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Recent Developments: Prout v. State: Witness' Prior Convictions of Crimes Involving Moral Turpitude Not Admissible for Impeachment Purposes

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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

crime which bears upon the witness' credibility. In reaching its holding, the court affirmed a decision of the Circuit Court for Baltimore City which refused to admit proof of a witness' convictions of prostitution and solicitation for prostitution (solicitation) for impeachment purposes.

In *Prout*, Lewis D. Prout, the appellant, was charged with assault and robbery with a deadly weapon. Subsequent to the selection of the jury, Prout's counsel made a motion *in limine* to advise the court of his intention to cross-examine the complainant, the state's sole witness, regarding her prior convictions. *Id.* at 351, 535 A.2d at 446. Specifically, Prout's counsel sought to cross-examine the complainant for her convictions of grand theft, shoplifting, prostitution, failure to appear in court, solicitation, resisting arrest, violation of probation, and contempt of court. *Id.* The state objected to the motion *in limine* stating that "there was nothing in the complainant's record to indicate that the offenses listed therein resulted in convictions." *Id.* at 352, 535 A.2d at 447.

Upon the trial judge's questioning, the prosecutor admitted that he was uncertain whether the aforementioned offenses resulted in actual convictions. Accordingly, the trial judge decided that he would not permit any evidence for impeachment purposes of any prior offenses which did not result in convictions. The judge stated further that he would allow the complainant to be cross-examined about her theft and shoplifting charges if it was shown that she was in fact convicted for these offenses. The judge cautioned, however, that

> [if] it turns out that this woman has been convicted of theft and shoplifting..., then on cross-examination when you ask her about her prior convictions, do not ask her what she has been convicted of. Lead her and say, "Is it not true that you have been convicted of theft and shoplifting?" *et cetera*, so... we will not inadvertently get into other inadmissable convictions.

Id. at 353, 535 A.2d at 447.

During the trial, Prout's counsel cross-examined the complainant by asking her leading questions about her grand theft and shoplifting convictions but neither proffered nor mentioned her prostitution and solicitation convictions. *Id.* The jury found Prout guilty of assault and Prout appealed to the Court of Special Appeals of Maryland. In an unreported per curiam opinion, the court of special appeals affirmed the decision of the circuit court. *Id.* (citing *Prout v. State*, No. 79, September Term, 1985; filed September 23, 1985). The court of appeals then granted certiorari to both parties to review the questions presented in the case.

On appeal, Prout's counsel asserted that the trial court erred in excluding the complainant's prostitution and solicitation convictions for impeachment purposes, maintaining that the crimes involved "moral turpitude" and, therefore, the trial judge was without discretion to exclude them. *Id.* at 354, 535 A.2d at 448. The issue presented before the court was whether prior convictions, allegedly involving moral turpitude, are admissible per se for impeaching the credibility of a witness.

The court of appeals addressed this issue by looking at the legislative history of impeachment by prior conviction in Maryland. At common law, the court noted, an individual convicted of an infamous crime was completely disqualified from testifying. In an attempt to eliminate the harshness of this common law rule, the Maryland General Assembly enacted Chapter 109 of the Acts of 1864 which is now embodied in Md. Cts. & Jud. Proc. Code Ann. § 10-905 (1984). *See Prout* at 359, 535 A.2d at 450. This statute provides in pertinent part that "[e]vidence is admissible to prove...the fact of [a witness'] conviction of an infamous crime." *Id.* at 358-59, 535 A.2d at 450. Thus, while a witness convicted of an infamous crime is no longer disqualified from testifying, his testimony is subject to impeachment by his conviction of an infamous crime.

Upon reviewing the legislative history of Md. Cts. & Jud. Proc. Code Ann. § 10-905, the court concluded that "the legislative purpose behind Maryland's impeachment statute requires that the crimes admissible *per se*... be limited to those crimes within the common law definition of infamous' ". *Prout*, at ____, 535 A.2d at ____. At common law, only "treason, felony, perjury, forgery and those other offenses classified generally as *crimen falsi*" were considered infamous. *Id.* at 360, 535 A.2d at 450. (citing *Garitee v. Bond*, 102 Md. 379, 383, 62 A. 631, 633 (1905)). In regard to Prout's moral turpitude argument, the court of appeals stated that the label "moral turpitude" serves no purpose for impeachment purposes in the context of § 10-905 other than acting as an adjective describing those crimes that "our society finds particularly repugnant." *Id.* at 360, 535 A.2d at 451. The court held, therefore, that the phrase "moral turpitude" does not provide another class of crimes separate and apart from infamous crimes under Md. Cts. & Jud. Proc. Code Ann. § 10-905 (1984). Furthermore, the court noted that no Maryand case concerning impeachment by prior conviction accorded any significance to the term "moral turpitude" until *Ricketts v. State*, 291 Md. 701, 436 A.2d 906 (1981). *See Prout*, at 361-62, 535 A.2d at 451.

In *Ricketts*, the trial court allowed the prosecutor to impeach Ricketts' testimony with his prior conviction for indecent exposure. *Id.* at 362, 535 A.2d at 451. On appeal, Ricketts' asserted that under Maryland law, only infamous crimes, crimes of moral turpitude and lesser crimes affecting the credibility of the witness were admissible for purposes of impeachment. *Id.* Ricketts argued that because his indecent exposure conviction did not fall into any of these categories, the trial court erred in allowing the state to use his prior conviction against him for impeachment purposes. *Id.*

In response to Ricketts' argument, the court of appeals held that a previous conviction for purposes of impeachment need not be limited to infamous crimes or those involving moral turpitude but could also include convictions for a lesser crime *if* the convictions bear on the witness' credibility. *Id.* at 362, 535 A.2d at 452 (citing *Ricketts*, at 707-08, 436 A.2d at 909-10) (emphasis added)). Unfortunately, in its effort to be thorough, the court of appeals in *Ricketts*, by its own admission, "grafted onto the [impeachment] statute the concept of a crime of moral turpitude." *Id.* at 362-63, 535 A.2d at 452. However, upon re-examining the legislative history of Md. Cts. & Jud. Proc. Code Ann. § 10-905 (1984), the *Prout* court concluded that the legislature had no intention of creating a class of infamous crimes known as crimes of moral turpitude. *Id.* at 363, 535 A.2d at 452. As a result, the court overruled *Ricketts* to the extent that it was inconsistent with its holding in *Prout*. The court then upheld the circuit court's refusal to allow Prout's counsel to impeach the complainant by her convictions for prostitution and solicitation, finding that such convictions were not for infamous crimes but rather for lesser crimes, the admissibility of which was within the discretion of the trial judge.

Thus, the *Prout* court makes clear that a prior conviction is admissible *per se* for impeachment purposes if it was a conviction for an infamous crime at common law (i.e., a felony or a crimen falsi), whereas, a lesser crime may be used for impeachment purposes *only* if it reflects on the witness' truthfulness and veracity, the determination of which is to be left to the sound discretion of the trial judge.

—Mark Scott Ledford