University of Baltimore Law Forum

Volume 18
Number 3 *Spring, 1988*

Article 16

1988

Recent Developments: Martin v. State: Trial Judge Must Inform Pro Se Defendant That He Cannot Be Forced to Testify

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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

he had a right to testify but that he was under no obligation to do so. Additionally, the defendant was told that if he did not testify, it would not be held against him.

Determined to speak in his own defense, Martin took the stand and offered his side of the story. Martin stated that he was "helping a friend move some furniture and was unaware that the syringe was in the truck." *Id.* at 600, 535 A.2d at 952-53. On cross-examination, the prosecution attempted to impeach Martin's credibility by revealing a prior conviction for the possession of marijuana with the intent to distribute. Apparently unpersuaded by Martin's testimony, the jury found him guilty and the court sentenced him to four years in prison.

On appeal, the issue was whether the advice and warning given were so inadequate in apprising the appellant of his fifth amendment right against self-incrimination that a prejudicial error was committed. Martin contended that his right against self-incrimination was violated because his election to testify was not based on a knowing and intelligent waiver. Specifically, he argued that as a *pro se* defendant, the trial court had a duty to inform him that "(1) if he took the witness stand, he could be impeached, and (2) the jury would be instructed as to the presumption of innocence if he elected not to testify." *Id.* at 600, 535 A.2d at 953. Thus, the more narrow question was whether the lack of such knowledge deprived the defendant of his ability to make an informed and intelligent waiver of his right against self-incrimination.

The court of special appeals viewed the issue presented as one which essentially involved a question of balancing a *pro se* criminal defendant's right to be sufficiently informed and the need to avoid imposing an onerous burden on the trial court. Thus, while it is necessary to provide an unrepresented defendant with sufficient advice to insure that an election to testify is voluntary and informed, the trial judge has no obligation to serve as defense counsel. As noted, "[t]he question then becomes, how much should the court say? How far should the court go?" *Id.* at 601, 535 A.2d at 953.

In *Stevens v. State*, 232 Md. 33, 192 A.2d 73 (1962), *cert. denied*, 375 U.S. 886 (1963), the Court of Appeals of Maryland recognized that "[m]ost jurisdictions ... have held that failure by a trial court to advise a defendant not represented by counsel of his right to refuse to take the witness stand constitutes prejudicial error." *Id.* at 39, 192 A.2d at 77 (citing 79 A.L.R. 2d 643 (1961) and cases therein). The reason this requirement is imposed upon the trial court is to protect a defendant's fifth amendment right to be free from compulsory self-incrimination. As stated in *State v. McKenzie*, 17 Md. App. 563, 593, 303 A.2d 406, 422 (1973), unrepresented "[d]efendants should not be called to the stand by the prosecutor or the judge; nor should they be led to believe that they are required or expected to take the stand."

Thus, to call a *pro se* defendant to the witness stand without informing him of his right to refuse to testify constitutes reversible error. To avoid such error, it is essential that the defendant waive his privilege against self-incrimination. Furthermore, in that the privilege against self-incrimination is a fundamental constitutional right, the waiver must be a knowing and intentional one. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Curtis v. State*, 284 Md. 132, 143, 395 A.2d 464, 470 (1978). The gist of the *Johnson* rule is that for a waiver to be valid, the defendant must be reasonably aware of what protection the right involves and must voluntarily choose to forego that protection. It is clear then, that when a defendant chooses to testify on his own behalf, he waives his fifth amendment right only if he has sufficient knowledge as to the meaning of such a wavier. Without sufficient knowledge, the defendant cannot make a voluntary and intelligent decision to forego the protection and safeguards afforded by the right. Thus, where a defendant is not assisted by counsel, it is incumbent upon the court to insure that his decision to testify is an informed and voluntary one.

In the instant case, the trial judge simply informed the defendant that he had a right to remain silent and that if he chose to exercise that right, it would not be held against him. The court of special appeals affirmed the lower court and refused to require that *pro se* defendants should be warned of the perils of cross-examination and impeachment. In order to address both the interests and rights of *pro se* defendants and the obligations imposed upon a trial judge, the court concluded that a minimum amount of advice was all that was required. The court explained its holding as follows:

> Trial judges are commanded by both Constitutionally-based case law and specific rules of procedure (see Md. Rule 4-215) to inform unrepresented defendants of their right to counsel, to encourage them to obtain counsel, and to warn them of the hazards of proceeding without counsel. If a defendant knowingly and voluntarily elects to disregard that advice and proceed without counsel, he cannot expect the judge to become his lawyer. Informing him that he has a right not to testify and that no inference of guilt can be drawn if he exercises that right suffices, we think, to allow him to make an intelligent—if not a wise—decision whether to testify. To go further, however, might involve the court, however subtle, in influencing that decision.

Martin, at 603, 535 A.2d at 954.

The information which a trial judge must provide to a *pro se* defendant is now clear. Once the minimum required warnings are given, however, the unrepresented defendant who elects to take the stand will be deemed to have voluntarily executed a valid waiver of his right against compulsory self-incrimination.

—*Gerard M. Waites*

Prout v. State: WITNESS' PRIOR CONVICTIONS OF CRIMES INVOLVING MORAL TURPITUDE NOT ADMISSIBLE FOR IMPEACHMENT PURPOSES

In *Prout v. State*, 311 Md. 348, 535 A.2d 445 (1988), the Court of Appeals of Maryland held that prior convictions of a witness may be admissible for impeachment purposes only if the conviction was for either an infamous crime or a lesser