

IN THE COURT OF APPEALS OF MARYLAND

No. 58

September Term, 1997

VICTOR TYRONE BEVERLY

v.

STATE OF MARYLAND

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Karwacki, Robert L. (retired,
specially assigned),

JJ.

Dissenting opinion by Wilner, J., in which
Raker and Karwacki, JJ., join

Filed: March 17, 1998

The Court frames the issue before it as “whether a trial court is bound to impose a mandatory minimum sentence pursuant to a subsequent offender statute where the defendant *is* a subsequent offender but there *is* a plea agreement whereby the State agreed not to treat the conviction as a subsequent offense” (emphasis added) and answers the question in the negative. It holds that (1) the decision to “pursue” a minimum sentence mandated by the General Assembly is a matter of prosecutorial discretion, and (2) a prosecutor, despite possessing (and indeed, informing the court of) undisputed evidence that the defendant is, in fact, a subsequent offender to whom the mandated sentence would be applicable if the defendant is convicted, nonetheless can thwart the clear legislative will by manipulatively declining to carry out his or her duties under Maryland Rule 4-245. In effect, the Court holds that a prosecutor, through a plea bargain, can bind a court to impose an illegal sentence. With respect, I dissent from those holdings. I also disagree with the particular disposition decreed by the Court.

The Relevant Facts

Appellant was charged with 12 drug offenses, including possession of cocaine with intent to distribute, possession of heroin with intent to distribute, and possession with intent to distribute those substances within 1,000 feet of an elementary school. Several of the counts charged him with conspiracy with another person, Anthony Leiby, to commit those crimes. In September, 1995, he entered pleas of not guilty and elected a jury trial.

Under Maryland Code (1957; Repl. Vol. 1996), Article 27, § 286(b)(1), a conviction

of possession with intent to distribute cocaine or heroin carries a possible sentence of imprisonment for up to 20 years and a \$25,000 fine.¹ If, upon conviction, the court finds that the defendant has previously been convicted of a similar offense, (1) the maximum permissible penalty is doubled (Md. Code, Article 27, § 293), and (2) the person must be sentenced to prison for at least 10 years, no part of which may be suspended and, except in accordance with the law governing Patuxent Institution, no part of which may be served on parole (§ 286 (c)). Maryland Rule 4-245 requires, however, that, in order to invoke the doubling provision under § 293, the State must serve notice on the defendant of the alleged prior conviction before acceptance of a guilty plea or 15 days before trial, whichever is earlier, and, in order to invoke the mandatory 10-year sentence under § 286(c), the State must serve a similar notice at least 15 days prior to sentencing, unless the notice is waived by the defendant.

On September 25, 1995, the State, through Assistant State's Attorney Jane Erisman, served both notices on appellant — one invoking § 293 and the other invoking § 286(c). In each notice, appellant was informed that he had previously been convicted of possession with intent to distribute heroin in Case No. 28727924 and that the State intended to prosecute him as a subsequent offender. On March 25, 1996, Beverly and Leby appeared for what was to be a joint trial. When the case was called, Leby entered a plea of guilty to possessing cocaine and heroin with intent to distribute. Beverly entered a plea of not guilty. Judge

¹ A similar penalty, non-mergable and to be served consecutively, is possible for possessing with intent to distribute such a substance within 1,000 feet of a school. Article 27, § 286D.

Hubbard interrogated Lebbly to assure that his plea was knowing and voluntary, following which, with Beverly and his lawyer still in court, the prosecutor set forth a statement of facts in support of the plea, establishing that Beverly and Lebbly were, indeed, actively distributing significant amounts of cocaine and heroin in the 2600 block of Woodview Road. The prosecutor asked that sentencing of Lebbly be deferred until after Beverly's trial. Judge Hubbard then inquired whether Beverly was ready for trial, and he and his attorney said that they were.

After a recess, proceedings resumed with respect to Beverly. One preliminary matter that needed to be resolved was his motion to dismiss under Maryland Rule 4-271, for lack of a speedy trial. Before that motion was considered, however, Ms. Erisman who, as noted, had sent the two Rule 4-245 notices six months earlier, stated that she had "inherited" the case from another prosecutor and that she was uncertain as to the sentence range that would be called for by the Maryland Sentencing Guidelines. She asserted that, if appellant was not on parole or probation when the instant offenses were committed, the guideline range would be seven to fourteen years, with 10 years being "mandatory." If he *were* on parole or probation at the time, the guideline range would be doubled — presumably 14 to 28 years — and would also be subject to the 10-year minimum.² She was not certain, she said,

² Section 2.3.8 of the Maryland Sentencing Guidelines states:

“Enhanced punishment legislation for subsequent offenders also takes precedence over guidelines ranges if not otherwise provided for in this Manual. When the statutory penalty for a drug offense is doubled

(continued...)

whether he was or was not on parole or probation at the time. She nonetheless indicated that, with that uncertainty, she had informed defense counsel that she would recommend a “cap” of 10 years. Specifically, she said:

“ I have explained to Mr. Guth that with that uncertainty my recommendation would be a cap of ten years, and if his client wishes to ask the court for the opportunity to obtain a presentence investigation and present that information to the court as well as any other information to the court that would be beneficial to him, that might enlighten us as to the true guidelines for the defendant. And even if they came back twelve to twenty, I would still be offering him a cap of ten years.”

The judge responded that she would not be inclined to impose a sentence outside the guidelines, suggesting that, if the guidelines were, in fact, 12 to 20 years (or 14 to 28 years), a 10-year sentence would not be approved, but that, if the guidelines were seven to fourteen years, a ten year sentence would be within them.³ She noted, however, that, as she read § 286(c), she could not give less than 10 years. As the State was not recommending less than 10 years in any event, it is not clear why the prosecutor should have had any problem with

²(...continued)

under Article 27, Section 293, the guidelines range for that offense is also doubled. The guidelines sentence is determined by doubling the appropriate sentence from the drug offense sentencing matrix *except when the mandatory minimum sentence under 27/286 is invoked and takes precedence.*”

(Emphasis added.)

³ Judge Hubbard first responded, “Yes, but I don’t know if the court is willing to underwrite your cap of ten years if it’s outside the guidelines,” adding then, “[t]he court is not inclined to go below or over the guidelines.”

that response. She nonetheless commented, “[i]f I were to invoke the mandatory,” which, by sending the notices six months earlier, she, in fact, had done. When Judge Hubbard asked, “[i]s that required?” the prosecutor responded “Yes. The State must invoke the mandatory.”

For some reason, the conversation then drifted into the hypothetical situation of what would or could occur if the State did not invoke the mandatory sentence, prompting from the prosecutor the statement:

“My understanding, Your Honor, is that the purpose of plea discussions on a pre-trial basis if the State does not invoke the mandatory, then the court is free to give whatever sentence the court deems appropriate in the case.”

The judge and the prosecutor then consulted Rule 4-245, which the judge interpreted as meaning that, if the State served a notice that day, the court would simply have to postpone sentencing for 15 days, unless appellant waived the notice. As noted, this discussion was entirely hypothetical, as the State had already served the required notices. The judge then asked the views of defense counsel, who responded:

“Your Honor, it is my understanding that if Mr. Beverly agreed to be sentenced today, the State’s offer of the ten-year, a cap of ten years with parole would be available to him. Or rather, that would — actually he would not be given an opportunity then to argue for less.”

That led, for the first time, to a discussion of whether the ten years could be with the possibility of parole. No one ever suggested that appellant had not previously been convicted of an offense triggering both § 293 and § 286(c); that was a “given.” As a result, Judge

Hubbard read the statute as requiring a minimum 10-year sentence, to be served without parole; Ms. Erisman disagreed, noting that there was a practice in her office of plea bargaining around mandatory sentences. Defense counsel supported Ms. Erisman's statement: "[I]n my experience other courts are getting involved in plea discussions and allowing defendants who are served notice with a mandatory to plead guilty to significantly less time." When the judge asked him to explain how her reading of the statute was wrong, he responded, "It sounds right to me, your Honor, *and I have no argument as to that.*" (Emphasis added.) His argument was simply that other judges allowed the State to plea bargain around mandatory sentences and that it was unfair that Beverly "is not being given the opportunities that other individuals are given in other courts" The judge responded that the State could reduce the charge if it chose — that was within the prosecutor's discretion — but "once the State calls the count, then I have to live with the count, and I have to give what I believe . . . the law requires." At that point, the discussion with respect to the sentence ended, and the court took up the motion to dismiss, which it denied.

A Manufactured Issue

Maryland Rule 4-243 sets out "the procedures to be followed and the conditions to be observed regarding plea bargains." *Allgood v. State*, 309 Md. 58, 66, 522 A.2d 917, 922 (1987). It allows the State and the defendant, without involvement by the court, to enter into an agreement for a plea of guilty "on any proper condition," including an amendment to the charging document, an agreement not to charge the defendant with certain offenses, and an

agreement that the State will recommend, not oppose, or make no comment with respect to a particular sentence. An agreement reached under those circumstances does not bind the court to any particular sentence or sentence range; it is strictly between the parties. The rule also permits the parties to “submit a plea agreement proposing a particular sentence, disposition, or other judicial action to a judge for consideration pursuant to section (c) of this Rule.” Section (c)(1) provides:

“If a plea agreement *has been reached* pursuant to subsection (a)(6) of this Rule for a plea of guilty or nolo contendere which contemplates a particular sentence, disposition, or other judicial action, the defense counsel and the State’s Attorney shall advise the judge *of the terms of the agreement* when the defendant pleads. The judge may then accept or reject the plea and, if accepted, may approve the agreement or defer decision as to its approval or rejection until after such pre-sentence proceedings and investigation as the judge directs.”

(Emphasis added.)

Section (c)(2) of the Rule makes clear that “[t]he agreement of the State’s Attorney relating to a particular sentence, disposition, or other judicial action is not binding on the court unless the judge to whom the agreement is presented approves it.”

It appears to me that the Court, in arriving at its extraordinary decision that a prosecutor can force a judge to disregard a clear mandate of the General Assembly, has overlooked an important fact: there is utterly no evidence in this record that any plea agreement was ever reached between appellant and the State, much less an agreement presented to Judge Hubbard for approval. Indeed, there is no basis in this record for even inferring that a plea agreement had been reached. The codefendant Leiby obviously reached

a plea agreement, but, from the beginning and throughout, Beverly maintained his plea of not guilty and never once indicated any desire to enter a plea of guilty to anything.

There was nothing more here than an academic discussion of whether, in a hypothetical situation, a prosecutor could tie the judge's hands. Neither the Court nor I have been able to discern just what crime appellant agreed to plead guilty to — which of the 12 offenses he was ready to admit in return for a particular sentence. Neither the Court nor I have been able to fathom what charges the State was willing to drop, or to reduce, in return for a guilty plea. At no point in any of the discussion that occurred was there any mention of any terms of a plea agreement. The closest the discussion came to that was the prosecutor's initial statement that, due to her uncertainty about the guideline ranges, she would be willing to recommend a cap of 10 years, with appellant having the right to request a presentence investigation and argue for less, which the court indicated would be acceptable only if a 10-year sentence was within the guidelines. There was never even an actual attempt by the prosecutor to withdraw the notices previously served on Beverly. The Court's concluding statement that "the State should abide by any agreement to withdraw the notice of mandatory penalties" is wholly unsupported in the record. There is utterly no basis for even an inference that such an "agreement" existed. I find it distressing that, on this record, the Court would remand the case to determine whether there was a plea agreement and, if so what its terms were, and if there was a plea agreement, to require the court to act in

accordance with its terms.⁴ That approach not only ignores the plain mandate of § 286(c) but also Rule 4-243(c), which is supposed to be one of those “precise rubrics” the Court insists everyone else follow religiously. If, indeed, the parties had reached a plea agreement calling for a sentence of less than 10 years or a sentence subject to parole prior to the expiration of 10 years and had presented that agreement to the court in conformance with Rule 4-243, and if the court rejected the agreement on the ground that the proposed sentence was not a lawful one, at least the substantive issue would be presented. On this record, however, it is, at best, a manufactured issue — nothing more than dust given life only by the Court’s own breath. It is the wrong case in which to announce such a policy.

The lack of any definitive, articulated plea agreement adds considerable force to the State’s argument that, by maintaining his plea of not guilty and proceeding to trial, appellant waived his right to complain about the judge’s perception of her duties under § 286(c). The Court’s response to that argument might have merit if, indeed, a real plea agreement had

⁴ The only conceivable basis for the Court’s supposition that there was, in fact, some sort of plea agreement comes from comments made by defense counsel at the sentencing hearing following trial. He said that prior to the start of trial, “we had extensive negotiations and discussions with Your Honor” and that “during our negotiations and discussions, we had constant discussions about what Mr. Beverly’s guidelines were, what his record was.” He continued that, “during our discussions, the State had made an offer of ten years with the possibility of parole and when I asked Mr. Beverly are you interested in ten years with the possibility of parole, Mr. Beverly said yes, I am.” Judge Hubbard recalled her view that the law did not allow her to ignore the mandatory sentences and her asking for authority to the contrary, which neither side supplied. Counsel acknowledged that, at that stage, “it is a moot point.” Even this belated proffer by defense counsel, in my view, fails to establish that there was actually an agreement reached, much less “the terms of the agreement,” which Maryland Rule 4-243 requires. In its determination that some sort of plea agreement had been reached — an agreement it has been unable to define — the Court has simply piled inference upon supposition upon assumption, which is hardly, in my view, a satisfactory substitute for fact.

been reached, presented to the judge, and rejected. On this record, however, its finding of no waiver is hardly compelling.

The Substantive Issue

The Court's substantive conclusion that, through the plea bargaining process, a prosecutor can implicate the judiciary in a thwarting of a clear legislative mandate rests essentially on three premises, two of which I readily accept. The first premise is the wide prosecutorial discretion vested in the State's Attorney. Undeniably, the State's Attorney has a nearly unbridled Constitutional discretion in deciding whether to prosecute, whom to prosecute, what charges to bring, and what charges to pursue. *Brack v. Wells*, 184 Md. 86, 40 A.2d 319 (1944). The second premise is the demonstrated usefulness of plea bargaining. Although other countries look askance at the practice, it is an accepted and necessary part of the American criminal justice system.

The confluence of those principles is what underlies Rule 4-243, expressly permitting, within the confines of the Rule, plea bargain arrangements. The Rule necessarily recognizes the prosecutor's authority and discretion in what to charge, in dropping counts already charged, in agreeing "to the entry of a judgment of acquittal on certain charges pending against the defendant," and in making or refraining from making recommendations as to sentence. Nothing in that Rule, however, suggests the ability to enter into an agreement, binding on the court, *that calls for an illegal sentence*. Interpreting the Rule to permit that would be diametrically inconsistent with prior holdings of this Court pointing out "the

impropriety of trial courts failing to follow the clear mandate of the legislature [by] refusing to impose a sentence mandated by law.” *Shilling v. State*, 320 Md. 288, 293, 577 A.2d 83, 87 (1990); *State v. Hannah*, 307 Md. 390, 514 A.2d 16 (1986); *State ex rel. Sonner v. Shearin*, 272 Md. 502, 325 A.2d 573 (1974). So strong was our view in that regard that we allowed the State to appeal from sentences not in accord with a legislative mandate and remanded for resentencing in conformance with the statute. It must, of necessity, stand to reason that there can be no valid plea bargain to an illegal sentence. *See State v. Nemeth*, 519 A.2d 367 (N.J. Super. Ct. App. Div. 1986); *State v. Bilse*, 581 A.2d 518 (N.J. Super Ct. Law Div. 1990).

Underlying the Court’s current reasoning seems to be the notion that, because Rule 4-245 requires that the State serve a notice on the defendant in order to seek a mandatory minimum sentence, the prosecutor can avoid the imposition of such a sentence by simply declining to send the notice or, worse, by withdrawing a notice already sent. The theory seems to be that, if the State fails to establish a necessary predicate, the court’s hands are tied, much the same as if, in an armed robbery prosecution, the prosecutor fails to establish the existence of a weapon. Notwithstanding that that view seems to have been accepted by the Court of Special Appeals, in *Middleton v. State*, 67 Md. App. 159, 506 A.2d 1191 (1996) and, without any critical analysis, in one other case (*U.S. v. Levay*, 76 F.3d 671, 674 (5th Cir. 1996)), there is, I suggest, an element of sophistry in such a theory. It is true, of course, that if the State fails to prove something that must be proved in order to justify a particular ruling or judgment, the court cannot ordinarily make the ruling or enter the judgment. It cannot act

in the absence of the requisite evidence. That situation normally arises when the State either doesn't have the requisite evidence or for some reason is unable to produce it in court or succeed in having it admitted. Even if, in a given case, the prosecutor has the requisite evidence and simply declines to produce it, the court would be unable to ignore the deficiency. All that I accept.

It is quite another matter, however, for this Court to bless a practice of a State's Attorney, who takes a solemn oath of office to "support the Constitution *and Laws*" of the State of Maryland (Maryland Constitution, Article I, § 9), of frustrating those laws by deliberately refusing to produce relevant evidence that is in his or her possession or by deliberately refusing to perform the ministerial act required by Rule 4-245 of sending a notice. Negligence in a particular case can be excused. A deliberate practice of thwarting the legislative will is not excusable; it may well constitute misconduct in office — whether of the nonfeasance, misfeasance, or malfeasance variety — and certainly should not receive the approbation of this Court. The fact that some prosecutors and probably most defense lawyers are anxious for prosecutors to have this authority is hardly a proper basis for ignoring a clear and relevant law.

Fortunately, this issue has not arisen often, as prosecutors are overwhelmingly content to follow the applicable law, as they are duty-bound to do. It has arisen in a few other jurisdictions, however. In *U.S. v. Schmeltzer*, 960 F.2d 405 (5th Cir.), *cert. denied*, 506 U.S. 1003, 113 S. Ct. 609, 121 L. Ed. 2d 544 (1992), the defendant was charged with certain pornography offenses. Because he had previously been convicted of a similar offense,

Federal law mandated a minimum sentence of five years imprisonment, but, as part of a plea bargain, the Government did not seek that sentence and it was not imposed. Schmeltzer, foolishly as it turned out, appealed the sentence he did receive, claiming that the judge did not make the proper calculations under the Federal guidelines. The Fifth Circuit Court of Appeals found it unnecessary to address his complaint because it held that he was subject to the mandatory minimum. The court observed that “both prosecution and defense counsel viewed the explicit minimum mandatory provision as being susceptible to negotiation ” but rejected that notion in light of the Guideline statement that “[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.” *Id.* at 408. The court concluded that it was bound to enforce that provision, making clear:

“Thus, we cannot give our imprimatur to the government’s attempted end run around the minimum mandatory sentence. That the government actually urged the court to sentence below the statutory minimum is, in our view, a serious breach of its duty to enforce the law Congress wrote.”

The Tenth Circuit Court of Appeals has explained that, even when plea bargains are reached calling for the Government to refrain from making sentence recommendations, the prosecutor has a duty to inform the court of evidence that would trigger a mandatory sentence. *See U.S. v. Jimenez*, 928 F.2d 356 (10th Cir.), *cert. denied*, 502 U.S. 854, 112 S. Ct. 164, 116 L. Ed. 2d 129 (1991) and *U.S. v. Johnson*, 973 F.2d 857 (10th Cir. 1992), both quoting from *United States v. Williamsburg Check Cashing Corp.*, 905 F.2d 25, 28 (2d Cir. 1990):

“[A]n agreement to keep the judge ignorant of pertinent information cannot be enforceable, because a sentencing court ‘must be permitted to consider any and all information that might reasonably bear on the proper sentence for the particular defendant, given the crime committed.’”

In enacting the Federal Sentencing Guideline legislation, Congress articulated its expectation that judges would “examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine sentencing guidelines.” S. Rep. 98-225, 98th Cong., 1st Sess. 63, 167 (1983); *see also* U.S. SENTENCING GUIDELINES MANUAL Appx., Ch. 6, Part B (1987).

To the extent that the Court’s holding rests, even tacitly, on the fear that the criminal justice system in this State will somehow collapse or be seriously impeded if prosecutors are not allowed to ignore legislative mandates, that fear is wholly unwarranted; it certainly finds no support in this record. Whether wisely or unwisely, the General Assembly has determined, as a matter of paramount State public policy, that repeat drug dealers such as Mr. Beverly should be locked up for a minimum period of ten years. As the law-making branch of the State government, it has the right to make that decision, and if, as a result, additional prosecutors, public defenders, or judicial resources are required, that need — for which there is no evidence in this record — will have to be presented to that legislative body. It is simply impermissible, in my view, for individual prosecutors to trump the policy decision made by our Legislature, and worse, to implicate the courts in doing so.

Judges Raker and Karwacki have authorized me to state that they concur with the views expressed herein.