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Recent Developments: Kosmas v. State: Unsolicited Statement by Witness Inadmissible as Evidence of Defendant's Refusal to Take Lie Detector Test

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because the Supreme Court had twice held that proceedings for the issuance of search warrants are not open. *Id.* (citing *Franks v. Delaware*, 438 U.S. 154, 169 (1978); *United States v. United States Dist. Court*, 407 U.S. 297, 321 (1972)). Although the Supreme Court addressed the issue in reference to the public, the court of appeals stated that "the common sense reason why proceedings for search warrants are not open to the public convinces us that the same principles apply when the press seeks disclosure." *Id.*

After rejecting the Sun's claim of a first amendment right of access, the court examined the press's common law right of access. The court held that at common law the press and the public have a qualified right to judicial records. *Id.* at 65 (relying on *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978)). "Federal Rule of Criminal Procedure 41(g) facilitates observance of this right by directing the judicial officer to file all papers relating to the search warrant in the clerk's office." *Id.*

The court held that "the common law qualified right of access to warrant papers is committed to the sound discretion of the judicial officer who issued the warrant." *Id.* The court noted that an abuse of discretion standard applied to the judicial officer's decision. When someone seeks to inspect sealed papers, the judicial officer may deny access if sealing is "essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 65-66 (quoting *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1984)). In the instant case, the magistrate and the district court both decided that the public interest in the investigation of crime outweighed the Sun's interest in publishing the affidavit. However, the court of appeals noted that "conclusory assertions are insufficient to allow review; specificity is required." *Id.* at 66. Moreover, the district court failed to examine the affidavit. *Id.*

Upon denying access to sealed papers, the judicial officer must consider alternatives. "This ordinarily involves disclosing some of the documents or giving access to a redacted version." *Id.* In the instant case, the magistrate complied by unsealing the warrants and the returns. However, the district court erroneously declined the government's offer to disclose a redacted version of the affidavit. *Id.*

The court of appeals resolved what was an ongoing dispute between the press and the government. By recognizing the Sun's common law right of access to the affidavit, the court broadened the freedom of speech and granted greater privileges to the press. No longer can a judicial officer rely on the government's position and summarily seal warrant papers. Rather, the judicial officer must exercise independent judgment in reaching such a decision.

—Richard E. Guida

Kosmas v. State: UNSOLICITED STATEMENT BY WITNESS INADMISSIBLE AS EVIDENCE OF DEFENDANT'S REFUSAL TO TAKE LIE DETECTOR TEST

The Court of Appeals of Maryland recently reversed a defendant's murder conviction "because the introduction of evidence that he refused to take a lie detector examination prejudiced his case beyond the point that an instruction to disregard the testimony reasonably could be expected to effect a cure." *Kosmas v. State,* 316 Md. 587, 589, 560 A.2d 1137, 1138 (1989). In so ruling, the court of appeals reversed the court of special appeals. Moreover, this case reflects the continuing trend in Maryland that evidence of a defendant's refusal to submit to a lie detector exam is inadmissible and remains inadmissible even if it is the result of a witness's unsolicited "blurt out."

Stanley Kosmas suspected his wife Maria was committing adultery. He hired a private detective, retired Baltimore City police sergeant Edward Mattson, to follow her. In early 1985, Mattson discovered Maria and her employer in a hotel room. Two months later, Kosmas saw his wife with the same man in her car. In December, 1985, Maria was discovered murdered within a mile of her home.

The eldest of the Kosmas children testified that his father subjected Maria to verbal and physical abuse and that Kosmas once threatened to kill her if she left him. *Id.* at 590, 560 A.2d at 1139. Mattson testified that Kosmas offered him $10,000 to murder Maria. *Id.* Kosmas, who had an excellent reputation in his business and home communities, denied these allegations.

The case turned on Mattson's testimony at trial. He testified that on December 20th, Maria had been missing for four days. That morning he went to the defendant's home where he found a detective interviewing Kosmas. While Mattson was on the stand, the prosecutor asked him if he heard the content of the conversation between Kosmas and the detective. Mattson responded that it was "[j]ust the typical police interview" in which the detective asked Kosmas if he had seen his wife or knew of her whereabouts. *Id.* at 592, 560 A.2d at 1140. The prosecutor next asked Mattson, "[a]nd then you talked to the defendant?" *Id.* Mattson replied, "[t]hen I talked to [Kosmas]. . . . I said, 'Would you take a lie detector?' He said no." *Id.* The defendant's attorneys immediately requested a mistrial. The trial judge denied the motion, then instructed the jury to ignore any testimony concerning a lie detector test. *Id.* at 591-92, 560 A.2d at 1139-40.

The court of appeals first noted that evidence that the defendant refused to submit to a lie detector test was inadmissible. *Id.* at 592-93, 560 A.2d at 1140. Having established this premise, the court concentrated on the damage done to the defendant by the inadmissible evidence and the extent to which the jury instruction cured this damage. *Id.* at 594, 560 A.2d at 1141. As a result, the precise question before the court was "whether the prejudice to the defendant was so substantial that he was deprived of a fair trial." *Id.* at 595, 560 A.2d at 1141.

The recent decision of *Guesfeird v. State,* 300 Md. 653, 480 A.2d 800 (1984), established factors to help answer this question. These factors include:

> whether the reference to a lie detector was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; whether a great deal of other evidence exists; and whether an inference as to the result of the test can be drawn.

Kosmas, 316 Md. at 594, 560 A.2d at 1141 (quoting *Guesfeird,* 300 Md. at 659, 480 A.2d at 803).

The state emphasized that the lie detector test was mentioned only once and that this reference was unsolicited by the prosecutor. The court, however, responded that the state was not entirely blameless for this "blurt-out" because Mattson testified on behalf of the state. *Id.* at 595, 560 A.2d at 1141. The court suspected that Mattson's fifteen years as a police officer should have made him aware of the inadmissibility of his statement. The court was also wary of Mattson's motives for disclosing this evidence since he was once suspected for the murder. *Id.* at 595-96, 560 A.2d at 1141-42.

Nonetheless, the court was more con-

cerned with whether Kosmas' credibility was a crucial issue. The state's case depended on circumstantial evidence that the defendant mistreated his wife and that he tried to put out a contract for her murder. The court said the evidence of Kosmas' refusal to take a lie detector test "cut to the heart of the defense." *Id.* at 597, 560 A.2d at 1142.

Finally, the curative effect of the jury instruction was addressed. Judge McAuliffe opined that the instruction was insufficient to cure the substantial prejudice poisoning the jurors' opinion of the defendant. He relied on *Bruton v. United States,* 391 U.S. 123 (1968) to support this position. In that case, the Supreme Court said, "[t]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Kosmas,* 316 Md. at 597, 560 A.2d at 1143 (quoting *Bruton,* 391 U.S. at 135).

Accordingly, *Kosmas v. State* indicates that Maryland courts are becoming increasingly intolerant of any evidence that a defendant refused to take a polygraph exam. This case also warns prosecutors not to ask open-ended questions on direct examination unless they are confident that the information solicited will not be substantially prejudicial to the defendant.

—Gregory R. Smouse

Wilson v. Morris: EVIDENCE OF PRIOR AND SUBSEQUENT PATIENT MONITORING POLICIES IS ADMISSIBLE TO DEMONSTRATE THE STANDARD OF CARE

In *Wilson v. Morris,* 312 Md. 284, 563 A.2d 392 (1989), the Court of Appeals of Maryland held that evidence of prior and subsequent procedures for transporting patients was relevant and admissible as a consideration of the required standard of care. Thus, the court of appeals affirmed the decision of the court of special appeals, which had remanded the case for a new trial.

Irene Ragland, appellee, brought an action against a hospital director and a county health department receptionist as a result of personal injuries sustained while she was a patient in the Western Maryland Adult Day Care Treatment Center ("the Center"). *Wilson,* 312 Md. at 287, 563 A.2d at 393. Ragland was returning from a doctor's office adjacent to the Center when Ann G. Wilson, the receptionist, temporarily left Ragland unattended in a wheelchair at the top of a handicapped access ramp. When the wheelchair rolled down the access ramp, Ragland fell forward on to the pedals and fractured two vertebrae. Approximately eighteen months prior to the accident, and again, beginning the day after the accident, the Center's policy was for an attendant to remain with a patient while transporting the patient between the two facilities. *Id.* at 288, 563 A.2d at 393. At the time of the accident, however, the Center's policy was to have an attendant accompany the patient to and from the adjacent facility, but not to wait there during the course of treatment. *Id.* at 288 n.5, 563 A.2d at 393 n.5. The trial court refused to admit the evidence of the Center's prior and subsequent practices and concluded that such evidence was irrelevant and inadmissible. *Id.* at 288, 563 A.2d at 393. The court of special appeals reversed the trial court's ruling. The intermediate appellate court held that the Center's prior and subsequent procedures demonstrated a pattern of conduct which made those procedures relevant and admissible. *Id.* at 288, 563 A.2d at 394 (citing *Morris v. Wilson,* 74 Md. App. 663, 668, 539 A.2d 1151, 1153-54 (1988)).

The Court of Appeals of Maryland granted certiorari to consider the law under which evidence of prior and subsequent practices is admissible to prove an alleged breach of the applicable standard of care. *Id.* at 289, 563 A.2d at 394.

The issue concerning the admissibility of prior policy evidence was one of first impression in Maryland. Consequently, the court examined the case law of other jurisdictions. In *Welsh v. Burlington N. R. R.,* 719 S.W.2d 793 (Mo. App. 1986), an injured employee provided evidence that a railroad company had abandoned a policy that supplied employees with carts for the purpose of loading propane tanks. The Missouri Court of Appeals held that the testimony regarding the previous use of the carts to load propane tanks was relevant and probative on the issue of whether the defendant was negligent in failing to provide reasonably safe employee equipment. *Wilson,* 317 Md. at 292, 563 A.2d at 396 (citing *Welsh,* 719 S.W.2d at 797). In another case, a woman tripped and fell upon a store entrance floor mat. *Id.* (relying on *Swiler v. Baker's Super Market, Inc.,* 277 N.W.2d 697 (Neb. 1979)). In *Swiler,* the evidence revealed that on wet and rainy days, it was the store owner's usual practice to tape the mat to the floor to protect against slipping. The Supreme Court of Nebraska ruled that the trial court properly allowed the plaintiff to introduce evidence relative to the store-owner's past practice of taping or securing the mat in question to the floor to prevent bulging. *Wilson,* 317 Md. at 294, 563 A.2d at 396 (citing *Swiler,* 277 N.W.2d at 700).

Applying the holdings in *Welsh* and *Swiler,* the court of appeals held the prior practice of the Center was relevant under the circumstances. *Id.* at 295, 563 A.2d at 397. The court also found the evidence of the prior policy a material fact to be considered in analyzing whether the current policy was reasonably safe or whether other methods could have been easily adopted. *Id.* Moreover, the court stated that the trial judge should consider the following test for determining whether prior policies should be allowed as evidence:

> 1) The remoteness in time of the prior policy;
>
> 2) The degree and significance of the change in relation to the substantive issues presented;
>
> 3) The reasons for the change in policy; and
>
> 4) The likelihood that any prejudicial effect of the proffered evidence will outweigh the probative value of the evidence.

Id. Thus, the court held that the Center's prior policy of remaining with patients taken for medical care was probative in revealing the Center's knowledge and perception of its duty to patients. *Id.* at 294-95, 563 A.2d at 397.

Next, the court discussed whether subsequent policy evidence was admissible to prove the scope of the duty of care owed to the plaintiff. The court recognized that there was "a standard of care exception" to the general rule excluding evidence of subsequent remedial measures when such evidence "provides circumstantial proof that the applicable standard of care had not been met at the time of the accident or other occurrence in question." *Id.* at 298, 563 A.2d at 395 (quoting 5 L. McLain, Maryland Practice: Maryland Evidence § 407.1 (1987, 1989 Supp.)). The court's opinion stated that although a jury should not consider the evidence of the immediate change in patient monitoring policies as an admission of negligence, it was admissible as evidence of the standard of care required under the circumstances. *Id.* at 301, 563 A.2d at 400. Therefore, the court ruled that the trial judge erred in precluding counsel from offering the