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Presence of Accused at Trial Necessary - Kidnapping and False Imprisonment Differentiated - Midgett v. State

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Presence Of Accused At Trial Necessary— Kidnapping And False Imprisonment Differentiated

Midgett v. State[1]

On January 16, 1957, the defendant and two others while parked behind the main office of a Baltimore restaurant, which they intended to rob, were surprised by a police patrol car. While the officer was inquiring as to the defendant's business in the alley, one of the defendant's companions drew a pistol and forced the officer to hand over his service revolver, belt, holster and flashlight. The officer was then placed in the defendant's car, driven ten miles out of the city and left tied to a tree. All of the officer's equip-

[1] 216 Md. 26, 139 A. 2d 209 (1958).

ment, except the flashlight, was later recovered. The defendant was indicted and tried for armed robbery and kidnapping. During the trial, when the jury retired, the defendant was sent back to jail. During its deliberations, the jury sent a note to the judge asking for assurance that the death penalty would not be imposed should they return a verdict of guilty. Neither the defendant nor his counsel were present when the note was received or when the judge answered assuring the jury that the death penalty would not be imposed. Later another similar note was sent by the jury to which the judge's reply was the same. The defendant was again absent from the court, but the note was shown to his counsel. A verdict of guilty was returned.

The questions on appeal included (1) the propriety of the trial judge's communications to the jury out of the presence of defendant and his counsel, and (2) the sufficiency of the evidence to show kidnapping, and the correctness of the trial judge's instructions thereon.[2] On appeal, the Court of Appeals reversed.

(1) *Presence at trial necessary:* Responding to the contention that a defendant has a right to be present at all stages of his trial, the court stated that:

> "[A]n accused in a criminal prosecution for a felony has the absolute right to be present at every stage of his trial from the time the jury is impaneled until it reaches a verdict or is discharged, and there can be no valid trial or judgment unless he has been afforded that right."[3]

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[2] The lower court was reversed on the grounds discussed in point (1). Discussion of point (2) was not necessary to the result, but the court thought it desirable to express its views for the guidance of the court below on a new trial, utilizing MD. RULE 885 (Scope of Review). For the same reason it discussed the sufficiency of the evidence for a conviction of robbery, a problem not considered in this note. The defendant's complaints against the attorney who had represented him below were not considered by the court in view of the result reached on point (1).

[3] Midgett v. State, *supra* n. 1, 36. The court held this right to be derived from the Constitution of Maryland, Declaration of Rights, Art. 5:

> "That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the courses of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law and Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have been expired, or may be inconsistent with

It is more specifically pointed out that the defendant has the right to be present when there is any communication whatsoever between the court and the jury, *unless* the record affirmatively shows that such communication was not prejudicial or had no tendency to influence the jury. On this latter point, the court was following the doctrine of *La Guardia v. State*,[4] which holds that such communication is reversible error unless the record shows that the communication was not prejudicial. If the appellate court can not be sure whether in a particular context the remarks of the trial judge in the defendant's absence were prejudicial or not, there is a tendency to reverse. Such a situation was involved in *Duffy v. State*.[5] There the trial court repeated its charge to the jury in the defendant's absence and it was held reversible error. Although the communication *may* not have prejudiced the defendant, the court felt that when dealing with an absolute right,[6] the citizen should not have to suffer speculation as to whether the violation of that right did or did not injure him.[7]

It is generally held that the accused must be present at his trial for a felony,[8] and usually should be present if charged with a misdemeanor,[9] although some jurisdictions allow trial in the defendant's absence when the punishment does not include imprisonment.[10]

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the provisions of this Constitution; subject. nevertheless to the revision of, and amendment or repeal by, the Legislature of this State. * * *"

[4] 190 Md. 450, 458, 58 A. 2d 913 (1948), where the defendant was indicted and tried for rape. While deliberating, the jury sent a question to the court asking if less than twelve jurors could request leniency from the court. The court answered in the affirmative, but gave no indication as to whether it would exercise leniency or not. On appeal the conviction was upheld since the record affirmatively showed what constituted the communication and the court was satisfied that it had no relation to the verdict, nor did it have any indirect constraining relation to the jury, hence the defendant was not prejudiced thereby.

[5] 151 Md. 456, 135 A. 189 (1926).

[6] Constitution of Maryland, Declaration of Rights, Art. 5.

[7] It should be noted that the record in the Duffy case did not set out the exact words of the communication to the jury, hence the appellate court would only be speculating as to its prejudicial characteristics, and it is such speculation that must be eliminated from this area of adjudication.

[8] Ah Fook Chang v. United States, 91 F. 2d 805 (9th Cir. 1937); Duffy v. State, 151 Md. 456, 135 A. 189 (1926).

[9] United States v. Shelton, 6 F. 2d 897 (D.C. La. 1925); People v. Beck, 305 Ill. 593, 137 N.E. 454 (1922).

[10] Bardsher v. State, 35 Okl. Cr. 185, 249 P. 437 (1926) (by statute); Gray v. State, 158 Tenn. 370, 13 S.W. 2d 793 (1929) (obiter). The decision

On the point that it was prejudicial to the defendant for the court to promise not to inflict the death penalty should the jury return a verdict of guilty, the court held that such a promise is calculated to overcome reasonable doubts and coerce an agreement for conviction, hence it is highly prejudicial to the defendant.[11] Most jurisdictions follow the rule that any communication which tends to overcome the volition and independent judgment of the jury is improper.[12]

(2) *Kidnapping:* The subject case also involves the first authoritative construction of the rather awkward Maryland kidnapping statute.[13] In its instruction, the lower court failed to distinguish between the offenses of kidnapping and false imprisonment. The instruction was to the effect that the defendant was not required to carry the victim away from the place where he was seized in order to constitute kidnapping. This element of carrying away is, however, the differentiating factor between the two offenses. At common law, the offense of kidnapping was the forcible abducting or stealing away of a person and carrying him out of the country. The offense of false imprisonment, contrarily, did not require that the victim be removed from the place of seizure. This distinction has been preserved in the Maryland statute which definitely requires that the victim be moved from one place to another, though not necessarily out of the State. Maryland has, then, by statute adopted the basic common law concept of the acts which constitute the offense of kidnapping, and

in Dutton v. State, 123 Md. 373, 91 A. 417 (1914), does not preclude the possibility that Maryland might make an exception with respect to the defendant's right to be present, when the defendant is not subject to imprisonment. Here the court held that even though the defendant was only charged with a misdemeanor he was subject to the death penalty and therefore he was entitled to the full protection of his constitutional right. *Cf.* Wheeler v. State, 42 Md. 563 (1875), where it was held not to be a denial of the defendant's constitutional right to be present for the court to receive and answer a note from the jury, with the knowledge of both the defendant and his counsel, without recalling the jury to the court room.

[11] McBean v. State, 83 Wis. 206, 53 N.W. 497 (1892).

[12] 23 C.J.S. 1054, Criminal Law, §1380.

[13] 3 MD. CODE (1957) Art. 27, §337:

"Every person, his counsellors, aiders or abettors, who shall be convicted of the crime of kidnapping and forcibly or fraudulently carrying or causing to be carried out of or within this State any person, except in the case of a minor, by a parent thereof, with intent to have such person carried out of or within this State, or with the intent to have such person concealed within the State or without the State, shall be guilty of a felony and shall be sentenced to death or to the penitentiary for not more than thirty years, in the discretion of the court."

in addition, has specified that there must be an intent to carry the victim to another place or, in the alternative, an intent to conceal the victim either out of or within the State. Therefore, the lower court's instructions to the jury were deemed to be unnecessary and improper under the indictment.[14] In addition, the court felt that the lower court's reference to an intent to conceal the victim, when the indictment charged only an intent to carry the victim away, was misleading, confusing and highly prejudicial to the defendant. The court stated: ". . . an abstract instruction ought not to be given where it is not applicable to the offense charged in the indictment."[15] In *Wintrobe v. Hart*[16] the court distinguished between erroneous and misleading instructions, holding that the latter type are never to be considered non-injurious. The reference in the principal case to the intent to conceal made by the lower court served to direct the attention of the jury to the more aggravated element of the offense of kidnapping with which the defendant was not charged.[17]

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[14] There may be a question as to whether the lower court's instruction regarding this so-called "standstill kidnapping", though unnecessary, was actually harmful to the defendant in view of the fact that in this case the victim was carried away from the place of seizure.

[15] Midgett v. State, *supra* n. 1, 40.

[16] 178 Md. 289, 13 A. 2d 365 (1940).

[17] The court upheld the lower court's refusal to direct the verdict for the defendant on the ground that there was evidence before the jury which would sustain a conviction for armed robbery. Since the communications between the court and the jury in the defendant's absence were considered an unauthorized interference with the deliberations of the jury on the robbery question, thereby necessitating a retrial on that question, the court thought it proper to discuss the intent element of the crime of robbery for the purpose of guiding the lower court during the retrial; MD. RULE 885 (Scope of Review). The court held that robbery required not only an unlawful taking of another man's property, but also a larcenous intent to "steal" at the time of the taking. Apparently the court was referring to the need for an intention to deprive the victim permanently of his property. The intent of the accused may be ascertained from his words, acts, and general conduct, both at the time of the taking and subsequent thereto. See 77 C.J.S. 462, Robbery, Sec. 22; WHARTON, CRIMINAL LAW AND PROCEDURE (1957), §548. If, when the defendant took the officer's equipment, he did not intend to steal, but merely to disarm, he is not guilty of robbery. See Rex v. Holloway, 5 Car. & P. 524, 172 Eng. Rep. 1082 (1833). The fact that an intent to steal may have formed after the taking is insufficient, for the requirement is that the act and the intent coincide. See Alaniz v. State, 147 Tex. Cr. 1, 177 S.W. 2d 965 (1944). Note that the weight of the evidence attempting to prove a present intent has been considered a jury question in Maryland. See Dodson v. State, 213 Md. 13, 130 A. 2d 728 (1957); Daniels v. State, 213 Md. 90, 131 A. 2d 267 (1957).