

IN THE COURT OF APPEALS OF MARYLAND

NO. 119

SEPTEMBER TERM, 1995

JAMES EDWARD PERRY

V.

STATE OF MARYLAND

*Murphy, C. J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker,

JJ.

DISSENTING OPINION BY BELL, J.

FILED: December 16, 1996

*Murphy, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court, after being recalled pursuant to the Constitution, Article IV, Section

3A, he also participated in the decision and the adoption of the opinion.

Maryland Rule 452 (a) (3) provides:

(a) Mandatory Motions. In the circuit court, the following matters shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise:

* * *

(3) An unlawful search, seizure, interception of wire or oral communication or pretrial identification. (Emphasis added)

This Rule specifies two (2) methods by which the interception of wire or oral communications may validly be raised.¹ To be sure, the preferred method is by motion filed pretrial. Because, however, the Rule also explicitly permits the court to forgive the failure timely to raise the matter, that method is not absolute.

The petitioner did not file a pretrial motion to suppress the 22 second telephone conversation, taped without, so far as the record reflects, his having consented to its being taped. He did

¹As the majority points out, the Maryland Wiretap statute, Maryland Code (1974, 1995 Repl. Vol., 1996 Cum. Supp.) §10-408 (i) expressly permits "[a]ny aggrieved person" to move, "before or during the trial," on the basis that it was unlawfully intercepted, to suppress the contents of an intercepted wire communication. Although not raised by the petitioner, this section certainly supports his position and buttresses my argument. The rationale offered by the majority for ignoring the clear mandate of § 10-408 (i) mirrors that offered as a means of getting around the Rule and, thus to justify avoidance of the merits. As far as I am concerned, it is no more persuasive.

move to suppress prior to the close of the State's case and before the tape had been admitted into evidence. When he interposed the motion to suppress, the court was able to grant the relief sought; the objection was raised at a time when it was within the power of the court to correct the error theretofore made by permitting the State to refer to and rely on the tape to corroborate the testimony of Thomas Turner, to whom the State granted complete immunity. Rather than entertain the motion, the court ruled that the petitioner, by failing earlier to file a motion to suppress, had waived his objection. That ruling was wrong for either of two reasons: the court failed to exercise the discretion given it by Rule 4-452 (a) (3) or it abused its discretion when it refused, under these circumstances, to conduct a suppression hearing outside the presence of the jury. Moreover, the error was not harmless beyond a reasonable doubt. Consequently, I would reverse the judgment of the circuit court.

It is true, as the State argues, that no objection was made by the petitioner to the admissibility of the tape until the fourth week of the trial, after the tape had been identified and played to the jury. At that time, the petitioner's counsel candidly acknowledged that he had failed to comply with the Rule's requirement that the suppression motion be filed pretrial. He explained, again candidly, and no one suggested that the explanation was not genuine, that his co-counsel and he

have been laboring for months on a variety of things, one of those being the issue of how we attempt to deal with the [S]tate's introduction of that particular 22- second recording, and suffice it to say that as I was driving home from the office last night about 8:30 or 9:00 o'clock, the neurons connected.

The argument he made in support of the objection he then interposed, premised on Maryland Code (1974, 1995 Repl. Vol., 1996 Cum. Supp.) §§ 10-402(a),² 10-402(c)(3),³ and 10-405,⁴ of the Courts and Judicial Proceedings Article, was the same argument that this Court announced in Mustafa v. State, 323 Md. 65, 73-75, 591 A.2d 481, 485-86 (1991). In that case, we characterized the language of

²Maryland Code (1974, 1995 Repl. Vol., 1996 Cum. Supp.) § 10- 402 (a)(1) makes "it unlawful for any person to [w]illfully intercept, endeavor to intercept, any wire, oral, or electronic communication."

³Section 10-402(c)(3) allows the "intercept[ion of] a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or the laws of the United States or of this State."

⁴That section provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this State, or a political subdivision thereof if the disclosure of that information would be a violation of this subtitle.

§ 10-405 as "unambiguous," providing for no exceptions and, thus, "no indication that the legislature intended to adopt anything but the `all-encompassing exclusionary rule which it unequivocally fashioned in § 10-405.'" Id. at 74, 591 A.2d at 485 (quoting Wood v. State, 290 Md.579, 584, 431 A.2d 93, 95 (1981)).

We then stated that "one of the clear purposes of the more restrictive consent provision of the Maryland Act [i.e. § 10-402 (c)(3)] is to prevent `the unauthorized interception of communications where one of the parties has a reasonable expectation of privacy.'" Id.

Rather than argue waiver,⁵ the State, at the trial court's request, posited that the recording was admissible because the petitioner and Horn, the co-defendant who made it, were co-conspirators. Apparently not satisfied with that argument, the court fell back on waiver. But it applied the waiver analysis in such a manner as to give meaning to only a part of Rule 4-452. I submit that, in so doing, the court failed to exercise the

⁵The State merely lamented:

We were prepared to proceed with Mr. Turner and now we are back in a suppression hearing. I would like to know what [the petitioner's counsel] wants. He has given a range of remedies to the Court and I don't know if I am prepared to respond to each one at this point.

discretion that it possessed to relieve a defendant from a default where there is good cause to do so. This becomes obvious when one focusses on the court's explanation of its ruling.

The court quite properly noted that the motion to suppress is a mandatory motion which must be made before trial and that the petitioner did not file any such motion or raise the issue in any way before trial. Relying on the latter fact, the trial court determined, "on that fact alone" that the issue of the recording's admissibility was waived. From its later remarks, it is even more obvious that it was the petitioner's default in not filing a pretrial suppression motion, or otherwise raising the issue before the jury heard the tape, that the court found dispositive of waiver, rather than the "good cause" requirement, to which it referred in passing. Having acknowledged that an initial default could be forgiven by a finding of "good cause," the court stated:

Furthermore, the Court notes that when the exhibit was offered yesterday, again there was no objection on this grounds to its admissibility. Indeed there was an objection on other grounds properly raised by counsel and I believe properly ruled on by the Court, but violation of this statute was not raised as a basis for excluding the evidence, so once again there was a waiver of any right to objection.

* * *

The Court also notes that we are in the fourth week of trial and that to revisit the issue of a tape that has already been played to the jury would create substantial other problems that give rise to the reason for the

rule to begin with, which is that something like this needs to be dealt with before the trial, not during the trial, but certainly needs to be dealt with before the jury hears it, not after they hear it.

As far as I am concerned, once it is waived, it is waived. I don't think it is partially waived. I don't think that it is appropriate for me to say, well, its in evidence but now the State can't offer further testimony with respect to the identification issue since that is an issue that may be before the jury for them to consider.

It is significant that the court did not even mention the adequacy of the petitioner's reason for failing to raise the issue earlier. Its sole focus, as I have demonstrated, was on the default and the effect that forgiving the default would have on the trial. But the fact that the Rule contemplates both that there will be defaults and that they, on occasion, will be excused, it seems much more appropriate that the emphasis be on why the motion or objection was delayed and whether that reason constituted "good cause." I can only conclude that the court simply failed to exercise discretion in this regard, preferring, as the majority also apparently does, to avoid reaching the merits of the suppression issue.

Even if one could read the record as reflecting that the court did not find "good cause" for the default, it is just as clear in reflecting that, in so finding, the court abused its discretion. I have already demonstrated that the argument that the petitioner's counsel made was consistent with, and foreshadowed by, the Mustafa

case. Accordingly it was an extremely strong argument in favor of the suppression of the recording. Moreover, there is nothing in the record that suggests that counsel was anything but truthful with respect to his reason for not earlier raising the suppression issue. Where the argument favoring the result sought by the defaulting party is strong and the evidence of his or her lack of good faith weak, it clearly follows, as far as I am concerned, that the defaulting party is entitled to a hearing on the merits and that a failure to so order is an abuse of discretion.⁶ And there was no impediment to the court conducting a suppression hearing without the jury. That is often done when the admission of evidence, offered after the jury is sworn, depends upon the establishment of a factual predicate.

Alternatively, we should address this issue on direct appeal since the record clearly demonstrates that the petitioner's counsel rendered inadequate assistance of counsel. That matter can be and, I submit, must be addressed whenever it is raised on direct appeal and the appeal record is adequate to permit its meaningful

⁶I am struck, but not impressed, by the majority's argument premised on the court's need to be fair to the State by ensuring that it had enough time to respond to and prepare for the petitioner's motion to suppress. I remind the majority that the Rule contemplates just this situation, when no motion has been filed pretrial and objection is made for the first time at trial. Moreover, in this situation, when the jury is in the box and the trial is ongoing, this Court has never suggested, or even intimated, that the same time frames apply as in the case of motions that are timely filed before trial. In short, there simply is no basis for that concern.

review. Johnson v. State, 292 Md. 405, 434-435, 439 A.2d 542, 559 (1982). To do otherwise is to waste judicial resources, a commodity that is, to say the least, very precious. I have already pointed out that there is no indication that the court was in any way concerned about the petitioner's counsel's motivation or believed that he acted in bad faith.

The decision in this case not only ducks an issue that I believe has been generated and is ripe for decision, but it ensures that there will be two full appeals. Had this Court, as precedent permits, addressed the merits of the suppression issue, we would be through with this issue, albeit the result undoubtedly would not be a welcome one.⁷ That the result is not likely to be that which we seek or hope for is no reason not to decide an issue on the merits; after all, that result is not likely to change with the passage of time. All that we have accomplished by this opinion and decision is to ensure that, if nothing happens in the meantime to render it moot, we will have to address the issue in another context. I can

⁷It seems crystalline to me that Mustafa v. State, 323 Md. 65, 591 A.2d 481 (1991) foreshadows a reversal of the petitioner's conviction, assuming that the issue has not been waived. It is interesting to me that the majority studiously avoids the merits of the case, suggesting to me, at least implicitly, that it does not "buy" the State's co-conspiracy argument. The waiver of the right to challenge the admissibility of the recording by counsel who did not think of it or recognize the holding in Mustafa until the fourth week of trial surely does not render effective assistance; hence, I foresee a return of this case to this Court on that basis in very short order.

not find any justification, and the majority opinion does not provide one, for the expenditure of judicial resources in this fashion.