University of Baltimore Law Forum

Volume 16
Number 2 *Winter, 1986*

Article 11

1986

Recent Developments: Bailey v. State: Pre-Trial Disclosure Extended to Non-Maryland Police Officer

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tion arose in *Leuschner v. State*, 41 Md. App. 423, 397 A.2d 622, *cert. denied*, 285 Md. 731, *cert. denied*, 444 U.S. 933 (1979). In that case, an undercover State Police officer had been placed in the defendant's jail cell under false pretenses. Statements made by the accused were held admissible because they were not made in response to interrogation. The *Hamilton* court distinguished its situation from that in *Leuschner*.

The court's decision in *Hamilton* is sure to delight law enforcement personnel. The use of "jail plants," which has long been a favored investigatory tactic, now has the court's official stamp of approval. This tactic, though, is not without its share of criticism. One court has stated that "[t]he frustration of the prosecuting authorities is understandable. There is, however, no excuse for this questionable conduct, which might result in reversal in a closer case." *Flittie v. Solem*, 751 F.2d 967 (8th Cir. 1985). *But see* Kamisar, *Brewer v. Williams, Messiah, and Miranda; What Is "Interrogation"? When Does It Matter?*, 67 Geo. L. J. 1, 69 (1978).

–Edward B. Lattner

Bailey v. State: PRE-TRIAL DISCLOSURE EXTENDED TO NON-MARYLAND POLICE OFFICER

In *Bailey v. State*, 303 Md. 650, 496 A.2d 665 (1985) the Court of Appeals of Maryland held that oral statements which the state intended to use at trial and which had been made by the defendant to out-of-state police were statements made by the defendant to a state agent within the meaning of Md. Rule 4-263(b)(2) (formerly Rule 741(b)(2)).

The appellant, Bailey, was charged with having committed a robbery with a deadly weapon on September 29, 1983. Along with other property alleged to have been taken from the victim was a 1967 Ford Mustang. Bailey and a companion were arrested later that day in possession of the Mustang on the New Jersey Turnpike by Officer Jenkins, of the New Jersey State Police.

On February 16, 1984, the state said that Bailey had made no oral or written statements known to them at that time. The defendant then formally requested, pursuant to Md. Rule 4-263(b), that the state submit a copy of the substance of each statement made by the defendant to a "state agent" that the state intended to use at trial. The state did not respond, leaving intact its position that no statement had been made. The state did, however, list Officer Jenkins as a witness it intended to call.

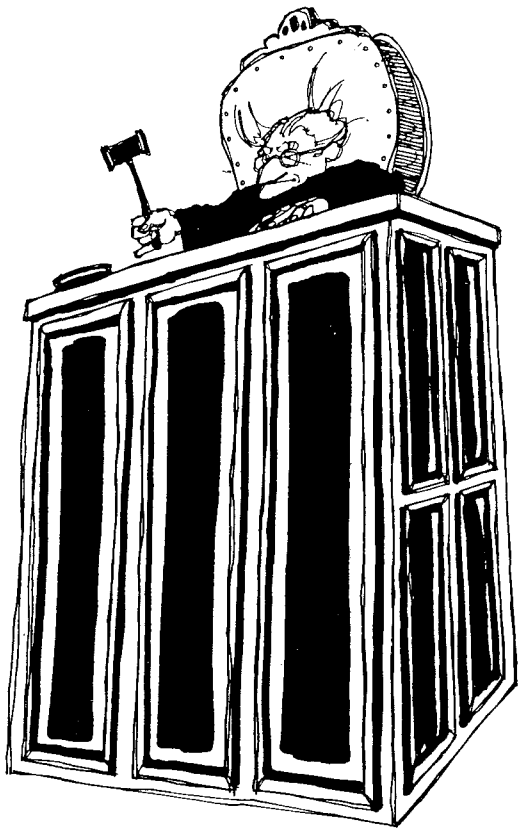
At trial, during the opening statement, the prosecution made reference to and described the prearrest statement made by the defendant to Officer Jenkins. The defense objected based on the state's failure to disclose this statement prior to trial. The trial court ruled there was no discovery violation because Officer Jenkins was not a "state agent" within the meaning of that phrase as used in Maryland Rule 4-263.

The court of appeals granted certiorari to decide whether the statements made by the defendant to non-Maryland police officers which the state intended to use at trial, were discoverable under Md. Rule 4-263.

In support of the trial court's ruling, the state made three arguments. First, the state argued that Md. Rule 4-263 is not applicable to agents of another sovereign. The court rejected this argument noting that the inter-relationship between subsections (a) and (b) of the rule require a different interpretation than that posited by the state in this case. Md. Rule 4-263(a) requires certain disclosures to be made by the state without the defendant's request. Subsection (b) deals with those matters discoverable on request by the accused, including those made to a "state agent." Md. Rule 4-263(b)(2). However, under the 'old rule', subsection (a) contained the following scope provision, conspicuously absent from subsection (b): "the State's Attorney's obligations under *this section* extend to material and information in the possession or control of . . . any others who have participated in the investigation . . . of the case and who . . . with reference to the particular case have reported to his office." Rule 741(a)(3) (emphasis added). If the state's contention was correct, the state would be forced to disclose the statement because subsection (a) would not be limited to "state agents." The defense however, would not be able to acquire the substance of the statement under subsection (b) because it would be limited to "state agent." In addition, most motions to suppress are based on federal constitutional violations in obtaining the evidence. These violations may be made by either state or federal agents. Clearly, the state's interpretation of Md. Rule 4-263 creates anomalous results and frustrates the very purpose of the rule.

The prosecution's second contention was that the Jencks Act, 18 U.S.C. § 3500 (1982), has applicability to the discovery issue here on appeal. The Jencks Act currently requires production of statements "in possession of the United States." The state claimed that the statements here are in possession of state officials, which would not constitute "in the possession of the United States," for purposes of the act.

According to the court, the Jencks Act was inapplicable to the present situation because the scope provisions of 4-263 clearly prove a contrary intent. The court,



again, made reference to the scope provision of Rule 741(a)(3), noting that in reenactment the provision had been moved from subsection (a)(3) to subsection (g) and now reads "obligations of the State's Attorney under *this Rule.*" Md. Rule 4-263(g) (emphasis added). "This change merely presents more clearly the intent of the predecessor, Md. Rule 741(a) and does not represent an enlargement of the obligations of a State's Attorney in furnishing disclosure." 303 Md. at 651, 496 A.2d at 668.

Finally, the state argued that the trial court did not abuse its discretion in deciding to admit Officer Jenkin's testimony and in permitting prosecutor's reference to it in his opening remarks. Alternatively, the state claimed that if there was error, it was not prejudicial. The court, once again, rejected this contention, drawing an analogy between this case and *Colter v. State*, 297 Md. 423, 466 A.2d 1286 (1983). *Colter* involved the portion of the discovery rule dealing with the identity of alibi witnesses and rebuttal-to-alibi witnesses. The court held that the practice of the judge excluding testimony from these nondisclosed witnesses was an abuse of discretion. In the instant case, however, the trial judge ruled there was no discovery violation, the question was never reached as to what sanction, if any, should be applied. The court went on to explain that there was a discovery violation in this case and whether or not it was prejudicial, turns on two things. The first is whether Bailey would have moved to suppress upon obtaining the statements; the second is whether that motion to suppress would have been successful.

Based on the above reasoning, the court remanded the case without affirmance or reversal, mandating that the trial court undertake a process potentially involving three steps. First, the trial judge will realize that there was a discovery violation. He shall consider the defendant's objection as of the time it was made and then determine the appropriate remedy. If exclusion is the proper remedy, then a new trial will be granted. If exclusion is not necessary, then the judge proceeds to step two.

Next, a suppression hearing should be held if the defendant moves to suppress on other grounds. At that hearing, a determination of whether to exclude or not must be made. Again, if exclusion is the appropriate remedy a new trial must be granted.

Step three involves the determination of prejudice. If exclusion was not the appropriate remedy in the suppression hearing, the state must then prove beyond a reasonable doubt that there was no prejudice or the judge shall grant a new trial.

The court's holding in *Bailey* serves two purposes. First, it furthers the rationale behind Md. Rule 4-263; that of requiring the state to disclose statements, therefore apprising the defendant of the evidence against him, and forcing the defense to file motions to suppress prior to trial. Second, the ruling clearly lays out a three step analysis for the trial court to follow in evaluating possible discovery violations under the rule.

–Lori S. Simpson

Sedima, S.P.R.L. v. Imrex Company, Inc.: THE SUPREME COURT GIVES ITS APPROVAL TO THE USE OF THE CIVIL RICO PROVISIONS

In *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 105 S.Ct. 3275 (1985), the Supreme Court examined the utilization of the private civil action provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO" or "Act"), 18 U.S.C. §§ 1961-1968 (1970). The Court reversed the decision of the Court of Appeals of the Second Circuit and may serve to greatly expand the use of the private civil action provisions of RICO.

In 1979, Sedima, a Belgian corporation, entered into a joint venture agreement with Imrex to provide electronic components to another Belgian corporation. Under the terms of the agreement, the buyer was to order the parts through Sedima, and then Imrex was to obtain the parts in this country and ship them to Europe. The net proceeds were to be split between Sedima and Imrex. However, Sedima became convinced that Imrex was presenting inflated bills, thereby cheating Sedima out of its fair share of the proceeds by collecting for nonexistent expenses.

In 1982, Sedima filed suit in the Federal District Court for the Eastern District of New York against Imrex, setting forth several common law claims. In addition, Sedima filed claims under the civil action provisions of RICO, pursuant to § 1964(c). Two counts alleged violations of § 1962(c), based on the predicate acts of mail and wire fraud. The third count alleged a conspiracy to violate § 1962(c).

The district court dismissed the RICO counts for failure to state a claim. The court held the requirement of § 1964(c) that the jury be "by reason of a violation of section 1962", means that it must be different in kind from the direct injury resulting from the predicate acts of racketeering activity. *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 574 F. Supp. 963 (E.D.N.Y. 1983). The court further held the complaint must allege a "RICO-type injury", which was some type of distinct racketeering or competitive injury. *Id.* at 965.

The Court of Appeals for the Second Circuit affirmed the district court's decision