Maryland Law Review

Volume 11 | Issue 4 Article 5

Is Burglary a Felony or Misdemeanor in Maryland? - Copeland v. Warden

IS BURGLARY A FELONY OR MISDEMEANOR IN MARYLAND?

Copeland v. Warden[1]

The appellant-petitioner-convict appealed from the trial court's refusal to issue the writ of habeas corpus sought against the appellee, Warden of the State House of Correction, where appellant was detained after being convicted of the crime of "burglary". The appellant's contention was that the crime for which he had been tried was of the grade of felony, but that because he had not been arraigned, his conviction was defective and that therefore he could seek release on habeas corpus. The Court denied leave to prosecute the appeal, and thus affirmed.

While this note does not question the ultimate correctness of the Court's ruling in denying habeas corpus, it should be pointed out that the language of the Court on the particular point involved is subject to question. The Court said, in a very brief *per curiam* opinion:

> "The record shows that the petitioner was convicted of burglary, but the indictment is not before us, and we are unable to determine exactly what the charge was. Burglary, under the Maryland statute, Article 27, Section 33, is not a felony. Bowser v. State, 136 Md. 342, 344. Whether he was indicted under this section or whether he was indicted for the common law offense of

---

[1] State of Maryland, ex rel. Copeland v. Warden of Maryland House of Correction, 70 A. 2d 813 (Md. 1950). In the present appeal the petitioner also contended that he was not assigned counsel nor given time to get counsel. The Court rejected those contentions because the record did not show that he had requested the appointment of counsel or a postponement in order to obtain his own counsel, so that he was not denied any right on that score. This was the second time that this petitioner had sought habeas corpus and had taken the case to the Court of Appeals. The earlier case was Frank Copeland v. J. Leroy Wright, Warden, 188 Md. 666, 53 A. 2d 553 (1947). In the former case, the Court turned down his petition for habeas corpus, where he had tried to use the writ (1) to review the legal sufficiency of the evidence on disputed facts, and (2) to contend that he had been tried without two witnesses in his behalf. The Court pointed out that the witnesses had been summoned, and their names called at the trial, but they did not answer, and that there was no allegation why they were not present. The Court held that, while an accused is entitled to witnesses if they can be found, their attendance is not guaranteed, although under proper circumstances the trial can be delayed while efforts are made to get witnesses whose appearance is essential. It not having appeared that such course was suggested by the defendant, he did not make a showing that he had been deprived of any right for that reason.

breaking and entering in the night-time,[2] does not appear. There is no right of arraignment for a misdemeanor. Basta v. State, 133 Md. 568. Under these circumstances we are unable to find that he was denied any right to which he was entitled."

As a preface to discussion of the validity of the Court's comment on the burglary and similar law of the State, it may be well to survey the relevant statutory sections as they are now numbered in the State Code and the most recent Supplement.[3]

Article 27, Section 32, merely fixes the punishment for the common law crime of burglary. Section 33[4] expands the definition of the crime of common law burglary to include breaking and entering a dwelling house in the night-time with intent to steal personal property of *any* value. This clarifies the case law rule[5] that one need not intend as such to steal property of the value required for the felony of grand larceny in order to be a burglar, so long as he intends to steal any property. Section 33A in the Supplement, provides, and permits the use of, a short form of indictment for burglary.

Section 34, also amended in the Supplement, denounces, and fixes the punishment for, the separate crime of breaking a dwelling house in the day-time with various intents, i.e., to commit murder or felony, or with intent to steal property of *any* value; or of breaking a storehouse or other described premises either by day or by night with intent to commit murder or felony, or steal property of the value of $25 or more. This was the section which the *Bowser* case, cited herein by the Court, said made the offense only a misdemeanor, and not burglary or a felony.

There is therein a certain overlap with Section 389, as also amended in the Supplement, for this section makes it a misdemeanor to break into any building not contiguous to

---

[2] Section 33, as mentioned below, *infra*, notes 4 and 5, refers to the night-time, and otherwise integrates the elements of the common law offense of burglary, and only clarifies the point as to the intent to steal property of minimum value.

[3] There have been no changes in the legislation since the most recent Supplement, that of 1947.

[4] The present discussion is in terms of the Section 33 of the current Md. Code (1939), Art. 27. At the time of the Bowser case, what is now Md. Code (1939) and Code Supp. (1947), Art. 27, Sec. 34 was then Md. Code (1912), Art. 27, Sec. 33. May it not be that a confusion of the two different sections numbered 33 is part of the complication now under discussion, especially as the present Section 33 specifically says a violator thereof is a felon.

[5] State v. Wiley, 173 Md. 119, 194 A. 629, 113 A. L. R. 1267 (1937).

a mansion house with intent to steal goods of the value of less than $25, or to break into any such premises and actually steal goods worth less than One Dollar. This section apparently applies regardless of the time of day, although that is not specifically set out.

Section 35, also amended in the Supplement, denounces the apparent misdemeanor of breaking into certain described premises not contiguous to any mansion house and stealing therefrom goods valued at more than One Dollar. This section was not involved in the case under discussion, nor were Sections 36 and 37, having to do with "burglary" with the use of explosives. Rather this discussion is concerned with contrasting the various common law and statutory crimes that punish breaking and/or entering various premises at various times of the day or night with various intents, whether the intent be executed or not. The common law crime of burglary was limited to dwelling houses, required both a breaking and an entering, in the night time, and an intent to commit felony, although the intent did not have to be executed.

Consequently, it would seem that, for the purposes of this discussion, Maryland has a modified common law felony of burglary, as found in Sections 32 and 33; and statutory misdemeanor crimes of house breaking by day; or store or other breaking at any time; or breaking into non-dwelling premises followed by stealing, under Sections 34, 35 and 389. The essential difference would be between the modified common law felony of burglary, and the entirely statutory crimes, misdemeanors, of other breakings as the statutes provide. In the case under discussion the Court said dogmatically that the petitioner was convicted of "burglary", although it admits that the record did not show exactly what the charge was, and went on further to say that "burglary" under the Maryland statute (citing Section 33) is not a felony. It should be pointed out that Section 33, which merely modifies the common law crime of burglary, includes the phrase "shall be deemed a felon", and further provides that the offender shall be guilty of "burglary".

Perhaps the Court mistakenly was talking about Section 34, as modified by Section 35, discussed above, particularly in view of the fact that they cited the *Bowser* case, which really was concerned with the earlier version of the present Section 34. To be sure, the *Bowser* case did decide that a violator of the present Section 34 was not a felon but only a misdemeanant. The problem arose in connection with the

matter of the necessary allegations in the indictment, going off on whether the crime in question was a felony or a misdemeanor, and the Court there decided that the statutory crime of day-time house breaking or of store breaking at any time was not a felony for reasons appropriate to that case.[6]

The *Bowser* case in fact was directed to the very point of whether the statutory crime of day-time house breaking or store breaking was tantamount to burglary, and if so, a felony, or not so tantamount, and therefore only a misdemeanor. The Court specifically decided in the *Bowser* case that because day-time house breaking or store breaking at any time was not the same thing as burglary, it was only a misdemeanor. But, had they been able to find that it had been the legislative intent to make that separate crime tantamount to burglary, then it would have been *ipso facto* a felony, for the reason that burglary was a felony at common law, and still is a felony, as witness the specific language of the 1937 Legislature in enacting the addendum of Section 33 to the much older provision for the punishment of common law burglary which is found in Section 32.

The logic of the *Bowser* case was that the fact that the newly enacted day-time house breaking and store breaking section was placed next to the then only other provision for common law burglary, under the joint title of "Burglary", did not place crimes under the new statute on the same level with common law burglary, or make them felonies.

The Court specifically ruled that a crime is not a felony merely because it is called burglary, or is put under the same general label. This case decided that there is an essential distinction between burglary as at common law, and a statutory "something else", which latter is what the

[6] On the felony-misdemeanor distinction, particularly with reference to the ritual of the indictment, see Whittington v. State, 173 Md. 387, 196 A. 314 (1938), noted, *Error In Charging A Misdemeanor As A Felony*, 2 Md. L. Rev. 284 (1938). Further on the ritual of the indictment, depending on whether felony or misdemeanor, see Barber v. State, 50 Md. 161 (1878); and Bowser v. State, 136 Md. 342, 110 A. 854 (1920), cited by the Court in the principal case; and also Dutton v. State, 123 Md. 373, 91 A. 417 (1914). This last case involved the same point as the case under discussion, whether the defendant was entitled to arraignment for the specific charge. On appeal from the actual conviction, the case was affirmed on that particular point, although reversed for other grounds, because as the law then stood, although the possible sentence was a capital one, which had been imposed, the crime was only a misdemeanor for which there was no right of arraignment anyhow. By subsequent legislation, the specific rule of the Dutton case has been changed and the particular crime in question, attempted rape, is now recognized as a felony. Maryland Code Supp. (1947), Art. 27, Sec. 13.

Court found the Legislature had intended in making a separate crime for day-time house breaking and store breaking. So, it would seem inappropriate now to merge the two crimes under the name of burglary when the Court had earlier specifically rejected such a contention in the *Bowser* case.

Beyond the point of Maryland felony-misdemeanor law, which is the theme of this discussion, the Court's opinion might be commented upon further in that it said, as pointed out above, that it was doubtful under the record before it whether Copeland was indicted under the Section it was thinking of or for the "common law offense of breaking and entering in the night-time". It might be remarked that the name "burglary" *is* customarily applied to the "common law offense of breaking and entering in the night-time"[7] and some other name is usually worked out for statutory variations which denounce other offenses that did not come within the definition of common law burglary or any modified version thereof. This seems to be the particular point in the *Bowser* case, that the offense of house breaking by day or store breaking at any time (now Section 34; Section 33 of the 1912 Code) is an entirely new offense different from common law burglary, and not even a modification of that common law crime, as does seem to be the intent of the now Section 33 cited above.

It could be mentioned that, if the record was not clear, the Court could have placed its affirmance on the ground that there was not a sufficient record to make it necessary to rule on the point. On the other hand, it could be argued that all doubts should have been resolved in the petitioner's favor, so that the "record" notation that the charge was "burglary" would then have been held to mean the common law felony of burglary, rather than some other quasi-burglary crime which is only a misdemeanor. Then, if the Court really felt that lack of arraignment in a felony case could be tested by habeas corpus, it could have affirmed by taking a stand on whether arraignment, even if the crime be a felony, is such a substantial right that the lack of it can be later tested by habeas corpus.

On this the present writer takes no stand, but it would seem to be plausible to rule that even if the crime were demonstrated to have been really a felonious crime, which is another point of confusion, the lack of arraignment would only be a ground for appeal and could not later be tested by

[7] CLARK AND MARSHALL, CRIMES (4th Ed., 1940), Sec. 401.

habeas corpus, any more than any other routine error in the normal trial of the case.[8]

These are merely passing suggestions, but going back to the main theme of the case, the point remains that the dogmatic statement that "burglary, under the Maryland statute, . . . is not a felony" can not be substantiated in the light of history, and that the citation of the *Bowser* case is actually in reverse, for that the *Bowser* case specifically decided that the statutory crimes of day-time housebreaking and storebreaking at any time are only misdemeanors, whereas *common law burglary*, as modified by statute, is a felony.

---

[8] Compare the recent case of State ex rel. Ballam v. Warden of Maryland House of Correction, 75 A. 2d 95 (Md. 1950), in which the Court of Appeals denied leave to appeal from refusal of a writ of habeas corpus where the petitioner claimed he was denied constitutional rights because he was misinformed of the true nature of the charges against him and did not receive a copy of the indictment as required by Md. Laws 1949, Ch. 757, adding Art. 27, Sec. 647A to Md. Code (1939), now Rules of Criminal Practice and Procedure, 1. The Court ruled that the failure to grant him a copy of the indictment would not entitle him to release on habeas corpus. The Court also ruled in that case that the failure of the trial judge to file a substantial but succinct statement setting forth the grounds of the application, the questions involved, and the reasons for action taken, was not jurisdictional, but only intended to help the Court of Appeals in disposing of the case.

On the general question of whether arraignment is such a substantial right that it can be tested by habeas corpus and is not merely limited to appeal from the criminal conviction itself, the case of Basta v. State, 133 Md. 568, 572, 105 A. 773 (1919), cited by the Court in the principal case, contains strong language as to the importance of the right of arraignment in felony cases. However, it does not contribute too much to the solution of the problem whether the deprival of it is so substantial that it may be tested by habeas corpus.

On the respective questions of arraignment, copy of indictment, and right to counsel, variously concerned in the principal and other cases cited, it should be noted that Rule 1 of the new Rules of Criminal Practice and Procedure, promulgated by the Court of Appeals and in effect since January 1, 1950, treats of these various matters, although without solution of the problem whether the deprival of any one of these privileges is so substantial that it may be tested by habeas corpus. In fact it is not too clear under Rule 1 whether arraignment is even now, such a requirement as to allow an appeal from conviction in both misdemeanor and felony cases. The Rule merely provides how arraignment shall be conducted, and incorporates the statutory rule cited above as to furnishing a copy of the indictment. It further provides that if the defendant appears in court without counsel, the court shall advise him of his right to obtain counsel, and that unless he elects to proceed without counsel, the court shall in all capital and all serious cases assign counsel to defend him. Subsection (c) of the rule provides that the record shall affirmatively show compliance with the rule. This, no doubt, applies to all of the requirements mentioned above, and the requirement for affirmative showing may suggest some answer to the question here discussed, as to whether the non-compliance is so jurisdictional as to entitle the accused to release on habeas corpus, even though the point was not raised by an appeal from the conviction.