, whereby the jury convicted appellant of only one count, second-degree assault. Appellant was found not guilty of first-degree rape, attempted first-degree rape, second-degree sexual offense, first-degree sexual offense, and attempted first-degree sexual offense. No verdict was reached as to second-degree rape, attempted second-degree rape, attempted second-degree sexual offense, fourth-degree sexual offense, and false imprisonment.

The court sentenced appellant to five years' imprisonment, with all but 18 months suspended, to be served on work release. Appellant was further sentenced to three years of supervised probation, a $500 fine, and he was required to complete an anger management course.

Held: Where the State, after having its consolidation request denied, enters a nol pros four days before the running of the 180-day Hicks Rule period, and later re-files nearly identical charges, the nol pros had the purpose of avoiding the court's order denying consolidation, and its necessary effect, four days before the end of the 180 day period, was to circumvent the 180-day rule. As appellant's trial was not held within the 180-day period and as these requirements were mandatory, dismissal of the charges against appellant was required.

The Court began by discussing several Court of Appeals cases, which established the general rule that when earlier charges are nol prossed and new charges are subsequently filed, the new charges have a life of their own in that a new and independent 180-day count begins with respect to them. The noted exception to this general rule occurs when the nol pros has the purpose or necessary effect of circumventing the requirements of the 180-day Hicks rule, and then, no new running of the count will be begin.

The Court noted that, although the Court of Appeals mandated in State v. Brown, 341 Md. 609 (1996), that a nol pros will only have the necessary effect of an attempt to circumvent the 180-day rule when the alternative to the nol pros would be a dismissal of the case for failure to commence trial within 180 days, the Court of Appeals has yet to decide the effect of a nol pros following a judicial decision denying the State's scheduling or procedural requests. The Court of Special Appeals, however, in State v. Price, 152 Md. App. 640 (2003), held that when a scheduling decision has been rendered by the circuit court, and the nol pros is entered as a means of circumventing that decision, the nol pros

will have the purpose or necessary effect of evading the 180-day rule. While noting that the discussion in Price was instructive, the Court decided the instant case based on the rule mandated by the Court of Appeals in Brown, 341 Md. at 609, and revisited by the Court of Special Appeals in Ross v. State, 117 Md. App. 357 (1997).

The Court analogized the instant case with Ross, where the State entered a nol pros after its postponement request was denied and the administrative judge found that the case could not be tried within 180 days if it was not tried on its then scheduled date. The Court of Special Appeals held in Ross that it could discern no clearer attempt to circumvent the time period dictated by the 180-day rule. The Court also noted the significance of the administrative judge's ruling, explaining the importance of deferring to that ruling with regard to trial scheduling.

In the instant case, appellant was initially charged with first-degree rape, a charge which was later dropped. Approximately one week before the scheduled trial, the State re-filed the first-degree rape charge in circuit court and sought consolidation of this charge with the remaining initial charges. When the court denied the State's consolidation request, the State nol prossed all but the first-degree rape charge, just 4 days before the running of the 180-day period. Nearly identical charges were then re-filed the following day. The circuit court expressly indicated there was no good cause for postponement.

Contrary to the circuit court's findings, the Court held that the instant case was significantly different from State v. Glenn, 299 Md. 464 (1984). Unlike in Glenn, where the nol pros occurred 57 days before the running of the 180-day period, appellant's charges were nol prossed just four days before the Hicks period would run. In the instant case, the court expressly found that it would not grant a postponement if one were requested, in essence a finding that there was no good cause for a postponement. Consequently, the State's only alternative to a nol pros on the scheduled trial date was to try the case on that day without the first-degree rape charge. The Court then specifically found that, practically speaking, it was impossible to try the case within the four day period after refiling of the charges.

The Court also found that the instant case was distinguishable from Glenn because the Glenn Court held that the prosecuting attorney's purpose in nol prossing charges against the defendant was not to evade the 180-day rule but, rather, resulted from the

defendant’s refusal to allow the State to amend the charging documents. In Glenn, the prosecutor needed to correct the defective charging documents, as they inadvertently omitted a key element of the prima facie case of the alleged crime. In the instant case, the Court noted, there was no indication that the charging documents were defective. The State initially charged appellant with first-degree rape, later dropped the charge, and attempted to re-file the charge again just before trial. The Court found that these were strategic moves, not at all associated with the defectiveness of the charging documents.

The Court then concluded that the entering of the nol pros on May 1, 2003, was for the purpose of avoiding the court’s order denying consolidation, and its necessary effect, four days before the end of the 180 day period, was to circumvent the 180-day rule. As appellant’s trial was not held within the initial 180-day period, as required by Rule 4-271 and § 6-103, and as these requirements are mandatory, dismissal of the charges against appellant was appropriate.

Jeffrey Joseph Alther v. State of Maryland, No. 1901, September Term, 2003, filed June 8, 2004. Opinion by Eyler, James R., J.

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ATTORNEY DISCIPLINE

By and Order of the Court of Appeals of Maryland dated June 2, 2004, the following attorney has been placed on inactive status by consent, from the further practice of law in this State:

DENNIS G. OLVER

*

By an Order of the Court of Appeals of Maryland dated June 3, 2004, the following attorney has been disbarred, effective immediately, from the further practice of law in this State:

BARRY K. WATSON

*

By an Order of the Court of Appeals of Maryland dated June 4, 2004, the following attorney has been indefinitely suspended by consent, from the further practice of law in this State:

DAVID S. PEARL

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By an Opinion and Order of the Court of Appeals of Maryland the following attorney has been disbarred from the further practice of law in this State:

ELLIS HOWARD GOODMAN

*

By an Opinion and Order of the Court of Appeals of Maryland dated June 9, 2004, the following attorney has been indefinitely suspended from the further practice of law in this State:

JOSEPH C. ASHWORTH

*

By an Opinion and Order of the Court of Appeals of Maryland dated June 14, 2004, the following attorney has been disbarred from the further practice of law in this State:

DUSHAN S. ZDRAVKOVICH

*

By an Order of the Court of Appeals dated June 16, 2004, the following attorney has been suspended for ninety (90) days by consent, effective July 1, 2004, from the further practice of law in this State:

CRAIG J. HORNIG

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JUDICIAL APPOINTMENTS

On April 26, 2004, the Governor announced the appointment of **JOSEPH BARRY HUGHES** to the Circuit Court for Carroll County. Judge Hughes was sworn in on May 28, 2004. He fills the vacancy created by the retirement of the Hon. Luke K. Burns, Jr.

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