

THE “NEW” WITHDRAWAL OF CONSENT STANDARD IN MARYLAND RAPE LAW: A YEAR AFTER *BABY v. STATE*

By
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I. INTRODUCTION

On April 16, 2008, the Maryland Court of Appeals, the highest court in the state, ruled that a woman may withdraw consent for vaginal intercourse after penetration has occurred. After consent has been withdrawn, the continuation of vaginal intercourse by force or threat of force may constitute rape.¹ The ruling caused a news sensation because the defendant, Maouloud Baby, was convicted of first degree rape and related charges after his female victim testified that he “continued to have sex with her for five or ten seconds after she asked him to stop.”² The over-reaching implications of what has been termed “The Five-Second Rule” are obvious, because the most difficult legal elements to prove in any rape crime case are force and non-consent.³ A victim’s ability to change his or her mind during intercourse could effectively remove the problem of consent as a barrier to rape convictions and give rise to a host of criminal prosecutions.

Black’s Law Dictionary defines rape as “unlawful sexual activity with a person without consent and by force or threat of injury.”⁴ At common law, the crime of rape consisted of unlawful sexual intercourse by a man with a woman who was not his wife through force and against her will and required at least slight penetration of the penis into the vagina.⁵ Currently, Maryland statutorily defines the crime of “rape in the first degree” as the act of “[engaging] in vaginal intercourse with another by force, or the threat of force, without the consent of the other.”⁶ The applicable punishment is “imprisonment not exceeding life.”⁷ In contrast, “post-penetration” rape⁸ describes a situation where two people initially engage in consensual sexual intercourse, but during intercourse one person “communicates to the other the revocation of consent and the other party forces the continuation of intercourse against the will of the non-consenting person.”⁹ One person decides to stop and the other person does not. Only one state has explicit legislation criminalizing post-penetration rape: Illinois.¹⁰ Until *Baby*, Maryland was one of two states that expressly held that post-penetration continuation of intercourse after withdrawal of consent did not constitute rape.¹¹

II. THE *BABY* CASE

At trial in 2004 Baby was convicted not only of rape in the first degree, but also of committing a sexual offense in the second degree and two counts of sexual offense in the third

degree, both felonies.¹² During deliberation, the jury came to the court with questions specifically concerning the effect of post-penetration withdrawal on consent. The pertinent note read, “[i]f a female consents to sex initially and, during the course of the sex act to which she consented, for whatever reason, she changes her mind and the man continues until climax, does the result constitute rape?”¹³ The defense argued that the court should respond to

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the note in the negative on the theory that the woman consented to penetration.¹⁴ The prosecution argued that any slight intrusion into the vagina is rape.¹⁵ The judge was confused by the question and avoided making a factual determination by telling the jury to re-read the initial instructions.¹⁶ The jury submitted another note which read, “[i]f at any time the woman says stop is that rape?”¹⁷ The defendant’s counsel requested that the court repeat the prior answer. The judge agreed and instructed the jury, “[t]his is a question that you as a jury must decide. I have given the legal

definition of rape which includes the definition of consent.”¹⁸ The jury returned with a guilty verdict, and on February 17, 2005, Baby was sentenced to fifteen years imprisonment with all but five years suspended and five years probation upon release.¹⁹

On appeal, Baby argued that the lower court erred in refusing his request to instruct the jury to return a verdict of “not guilty” if persuaded that the complaining witness consented to sexual intercourse but withdrew her consent after penetration. Baby also argued that the court erred in denying his motion to exclude expert testimony concerning “rape trauma syndrome.”²⁰ The Court of Special Appeals agreed, overturning Baby’s rape and sexual offense convictions and holding that the trial court erred in not answering the jury’s questions on consent. Based upon its interpretation of the English common law behind Maryland’s statutory definition of rape, and relying on *Battle v. State*,²¹ the Court of Special Appeals ruled that “if a woman consents to sexual intercourse prior to penetration and withdraws the consent following penetration, there is no rape.”²²

On certiorari, the Maryland Court of Appeals affirmed the reversal of Baby’s convictions but articulated a new standard of consent. The highest state court held that the language in *Battle* stating, “ordinarily, if [a woman] consents prior to penetration and withdraws the consent following penetration, there is no rape,” is properly characterized as *obiter dictum* and will not be afforded precedential weight.²³ After a lengthy discussion of the history of rape and its original emphasis on punishing those who de-flower virgins, the court turned to recent cases in other states on the withdrawal of consent post initial penetration. For

example, in *State v. Bunyard*,²⁴ under a rape statute similar to Maryland's, the Kansas intermediate appellate court held that "a participant in sexual intercourse may withdraw consent after penetration has occurred. The continuation of sexual intercourse after consent has been withdrawn, and in the presence of force or fear, is rape."²⁵ The Maryland Court of Appeals found the reasoning in similar cases in Kansas, Connecticut, and Maine persuasive and held that the Maryland rape statute "punishes the act of penetration, which persists after the withdrawal of consent."²⁶ The court further held that initial penetration does not complete the act of intercourse.²⁷ Therefore, a woman may withdraw consent for vaginal intercourse after penetration has occurred, and after consent has been withdrawn, the continuation of vaginal intercourse by force or the threat of force may constitute rape.²⁸

The court also agreed with the Court of Special Appeals that the trial court erred in refusing to instruct the jury on the issue of consent and by simply sending the jury back to review previous instructions.²⁹ The seven-judge panel was split over the section of the opinion addressing a victim's withdrawal of consent, with four judges signing on to the opinion and one concurring.

III. COMPARISONS WITH OTHER STATES

Although the recent *Baby* ruling created a firestorm of local media coverage in the Washington, DC metropolitan area, seven other states ascribe to similar laws on consent in rape cases: Alaska, California, Connecticut, Kansas, Maine, South Dakota, and Illinois.³⁰ The Supreme Judicial Court of Maine recognized a woman's right to withdraw consent to sexual intercourse as early as 1985. During that time, feminists and legal reformists were attacking states' statutory marital rape exemptions as well. Advocates of the right to withdraw consent approve of outcomes such as that in *Baby*, arguing that holding otherwise only serves to deny women basic civil rights³¹ and perpetuates social myths about men, women, and sex.

Failure to recognize a person's ability to withdraw consent to sexual intercourse denies that person dignity and autonomy under the law. For example, the Supreme Court of North Carolina has declared, without any citation to legal authority, that "if the actual penetration is accomplished with a woman's consent, the accused is not guilty of rape."³² Therefore, once a woman consents to penetration there can be no rape during that act of intercourse, even if the penetration continues subsequently by use of force or coercion.³³ A woman in North Carolina may have a right to say 'no' to sex, but she has no right to say 'stop'. Courts addressing the issue of post-penetration withdrawal of consent have pointed out the absurd implications of holding that post-penetration rape is something less than rape. The Maine Supreme Court reasoned that

"if rape occurs only when a male's entry of the female sexual organ is made as a result of compulsion, [rape cases] would turn on whether the prosecutrix, on revoking her consent and struggling against the defendant's forcible attempt to continue intercourse, succeeds at

least momentarily in displacing the male sex organ."³⁴

In other words, the court's reasoning was a very polite way of saying that a female victim would have to temporarily separate her partner's sexual organs from her own after asking him to stop in order to have legal recourse. Along a different line, Judge O'Connell, writing for the Appellate Court of Alaska, has also noted that if the crime of rape depended on proof of non-consent prior to *initial* penetration, there could be no rape if a male penetrated a sleeping victim.³⁵

Feminist scholars claim that judicial and legislative failure to recognize a person's right to withdraw consent to sexual intercourse at any time exposes adherence to social myths and antiquated attitudes underlying rape laws. One such myth is that of "The Unstoppable Male," or the idea that "once a man engages in sexual activity, it is physically impossible for him to stop."³⁶ The modern articulation of this reasoning is that a man should be allowed "reasonable time to withdraw" after hearing a woman's withdrawal of consent.³⁷ Feminist advocates concede that there may be a need for a reasonable time analysis and that this would be a proper question of fact for a jury.³⁸ Another social myth reflected in the debate on withdrawal of consent is that "promiscuous women suffer less harm," or that someone who has already put herself in a compromising position is not harmed.³⁹ Finally, the most prominent myth in discussions of post-penetration rape is the idea that "initial consent waives autonomy."⁴⁰ This myth is the law in North Carolina, where once a woman initially consents to sexual intercourse or penetration, she has, for the purposes of a rape prosecution, waived the right to withdraw consent.

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On the other side of the debate, critics point to the danger and uncertainty the issue of post-penetration withdrawal of consent raises for men. Specifically addressing the *Baby* ruling, Pennsylvania litigator Julia Morrow argued in a televised interview with CNN Prime News that "this law is literally climbing into bed with people and seeking to micromanage the entire sexual experience. This law is incredibly dangerous and will open up the floodgates."⁴¹ Morrow continued to harp that women should take responsibility for "who they bring home" so that innocent men will not become victims of this new law.⁴² Morrow's concerns about the holding's implications for men are well-founded. Particularly because the specific facts in *Baby* refer to a five to ten second continuation of sex after protest, men may have to be educated to acknowledge that this translates into the need to stop immediately when a sexual partner does communicate a wish to stop in order to avoid criminal penalty.

Aside from this, Morrow's reaction reflects a common willingness to ignore the real harms suffered by actual rape victims by preferring hypothetical concerns for men. Additionally, the law does climb into bed with people, and always has. Out of necessity, and in order to protect people from harm, state legislatures define what constitutes a punishable offense, and courts interpret matters that come before them. Legislatures and courts thereby establish legal definitions of acceptable sexual behavior and carve out rights and boundaries. For example, in all states a

person may freely withdraw consent to sexual intercourse before penetration.⁴³ Even in North Carolina, in situations involving multiple acts of sexual intercourse, consent for a prior act, whether with the defendant or a third party, does not constitute consent for a subsequent act of intercourse.⁴⁴

In the same CNN Prime News interview, former Florida prosecutor Mark Eigarsh opined that *Baby* should only be used as precedent “in the most limited of circumstances by both prosecutors and law enforcement [officials].”⁴⁵ In Eigarsh’s opinion, “no jury in the world will convict” a man for simply not stopping for five seconds during consensual sex.⁴⁶ Eigarsh seems to have been correct, for the time being. In over a year since the final ruling, *Baby* has not been the basis for any successful prosecutions of rape defendants.⁴⁷ During this time, the case has been cited twice, but only as precedent for criminal procedure matters.⁴⁸ In *Hutchinson v. State*, *Baby* clearly applied as precedent: the complaining witness claimed forcible rape by a stranger and the defendant admitted to penetrating the witness “digitally” but claimed he stopped when she changed her mind.⁴⁹ However, the decision failed to address the issue of post-penetration withdrawal of consent entirely and only cited *Baby* for the Maryland standard of evaluating harmless error to a defendant on an evidentiary ruling.⁵⁰

IV. IMPLICATIONS

Understandably, the “five to ten seconds” timeframe upon which *Baby* was convicted is the key source of public outcry. However, the facts of the case were more complicated than the media would suggest. *Baby* testified that he placed himself between the victim’s legs while the two were in the backseat of the victim’s car and merely attempted to penetrate her with his penis, but failed.⁵¹ The complaining witness testified that *Baby* did penetrate her vagina with his penis.⁵² The victim testified that first another man forced himself upon her in the car. Then *Baby* made advances towards her and verbally made it clear that she could not leave until he was finished with her.⁵³ The victim said that *Baby*’s attempts to penetrate her with his penis hurt her, so she

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yelled at him, told him to stop, and even attempted to push him off of her but *Baby* continued to push his penis for about five seconds after the witness asked him to stop.⁵⁴ Only a construction of the facts in the light most favorable to the defendant could negate a clear indication that an unwanted sexual assault occurred upon an unwilling victim.

Most cases involving the issue of post-penetration withdrawal of consent consist of a similar fact pattern. The complaining witness makes allegations of forcible rape and the criminally accused claims that there was no sexual intercourse, or if there was, that it was consensual and he stopped after she asked him to. Prosecutors almost never pursue rape charges in cases involving the purely hypothetical “we knew each other, we were both into it, now she’s claiming rape because she’s angry with me or embarrassed about what she did” scenario against which opponents of post-penetration withdrawal of consent in rape laws warn.

Most interestingly, the media did not pick up on the fact that the defendant walked away as a free man. In order for the Maryland Court of Appeals to articulate a new rule that effectuates a human being’s right to exercise free will and choose to stop engaging in intercourse, it had to release a previously convicted rapist onto the streets. Indeed, “The Five Second Rule” does raise a host of concerns such as abuse of litigation and Constitutional Due Process concerns for perpetrators who have to be put on notice of the law. However, such concerns are beyond the scope of this article. As the public record indicates, future rape convictions are unlikely in instances where the victim changed his or her mind in the throes of sex. Further, this kind of conviction will depend on the ability of the prosecution to show that the perpetrator continued with intercourse despite the victim’s clear verbal or behavioral cues to stop. As in *Baby*, a complaining witness may have to assert that the defendant caused her pain in order to aid in successful prosecution. The ability to withdraw consent can be viewed either as a triumph for women’s rights or as a potential floodgate for litigation that infringes upon the rights of innocent men. In over a year, the predicted “flood” has been less than a leaky faucet. The effects of the “new” Maryland standard of post-penetration withdrawal of consent remain to be seen.

ENDNOTES

*Mary has a B.A. from the University of North Carolina and will receive her J.D. from WCL in 2010. Thanks to all who have made this possible.

¹ *State v. Baby*, 946 A.2d 463, 486 (Md. 2008).

² *Id.* at 467.

³ See SUSAN ESTRICH, *REAL RAPE* 29 (Harvard Univ. Press) (1987) (“Female nonconsent has long been viewed as the key element in the definition of rape.”).

⁴ BLACK’S LAW DICTIONARY (8th ed. 2004) (Westlaw).

⁵ *Id.*

⁶ MD. CODE ANN., CRIM. LAW § 3-303 (a)(1) (West 2008).

⁷ *Id.* at § 3-303 (d)(1).

⁸ See Amy McLellan, Comment, *Post-penetration Rape – Increasing the Penalty*, 31 SANTA CLARA L. REV. 779, 780 (1991) (coining the term “rape”).

⁹ Meg Garvin & Megan McGill, *No Means No: The Need for Vigilance in Sexual Assault Law*, NAT’L CRIME VICTIM L. INST. NEWS at Lewis & Clark L. Sch., Spring/Summer 2007, at 6 (citing Amy McLellan, Comment, *Post-Penetration Rape – Increasing the Penalty*, 31 SANTA CLARA L. REV. 779).

¹⁰ 720 ILL. COMP. STAT. 5/12-17(c) (2004 Supp.) (“A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct”).

¹¹ The other state is North Carolina. *State v. Way*, 254 S.E.2d 760, 762 (N.C. 1979).

¹² MD. CODE ANN., CRIM. LAW § 3-307 (b) (West 2008)

¹³ *State v. Baby*, 946 A.2d 463, 471 (Md. 2008).

ENDNOTES CONTINUED

- ¹⁴ *Id.*
¹⁵ *Id.*
¹⁶ *Id.*
¹⁷ *Id.* at 472.
¹⁸ *Id.*
¹⁹ *Id.*
²⁰ *Id.*
²¹ 414 A.2d 1266 (Md. 1980).
²² *Baby*, 946 A.2d at 473.
²³ *Id.* at 478 (citing *Battle*, 414 A.2d at 1269).
²⁴ 75 P.3d 750 (Kan. Ct. App. 2003).
²⁵ *Id.* at 756.
²⁶ *Baby*, 946 A.2d at 486.
²⁷ *Id.*
²⁸ *Id.*
²⁹ *Id.* at 475.
³⁰ See 720 ILL. COMP. STAT. 720 5/12-17(c); *McGill v. State*, 18 P.3d 77 (Alaska Ct. App. 2001); *In re John Z.*, 60 P.3d 183 (Cal. 2003); *State v. Siering*, 644 A.2d 958 (Conn. App. Ct. 1994); *State v. Bunyard*, 75 P.3d 750 (Kan. App. 2003); *State v. Robinson*, 496 A.2d 1067 (Me. 1985); *State v. Jones*, 521 N.W.2d 662 (S.D. 1994).
³¹ Most scholarly literature assumes a female victim, because while rape is perpetrated against both sexes, the majority of rape victims continue to be females. See e.g., Garvin & McGill, *supra* note 9, at 3.
³² *State v. Way*, 254 S.E.2d 760, 762 (N.C. 1979).
³³ Erin G. Palmer, *Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-Penetration Rape Should be a Crime in North Carolina*, 82 N.C. L. REV. 1258, 1259 (2004).
³⁴ *Robinson*, 496 A.2d at 1071.
³⁵ *McGill*, 18 P.3d at 84.
³⁶ Garvin & McGill, *supra* note 9, at 7; see also Palmer, *supra* note 33, at 1276.
³⁷ *In re John Z.*, 60 P.3d 183, 187 (Cal. 2003).
³⁸ Garvin & McGill, *supra* note 9, at 7.
³⁹ See *id.* at 8; see also *People v. Vela*, 172 Cal. App. 3D 237, 243 (1985) (overruled by *In re John Z.*, 60 P.3d at 186).
⁴⁰ See Garvin & McGill, *supra* note 9, at 8.
⁴¹ Interview of Julia Morrow, CNN Prime News, <http://www.cnn.com/video/#/video/bestoftv/2008/04/22/mg.morrow.eiglarsh.int.cnn> (CNN Online Video broadcast Apr. 2008) (last visiting August 19, 2009) [hereinafter CNN].
⁴² *Id.*
⁴³ *State v. Way*, 254 S.E.2d 760, 761-62 (N.C. 1979).
⁴⁴ See *id.*
⁴⁵ CNN, *supra* note 41.
⁴⁶ *Id.*
⁴⁷ The author is unaware of whether any unsuccessful attempts have been made by prosecutors.
⁴⁸ See *Cruz v. State*, 963 A.2d 1184, 1189 (Md. 2009) (discussing ways to address central questions to the case presented to a deliberating jury); *Hutchinson v. State*, 958 A.2d 284, 288 (Md. 2008) (discussing the Maryland standard for evaluating harmless error).
⁴⁹ 958 A.2d at 285.
⁵⁰ *Id.* at 288.
⁵¹ *State v. Baby*, 946 A.2d 463, 469-470 (Md. 2008).
⁵² *Id.* at 467.
⁵³ *Id.*
⁵⁴ *Id.* at 467-68.



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