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Recent Developments: Cobey v. State: Chromosome Variant Analysis Inadmissible to Match Alleged Rapist to Victim's Aborted Fetus

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tion by entering a judgment in favor of one of the students. The general rules according to which the sufficiency of evidence is tested on appeal are the same for a directed verdict as for a judgment n.o.v. *Id.* at 66-67, 533 A.2d at 15-16.

Through its holding in *Campbell*, the Court of Special Appeals of Maryland effectively restrained a trial judge's authority, while ensuring that a plaintiff is not simply subjected to the prejudices of the trial judge. The defenses of assumption of the risk and contributory negligence were preserved as viable options for plaintiffs.

—*Stephanie A. Babb*

Cobey v. State: CHROMOSOME VARIANT ANALYSIS INADMISSIBLE TO MATCH ALLEGED RAPIST TO VICTIM'S ABORTED FETUS

In a case of first impression, the Court of Special Appeals of Maryland in *Cobey v. State*, 73 Md. App. 233, 533 A.2d 944 (1987), has held that results acquired by a technique known as Chromosome Variant Analysis (C.V.A.) cannot be used as evidence to support the possibility that an alleged rapist fathered the victim's fetus.

On the evening of September 4, 1985, a woman drove her 1985 blue Subaru automobile to Northwest Branch Park. After parking her car, she went for a walk on a trail. While she was walking, the woman heard someone coming from behind and stepped aside. A man grabbed her, threw her off the trail into the woods and threatened to kill her if she screamed. He forced her to have oral sex with him, raped her, and then had anal sex with her, all against her will. Afterwards, he took the keys to her car and drove off.

On September 27, 1985, Appellant, Kenneth S. Cobey was ordered by the police to pull over and stop at a traffic observation checkpoint on Kennedy Street in the District of Columbia. Although Appellant had a valid Maryland driver's license he failed to produce the registration. The police impounded the car and after issuing the appellant two traffic tickets they allowed him to leave. Further investigation by a police auto theft unit revealed that the car appellant had been driving was the victim's 1985 blue Subaru which had been taken from Northwest Branch Park 23 days earlier. On September 30, 1985, Appellant was arrested by Montgomery County Police.

During the early part of October, 1985, the victim learned that she was pregnant and testified at trial in the Circuit Court for Montgomery County that the only possible source of her pregnancy was the rape. On October 21, 1985, the victim procured an abortion and with her permission, the police took possession of the aborted fetus. The fetus and blood samples from the victim and Appellant were flown to Dr. Susan Olson, a cytogeneticist at the Oregon Health Sciences University. There she performed a technique known as Chormosome Variant Analysis (C.V.A.) to determine whether Appellant might be the man who fathered the fetus.

Appellant was brought to trial in July of 1986. Although this resulted in a mistrial, the judge had denied Appellant's motion to exclude Dr. Olson's testimony before the mistrial was declared. At Appellant's second trial, the judge once again declined to relitigate the issue and permitted Dr. Olson to testify concerning the results of the C.V.A. *Cobey*, 73 Md. App. at 236, 533 A.2d at 946.

In *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978), the Court of Appeals of Maryland adopted the holding of *Frye v. United States*, 293 F. 1013 (D.C. Cir., 1923) which created the *Frye-Reed* test. The test requires that "before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field." *Id.* at 237, 533 A.2d at 946 (quoting *Reed v. State*, 283 Md. 374, 381, 391 A.2d 364, 368 (1978)). Appellant contended that C.V.A. had not been generally accepted as reliable in the relevant scientific community; therefore, the testimony derived from the results of C.V.A. were inadmissible. Under the *Frye-Reed* test, the proponent of a new scientific test bears the burden of producing evidence to establish the general acceptance of the technique. *Id.* at 238, 533 A.2d at 946 (citing *Thompson v. Thompson*, 285 Md. 488, 497, 404 A.2d 269, 274 (1979)). At trial, the court held that the State had met its burden under the *Frye-Reed* test and it was this determination that was at issue before the appellate court.

In reviewing the trial court's admissibility of evidence established by C.V.A., the court had to resolve two threshold issues: first, whether the court is bound to consider only evidence in the record which was before the trial court, and second, what standard of review should be applied to the trial court's decision. Although the court in *Reed*, did not address the issue of whether appellate review should be limited to materials specifically set forth in the record, the court's holding indicated that available legal and scientific commentaries could be taken into consideration even if not part of the record. *Id.* at 238, 533 A.2d at 947.

In *Cobey*, the Court of Special Appeals of Maryland also concluded that the standard of review applicable to the trial court's finding of general acceptance is whether the finding was against the weight of the evidence as opposed to whether it was clearly erroneous. The court based its conclusion on the fact that the court of appeals in *Reed* conducted its own examination of the evidence and concluded that spectrography was not generally accepted as reliable, seeming to place no weight on the trial court's contrary finding. *Id.* at 239, 533 A.2d at 947.

At trial, the judge held a hearing out of the jury's presence to determine whether Dr. Olson would be allowed to testify

about the results of the C.V.A. performed on the victim, Appellant, and the fetus. At the hearing, Dr. Olson testified that medical genetics is the study of diseases associated with inherited characteristics and that cytogenetics is a subspecialty concentrating on chromosome structures and abnormalities. The doctor explained that C.V.A. is a process through which cytogeneticists look at chromosome variants. *Id.* at 241, 533 A.2d at 948. Where paternity is in dispute, as it was before this court, the variants of the child are compared to that of the mother's, determining which chromosomes the mother contributed. The child's remaining chromosomes are then compared to the alleged father. If any of the child's variants matches a variant of the father, then the man could have contributed all of the chromosomes, but if there is no match then the man is excluded from paternity. *Id.*

At Appellant's second trial, Dr. Olson was allowed to testify that C.V.A. showed that the non-maternal (alleged father's) variants of the fetus all matched the variants exhibited by Appellant's chromosomes. Hence, it was highly unlikely that anyone else had the same variants as Appellant. *Id.* at 244, 533 A.2d at 950.

The court of special appeals was not satisfied, however, that C.V.A. had been generally accepted as reliable in the relevant scientific community, and therefore, the State failed to meet its burden under the *Frye-Reed* test. In support of their finding the court took special note of the fact that Dr. Olson failed to produce any journal articles or textbooks which showed that C.V.A. is believed to be as reliable in paternity cases as she asserts and failed to name any of the other cytogeneticists she claimed share her views. *Id.* As a result, the court reversed Appellant's conviction and on remand the State would not be permitted to introduce evidence which was based upon C.V.A. The court, however, limited its holding by stating that the use of cytogenetic evidence "is subject to reconsideration in future cases if evidence can be produced showing that C.V.A. is generally accepted as reliable in establishing paternity." *Id.* at 245, 533 A.2d at 951.

The prosecution faces many difficulties when attempting to prove the guilt of an alleged rapist. In *Cobey*, the court has contributed to this already difficult process by excluding reliable and possibly determinative evidence. Reliability should be based on the degree of accuracy and not on the number of articles or textbooks that have been written in response to the proposed subject matter.

—Deborah Dykstra

Martin v. State: TRIAL JUDGE MUST INFORM PRO SE DEFENDANT THAT HE CANNOT BE FORCED TO TESTIFY

In *Martin v. State*, 73 Md. App. 597, 535 A.2d 951 (1988), the Court of Special Appeals of Maryland established the scope and limits of the duty owed by a trial court to a *pro se* criminal defendant. The court held that when a criminal defendant chooses to proceed to trial without the assistance of counsel, it is incumbent upon the trial judge to inform the defendant that he cannot be forced to testify and that his failure to testify cannot be used against him. Once these warnings are given, however, and the defendant nevertheless elects to take the witness stand on his own behalf, the court is under no obligation to inform him that he may be subject to cross-examination and impeachment.

Appellant, Thomas Eugene Martin, was arrested and charged for unlawful possession of controlled paraphernalia after a hypodermic syringe was discovered in a pickup truck he had been driving. Martin waived his right to counsel and chose to proceed *pro se* in a jury trial in the Circuit Court for Washington County. After the State concluded the presentation of its case, the trial judge informed Martin that