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Appeals by the State in Criminal Cases - State v. Mariana

APPEALS BY THE STATE IN CRIMINAL CASES

State v. Mariana[1]

Defendant-appellee was indicted on charges of illegal betting and selling books and pools on races. On the day of the trial, but before the trial began, he moved the Criminal Court that the papers obtained by a search of his house in violation, as he alleged, of the Bouse Act[2] be suppressed as evidence and their use at the trial prohibited. Over the objection of the State, the motion was received and granted, and, in the subsequent trial, the State being without evidence, the defendant was acquitted. The State appealed on the ground that the defendant's motion should not have been received and ruled on before trial. The Court of Appeals reversed the decision and awarded a new trial, pointing out that they had previously decided, in *Sugarman v. State*,[3] that the practice of

[1] 174 Md. 85, 197 A. 620 (1938).

[2] Md. Code Supp. (1935) Art. 35, Sec. 4A, which is the Maryland statute rendering inadmissible, in misdemeanor cases, any evidence obtained by illegal search and seizure, in violation of the Declaration of Rights, or the use of which would amount to self-incrimination.

[3] 173 Md. 52, 195 A. 324 (1937). The practice of moving before trial to suppress and to obtain the return of evidence obtained by unconstitutional search and seizure does prevail in the Federal courts under the Federal version of the rule against the use of such evidence.

suppressing evidence before trial was not founded on any statute and was not supported by precedent of this State and the Court saw no reason for adopting it. That statement was intended as an adjudication in effect excluding the practice from the courts of this State, and the action contrary to it in the present case was an error requiring a reversal of judgment.

This case is of interest not at all for what it decided, but for what, without any hesitancy or discussion, it assumed, namely the right of the State to appeal after a judgment of acquittal in a criminal trial. What is the basis for the right of the State to appeal in criminal cases? How is the assumption of the principal case to be interpreted in the light of previous decisions of the Maryland Court of Appeals? What effect will this case have on future criminal trials in Maryland?

None of these questions can be decided with any certainty by reason of the fact that the issue of the right of the State to appeal was never raised. In effect, what happened was that the State took an appeal from the lower Court's ruling in order that the Court of Appeals might give a declaratory decision on the Maryland rule in regard to the pre-trial motion to exclude evidence under the Bouse Act, and that is all that they decided. Defendant's counsel made no objection to the Court's extraordinary action in entertaining an appeal by the State after an acquittal, and not once is the question of the right behind that action ever mentioned. The Court's very brief decision merely emphasized what it had said in the case of *Sugarman v. State,* and it left unanswered the numerous questions that arise in the mind of one reading the record of *State v. Mariana.*

The first reported case in which the Court decided the issue of the right of the State to take an appeal was *State v. Buchanan et al.*[4] The State brought a writ of error over the objection of the defendant, after a judgment for the defendant on demurrer to the indictment. The Court said, in reversing the lower court, that it could see no reason that the State should not be entitled to a writ of error. It cited in support of its proposition several unreported cases in Maryland and from Hale's Pleas to the Crown[5] to the effect:

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[4] 5 H. & J. 317, 500, 9 Am. Dec. 534 (1821).
[5] Hale's Pleas to the Crown, 247.

> "That if A be indicted for murder or other felony and plead nul cul, and a special verdict be found, and the court do erroneously judge it to be no felony, yet so long as that judgment stands unreversed by writ of error, if the person be indicted de novo, he may plead autrefois acquit, and shall be discharged; but if the judgment be reversed, the party may be indicted de novo."

The Court reasoned from this that Hale had meant that the judgment could be reversed by writ of error. The rule of this case that the State is entitled to an appeal from a ruling on demurrer in favor of the defendant is a reasonable one based on the fact that there has been no trial on the merits, but merely a ruling on the validity of the indictment. Inasmuch as the State could under present practice draw a new and valid indictment and bring the accused to trial for the same crime,[6] why should the State be prevented from appealing the ruling on demurrer? Later decisions have followed the rule of this case,[7] and it has been regarded as settled law in Maryland that the State may appeal from the ruling of the lower Court either sustaining the defendant's motion to quash or entering judgment for the defendant on demurrer.

In the case of *State v. Scarborough*[8] the State's appeal was allowed on the trial court's action in overruling the State's demurrer to the plea of the defendant that the grand jury which had returned the indictment was incompetent to act. The assignment of errors was dismissed because it was not drawn in compliance with the statutory requirements. It appears from this case that the State's right to appeal extends not only to the ruling on the defendant's demurrer to the indictment, but also to any adverse ruling on the pleadings. This rule must be limited, however, by the Court's statement that, as is so for civil cases, appeal can only be taken from a final judgment,[9] and that when one good count remains in an indictment

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[6] Kenny v. State, 121 Md. 120, 87 A. 1109 (1913); HOCHHEIMER, CRIMINAL LAW (2d ed. 1904) Sec. 118.

[7] State v. McNally and Myers, 55 Md. 559 (1880); State v. Camper, 91 Md. 672, 47 A. 1027 (1900); State v. Tag, 100 Md. 588, 60 A. 465 (1905); State v. King, 124 Md. 491, 92 A. 1041 (1915); and State v. Gregg, 163 Md. 353, 163 A. 119 (1932).

[8] 55 Md. 345 (1881).

[9] State v. Tag, 100 Md. 588, 60 A. 465 (1905); and State v. Floto, 81 Md. 600, 602, 32 A. 315, 316 (1895).

the sustaining of the defendant's demurrer to any other counts in the indictment is not such a final judgment.[10]

We come now to several Maryland cases directly on the question of the right of the State to appeal *after a verdict of acquittal* in the lower court. The first of these was *State v. Shields.*[11] The State took an appeal after a verdict of acquittal on an indictment charging forgery; the only exceptions given as grounds for the appeal being three adverse rulings on the admission of certain testimony. The Court dismissed the appeal in strong terms, stating:

> "It has always been a settled rule of the common law that after an acquittal of a party upon a regular trial on an indictment for either a felony or a misdemeanor, the verdict of acquittal can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted, and it matters not whether such verdict be the result of a misdirection of the Judge on a question of law, or of a misconception of fact on the part of the Jury. . . ."

Under the statute governing appeals in criminal cases[12] the Court of Appeals will "notice exceptions by the State, in criminal cases, on appeals by the State, only in cases where the parties accused have been *convicted,* and have also taken exceptions and appeals."[13]

The Court of Appeals in the case of *Bell v. State*[14] said, in speaking of the right of the court to instruct the jury as to the law in criminal cases: "If the jury disregard it (the Court's instructions) and convict, the evil can be remedied by a new trial. But if they should acquit, in disregard of it there seems to be no remedy."

This same line of thought was followed in the later case of *Cochran v. State*[15] in which the accused was tried under an indictment containing ten counts and was found guilty under two of them, and himself appealed. The Court held that the appeal dealt exclusively with the two counts under which the accused had been found guilty, quoting the statement above from the *Shields* case as the

[10] State v. Gregg, 163 Md. 353, 163 A. 119 (1932).
[11] 49 Md. 301 (1878).
[12] Md. Code (1924) Art. 5, Sec. 86.
[13] 49 Md. 301, 306 (1878).
[14] 57 Md. 108, 120 (1881).
[15] 119 Md. 539, 87 A. 400 (1913). See also State v. King, 124 Md. 491, 496, 92 A. 1041, 1043 (1915); and Birkenfeld v. State, 104 Md. 253, 65 A. 1 (1906).

basis of that holding. Thus again the State was prevented from appealing after a verdict of acquittal, even when the defendant was found guilty under other counts in the same indictment.

From the cases here discussed, excluding for the moment the principal case, it would appear that the Maryland rule in regard to appeals by the State in criminal cases might be briefly stated: The State may only take an appeal in criminal cases from a final judgment given on defendant's demurrer to the indictment or on other rulings on the pleadings adverse to the State or on the sustaining of the defendant's motion to quash the indictment. In all other cases after a regular trial on a valid indictment the Court of Appeals will take notice of and review the State's writ of error only when after a verdict of guilty, the defendant appeals and brings error, and even then the State's exceptions must relate to the count or charge appealed from by the defendant.

At first glance the case of *State v. Williams*[16] appears very similar to the present case. The defendant was indicted for forgery and pleaded not guilty. After the jury was sworn the defendant took an objection to the indictment which the Court sustained. Thereupon the State moved to quash the indictment. Motion was refused and exactly what happened at this point is difficult to determine, but the record reads that the defendant was acquitted. The State's appeal was allowed and the Court said that the State's motion should have been granted, but as the error relied on was not set out in the record, the lower court's verdict was affirmed. The situation was one of an appeal by the State after a verdict of acquittal and the Court indicated that it would have reversed if the State's appeal had been correctly drawn, but it must be noticed that the error relied on was the failure to grant the State's motion to quash its own indictment. So in reality, the trial by which the defendant was acquitted was founded on an invalid indictment and should not have occurred at all. Hence, while this case superficially appears an exception to the rule as above stated, actually it is not, in that it does not fulfil the condition of the rule stating that the trial which results in the acquittal of the defendant must be founded upon a valid indictment.

Again we are reduced to the statement that there is no basis in the law of Maryland for the State to take an

[16] 5 Md. 82 (1853).

appeal after a regular trial upon a valid indictment which results in a verdict and judgment of acquittal.

What then is the effect of the principal case of *State v. Mariana?* A review of the Maryland cases indicates that it is not based on any previous practice of the State. In fact, the appeal allowed is in direct opposition to the statement made in the previous case of *State v. Shields,* as quoted with approval in *Cochran v. State,* to the effect that, after an acquittal of a party upon a regular trial on a valid indictment, verdict can never afterward be set aside and a new trial granted.

Is this remarkable case to be treated as a reversal of this principle of law stated and affirmed in all previous cases? Or may it be distinguished? It seems highly probable that the Maryland Court of Appeals will not treat this case as completely reversing its previous stand. Certainly, the question should be thoroughly considered and not decided incidentally to a point of court procedure. The instant case may be distinguished easily on its facts and to treat it as reversing well established law without discussion would have unfortunate results.

Inasmuch as the right of the State to appeal was never objected to by the defendant or even mentioned by the Court, this case might be regarded as only a declaratory judgment for the direction of the lower court in regard to the procedural question directly decided. This is a practice that is followed by the courts of some states and is of invaluable assistance to the trial courts.[17] It would be particularly apt to apply this practice to Maryland because of the extreme scarcity of appellate decisions in criminal cases, occasioned by our peculiar constitutional provision making the jury the judges of the law as well as the fact.[18]

However, before so classing this case, it must be noted that it is not in form a declaratory decision. The Court by its direction at the end of the case ("reversed, and a new trial awarded") seemed to envisage further action in this case. In view of this statement, this question pre-

[17] 2 Am. Jur. 984, Appeal and Error, Sec. 227; Miller, *Appeals by the State in Criminal Cases* (1927) 36 Yale L. J. 486, 487. On Appeals by the State in general, see ORFIELD, CRIMINAL APPEALS IN AMERICA (1939) 55-77, reviewed (1940) 4 Md. L. Rev. 214.

[18] Md. Const., Art. 15, Sec. 5. See, for a discussion of this, Book Review (1940) 4 Md. L. Rev. 214; and Note, *Difficulty of Obtaining Appellate Rulings on Substantive Criminal Law—Corroboration of Accomplices* (1937) 1 Md. L. Rev. 175, noting Folb v. State, 169 Md. 209, 181 A. 225 (1935).

sents itself, has the defendant by allowing the appeal to be taken without objection on his part, waived his right to object to a later new trial? By the decisions here discussed it would seem that he did have that right, but what was the effect of his action in not raising the issue? The State in its appeal practically admitted that the evidence had been seized in violation of the Bouse Act, so the evidence produced at the first trial could not be used in a subsequent one; but, presuming the State found new evidence or the ruling on the admissibility of the old was changed, could the State re-try this same defendant on the same indictment for the same crime and have him found guilty? Might not the defendant, by his conduct in allowing the appeal when he could have objected by motion to dismiss, be estopped from denying the obvious aftermath of a reversal—the new trial? No further action has been taken on the part of the State in the principal case and no likelihood exists that any will be, but this is an interesting possibility. A definite problem of double jeopardy is raised by the possibility.[19]

This appeal was based on error in the pre-trial proceeding and, reasoning by analogy, this might be treated as a proceeding similar to the appeal from a ruling on the pleadings. Assuming that to be possible, if the State had stopped its proceedings *at that point* and had suffered a

[19] But, for that matter, is the rule against double jeopardy, as now set up in Maryland, any objection to either a legislative or a judicial rule permitting appeals by the State after acquittal and subsequent new trials if the State obtains a reversal? The rule against double jeopardy in Maryland law is only a common law one, and subject to change either by legislation or by judicial reversal.

The double jeopardy provision of the Federal Constitution does not apply to the State Courts. See Note, *Extent to Which Rights Secured by the First Eight Amendments to the Federal Constitution Are Protected Against State Action by the Fourteenth Amendment* (1938) 2 Md. L. Rev. 174, noting Palko v. State of Connecticut, 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149 (1937), a case upholding (under Federal constitutional law) the Connecticut practice of re-trying a defendant after reversal obtained upon State's appeal.

There is no double jeopardy provision in the Maryland constitution. Opportunity is here availed of to correct an error (an editorial one, and not one by the author) whereby the Maryland constitution was mistakenly credited with such a provision. See *Effect of Acquittal for Assault on Trial for Murder When Victim Subsequently Dies* (1939) 3 Md. L. Rev. 184, 185, noting Crawford v. State, 174 Md. 175, 197 A. 866 (1938). In that casenote an editorial query on the author's manuscript concerning the possible presence of a Maryland constitutional provision was translated by the typist into a statement to the effect that one did exist. The Court of Appeals of Maryland had shortly before fallen into the same error in Friend v. State, 175 Md. 352, 356, 2 A. (2d) 430, 432 (1938) where the opinion stated that a certain practice would be double jeopardy and thus violative of "our constitutional provisions."

judgment of not guilty before the trial of the defendant, this analogy might be tenable. But this the State did not do. It allowed the case to go to trial on the merits; and to allow the appeal was to proceed in direct opposition to the decisions here discussed.

If we analogize the trial court's ruling suppressing the illegally obtained evidence in advance of trial to a ruling excluding evidence offered by the State during the trial, then the appeal by the State would seem improper under the *Shields* and *Cochran* cases, which cases, in effect, permit trial courts to commit all the error they please (during the trial) which is favorable to defendants.

On the other hand, if we analogize the trial court ruling in the instant case to a ruling denying the State the right to go to trial under the indictment, as when an indictment is quashed or a demurrer to it is sustained, then allowing the State to appeal is consistent with the previous cases. As matters stand, the trial court ruling was not exactly either. In effect it deprived the State of the chance to go to trial under the indictment, as it deprived the State of all its evidence. But on the surface the State was appealing from a judgment of not guilty after a trial.

There is another, similar problem of the right of the State to appeal in a borderline situation. Suppose a trial court, in a criminal case in Maryland, directs a verdict of not guilty. May the State appeal from a judgment entered upon such a verdict? The Court of Appeals has said that a criminal trial court in Maryland has no power to direct a verdict of not guilty, in these words:[20]

> ". . . under the Constitution of Maryland,[21] the jury is the sole judge of the law and the facts, and this court has repeatedly declined to usurp this function, either by passing upon the question of the legal sufficiency of all testimony to establish the crime of which the accused is charged, *or by permitting the court at nisi prius*[22] thus indirectly, but decisively, to invade an exclusive constitutional prerogative of the jury."

Of course, the trial courts (in the counties) and the Supreme Bench (in Baltimore City) have the *power* to prevent accused defendants from ever being convicted by

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[20] Simmons v. State, 165 Md. 155, 158, 167 A. 60 (1933).
[21] Md. Const., Art. 15, Sec. 5.
[22] Italics supplied.

granting new trials every time a jury returns a verdict of guilty. And there is no appeal by the State from such a ruling. But this is somewhat different from directing a verdict of not guilty, because after judgment on the latter the defendant could not again be tried. There is more at stake if that can be done and so there is more reason for allowing the State to appeal from such a direction, which would be error regardless of the merits of the case.

But it is not so clear that the State would have any more right to appeal from such an erroneous direction than it probably had in the *Mariana* case where the right to appeal was, apparently, conceded by the traverser. To be sure, we might analogize the trial court's error in directing a verdict of not guilty to a complete denial of the State's right to try the case and thus an appeal would lie as readily as from a quashing of an indictment. But, on the other hand, if a trial court has the power to prevent a defendant's being convicted by excluding, at trial, every bit of evidence and testimony offered by the State, howsoever intrinsically erroneous this may be, why can it not also commit error with impunity by directing a verdict of not guilty? If the State is impotent in the former regard, why not in the latter?

In the last analysis, the *Mariana* case should be analogized to the *Folb* case[23] where, too, the Court went out of its way to give a ruling desirable to be made, but one not necessary to be made for a decision of the case. There the defendant appealed and raised a point of the substantive law of the crime in question. The Court said the point amounted to a request to them to decide the sufficiency of the evidence, which they could not touch, but that if the problem had been before them they would have decided it in a certain way. Thus by dictum it was made possible to obtain an appellate ruling on a point of substantive criminal law, otherwise difficult to obtain in the Maryland practice.[24]

And so it was in the *Mariana* case. Unless the State was allowed to appeal from such a pre-trial ruling (by appealing after acquittal) there was no effective sanction to compel the trial court to follow the rule of the *Sugarman* case that the Bouse Act is to be implemented by ex-

[23] 169 Md. 209, 181 A. 225 (1935), noted (1937) 1 Md. L. Rev. 175.
[24] *Ibid.*

clusion of evidence at trial rather than by motion to suppress made in advance.

The *Mariana* case was uncontested on the point of the right of the State to appeal. It would be interesting to have a similar case which would be contested on the point and to see how the Court would rule on a motion to dismiss the appeal. For to come out squarely in favor of the right of the State to appeal in the *Mariana* case situation (or in that of the directed verdict of not guilty) would be to leave but two alternatives. One would be to create a difficult question of double jeopardy. The other would be to allow the appeal, as a way of getting a declaratory ruling, without allowing a re-trial of defendant after reversal. This latter would be foreign to our traditions in the matter.

And yet there seems no other device[25] for compelling trial courts to follow the rule of the *Sugarman case*. But to deny the right to appeal would be consonant with the rule, applicable to other points, that trial courts have the power (if not the right) to commit all the errors they may wish if the errors are favorable to defendants.