RECENT DEVELOPMENT

EVANS V. STATE: SECTION 142 OF THE MARYLAND PUBLIC SAFETY ARTICLE OF THE MARYLAND CODE DID NOT CONTAIN A PENALTY PROVISION NOR A RELATED PENALTY; THEREFORE, THE ACT OF OBLITERATING, REMOVING, OR ALTERING A MANUFACTURER'S IDENTIFICATION MARK OR SERIAL NUMBER ON A FIREARM WAS NOT A CRIME.

By: James Robinson

The Court of Appeals of Maryland held that no crime exists when a criminal statute lacks an internal or corresponding penalty provision. *Evans v. State*, 420 Md. 391, 23 A.3d 223 (2011). Specifically, the court held that because the statute prohibiting the removal of a firearm's identification mark or number contained no internal or related penalty provision, due to legislative oversight, it did not constitute a crime. *Id*. at 414, 23 A.3d at 236.

In 2007, Leroy Evans, Jr. ("Evans") was indicted on eleven drug and firearm counts in the Circuit Court for Prince George's County. Count Nine of the indictment charged Evans with violating section 5-142 of the Public Safety Article of the Maryland Code, which prohibited the "obliteration, removal, change, or alteration of a manufacture's identification mark or number on a firearm." A jury convicted Evans on Count Nine and the court sentenced him to five years incarceration, running consecutively to the sentence for another count.

Evans appealed his five-year sentence for Count Nine to the Court of Special Appeals of Maryland. He argued that the trial court erred in imposing a punishment for his violation of section 5-142 of the Public Safety Article. However, the Court of Special Appeals of Maryland affirmed the trial court's conviction and sentence, holding that Evans' removal of the serial number from the handgun amounted to illegal possession of a regulated firearm and that a five-year prison term was justified under the penalty provision in section 5-143(b) of the Public Safety Article. In response, Evans filed a petition for a writ of certiorari to the Court of Appeals of Maryland. The writ was granted to determine whether his conviction under section 5-142 and his sentence under section 5-143(b) were proper.

The Court of Appeals of Maryland began its analysis by emphasizing that generally, criminal statutes must contain language that bans specific behavior and prescribes a penalty for the prohibited act. *Evans*, 420 Md. at 397, 23 A.3d at 226. Without an assigned penalty, the forbidden

conduct is not a crime. *Id*. at 397-98, 23 A.3d at 226 (citing WAYNE R. LAFAVE, CRIMINAL LAW § 1.2(d), at 12 (5th ed. 2010)). The court based their reasoning on the basic principle that a criminal statute should be reasonably explicit in order to put an ordinary person on notice of the prohibited conduct and penalty for such behavior. *Evans*, 420 Md. at 398, 23 A.3d at 226 (citing *Gargliano v. State*, 334 Md. 428, 445 n.16, 639 A.2d 675, 638 n.16 (1994)).

Although typically located within the criminal statute, the court acknowledged that the lack of an internal penalty provision does not necessarily inhibit a statute's ability to criminalize conduct. *Evans,* 420 Md. at 398-99, 23 A.3d at 226-27. The court identified situations where a criminal statute may reference another statute for punishment or refer to a separate catch-all statute, to ensure that a person is punished in a prescribed way. *Id.* (citing LAFAVE, CRIMINAL LAW § 1.2(d), at 12-13). Additionally, a statute may classify behavior as a misdemeanor or felony with another statute, indicating the permissible punishment for each classification. *Evans*, 420 Md. at 398-99, 23 A.3d at 227.

The court also cited a previous case in which the penalty provision for the forbidden conduct of possessing unstamped cigarettes was located under a different title of the Tax-General Article. *Evans*, 420 Md. at 399, 23 A.3d at 227 (citing *Chen v. State*, 370 Md. 99, 803 A.2d 518 (2002)). The court held that the two sections, despite their different locations within the Maryland Article, could be read *in pari materia* so that the penalty provision was applicable to the statutory provision. *Evans*, 420 Md. at 399, 23 A.3d at 227 (citing *Chen*, 370 Md. at 110, 803 A.2d at 524).

Similarly, the State argued that the penalty provision found in section 5-143 is linked to the prohibited conduct proscribed by section 5-142. *Evans*, 420 Md. at 405-06, 23 A.3d at 230-31. In addressing this assertion, the court relied on principles for statutory interpretation. *Id*. at 400, 23 A.3d at 228 (citing *Ray v. State*, 410 Md. 384, 978 A.2d 736 (2009)). According to these principles, the court first considered the plain language of the statute giving meaning to each word, sentence, and clause. *Evans*, 420 Md. at 400, 23 A.3d at 228 (citing *Ray*, 410 Md. at 404-05, 978 A.2d at 747-48). When the language is still ambiguous, the court then looks to the legislative history, intent, and overall statutory scheme. *Evans*, 420 Md. at 400-01, 23 A.3d at 228 (citing *Ray*, 410 Md. at 404-05, 978 A.2d at 747-48).

Applying these principles, the court first compared the language that described the forbidden conduct in section 5-142(a) to the language in section 5-143(a). *Evans*, 420 Md. at 401-02, 23 A.3d at 228-29. The court observed that section 5-142(a) prohibited the removal or obliteration of the manufacturer's identification mark or number, while section 5-143(a) addressed the specific actions of "illegal sale, rental,

transfer, purchase, possession, or receipt." *Id*. at 405, 23 A.3d at 230. According to the court, which cited Black's Law Dictionary and Merriam-Webster's Collegiate Dictionary, the actions listed in the two statutes are not synonymous. *Id.* at 405, 23 A.3d at 230-31.

The court also focused on the fact that the two statutes varied in their basic applicability. *Evans*, 420 Md. at 401-02, 23 A.3d at 228-29. Specifically, section 5-142 referred to "firearm" while section 5-143(b) referred to "regulated firearms," a much narrower class of firearms, which excludes shotguns and rifles. *Id*. The court found this distinction meaningful and pointed out that the legislature could have easily remedied the inconsistency as it had with other statutes. *Id*. at 404, 23 A.3d at 230.

Considering the State's argument that the legislative history of sections 5-142 and 5-143 promoted a reconciliation of the two provisions, the court expanded its focus on the actions of the legislature. *Evans*, 420 Md. at 406, 23 A.3d at 231. A thorough recitation of the legislative history of the two statutes revealed that section 5-142's statutory predecessors always contained an internal penalty or explicitly referenced the penalty provision of another statute. *Id*. at 406-13, 23 A.3d at 231-35. However, in its 2003 effort to recodify sections of the Public Safety Article and assign each statute an internal penalty provision, the legislature unintentionally omitted the penalizing language from section 5-142. *Id*. at 411-12, 23 A.3d at 234-35.

The court ultimately rejected the State's arguments and determined that the absence of an internal penalty provision and the legislature's failure to amend the term "firearm" to "regulated firearm," revealed that section 5-142 was accidentally "orphaned" from a penalty provision. *Evans*, 420 Md. at 413-14, 23 A.3d at 235-36. Although the error was clearly a legislative oversight, the court stated that it could not add or correct the language. *Id*. at 414, 23 A.3d at 236 (citing *Graves v. State*, 364 Md. 329, 772 A.2d 1225 (2001)). As such, the court held that section 5-142 did not constitute a crime and accordingly reversed the conviction and vacated the sentence as to Count Nine. *Evans*, 420 Md. at 414, 23 A.3d at 236.

Applying strict statutory interpretation consistent with the basic principles of criminal law, *Evans* held that a person must be on notice as to specific prohibited conduct and its accompanying penalty, otherwise there is no crime. This holding also reinforces the separation of powers principle. Although the court recognized that the absent penalty provision was a result of legislative oversight, it was unwilling to correct the mistake because doing so would equate to lawmaking, a power reserved to the legislature. *Evans* places defense attorneys on notice that clients may have been convicted and sentenced for non-criminal conduct if they committed the act of obliterating, removing, or altering the serial

number on a firearm during the time when there was not a prescribed penalty. Finally, prosecutors and judges should be aware that charging defendants with this offense is improper and until the legislature remedies the error, dismissal of the charge is the appropriate recourse.