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Recent Developments: Rosenberg v. Helinski: A Witness May Reiterate the Substance of His Testimony to Journalists outside a Courtroom, and His Remarks Remain Legally Privileged

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mined that the balancing test was intended to apply to both infamous crimes and crimes affecting witness credibility. *Id.* at 271, 619 A.2d at 109. Second, the court considered the legislative history underlying the adoption of the rule to determine the drafters' intent. It found that the Standing Committee on Rules of Practice and Procedure sought to replace the old, dangerously rigid rule, by establishing a "broadly-applied" balancing test to limit the admissibility of all prior convictions. *Id.*

Next, the court acknowledged the differences between the new Maryland rule and the federal rule on impeachment by prior conviction. The court noted that the federal rule provides for automatic admission of crimes of dishonesty or falsehood and is, therefore, quite inflexible. *Id.* at 273, 619 A.2d at 110 (citing Fed. R. Evid. 609(a)(2)). Alternatively, the Maryland rule requires a preliminary balancing test for all prior conviction evidence. The court concluded that requiring the trial court to use the balancing test for both types of prior convictions is more consistent with the State of Maryland's policy of permitting courts to regulate the admissibility of all evidence. *Beales,* 329 Md. at 273, 619 A.2d at 110.

In applying its interpretation of Rule 1-502 to the facts before it, the court of appeals recognized the strong presumption in favor of upholding the trial court's decision. Nevertheless, after reviewing the record as a whole, the court decided that the trial judge had failed to adequately weigh the probative value against the risk of unfair prejudice in admitting the evidence of Lawrence's prior conviction for theft, as required by Rule 1-502. *Id.* at 274, 619 A.2d at 110. The trial judge had demonstrated his unawareness of the new rule by alluding to the prosecutor's "right" to impeach by prior conviction and by failing to inquire about the date of the theft conviction. *Id.*

Finally, the court of appeals found that the trial judge's error was not harmless. It held that because of the factual nature of the arguments from both parties, the jury's verdict depended primarily on its perception of the witnesses' credibility. *Id.* at 275, 619 A.2d at 111. Furthermore, it noted that due to the difficulty in determining credibility, harmless error analysis would require the court to speculate as to what weight the jury assigned to Lawrence's testimony. The court, therefore, could not find beyond a reasonable doubt that the trial judge's error was harmless. Accordingly, it remanded the case to the circuit court for a new trial.

Beales v. State represents the first attempt by the Court of Appeals of Maryland to interpret the new Maryland Rule 1-502 governing impeachment of witnesses by prior conviction. As interpreted, Rule 1-502 gives the trial court considerably broader discretion in ruling on the admission of this type of impeachment evidence. Because the trial judge hears all the testimony and experiences witness demeanor first hand, this discretion will probably lead to more equitable results. Moreover, although a bright-line rule may provide notice as to the admissibility of prior convictions for impeachment of witnesses, this rule will give opponents of the impeachment evidence greater capacity to argue against its admissibility. As a result of this decision, Rule 1-502 will lead to increasing amounts of testimony and greater weight given to the testimony of witnesses or parties with prior criminal convictions.

-Kelly A. Casper

Rosenberg v. Helinski: A WITNESS MAY REITERATE THE SUBSTANCE OF HIS TESTIMONY TO JOURNALISTS OUTSIDE A COURTROOM, AND HIS REMARKS REMAIN LEGALLY PRIVILEGED.

In *Rosenberg v. Helinski,* 328 Md. 664, 616 A.2d 866 (1992), the Court of Appeals of Maryland addressed a case of first impression regarding the issue of whether remarks made to reporters outside a courtroom by a witness are privileged. The court held that the psychologist's remarks concerning his expert testimony at a child abuse hearing, even though defamatory to the father's personal reputation, are absolutely privileged, and the psychologist is protected from liability.

The instant case arose out of a divorce hearing before the Circuit Court for Baltimore County wherin Mr. Helinski requested unsupervised visitation with his two-year old daughter. Mrs. Helinski opposed his request, alleging that Mr. Helinski had sexually abused the child. As evidence of the abuse, Mrs. Helinski offered the expert testimony of a pediatrician at Baltimore's Mercy Hospital, who testified that the child had a well-healed scar which was diagnostic of a sexual abuse injury. Holding that there was no connection linking the child's injury to Mr. Helinski, the trial court granted the divorce, and allowed Mr. Helinski unsupervised visitation with his daughter.

Despite the court's ruling, Mrs. Helinski denied visitation of the child to Mr. Helinski, and the couple appeared again in a hearing before the Circuit Court for Baltimore County. At this hearing, Mrs. Helinski offered the testimony of Leon Rosenberg, Ph.D., a child psychologist and associate professor of medical psychology and pediatrics at Johns Hopkins University School of Medicine. Dr. Rosenberg's testimony was offered to prove that the abuse had occurred, and as a result, Mr. Helinski should not have unsupervised visitation

of the child.

Dr. Rosenberg testified that he had evaluated the child three times, and included in his evaluation the report of the pediatrician who had initially examined the child, as well as that of a Child Protective Services social worker who had interviewed the child. The basis of his testimony was that the child expressed fear of her father because he had hurt her in the genital area and was afraid of being hurt there again, and that Rosenberg believed the child was "honest and spontaneous" and not coached.

At the end of the hearing, Dr. Rosenberg was confronted on the courthouse steps by a television camera crew and a Baltimore station WJZ newswoman who asked him questions regarding the case. The only record of the conversation was the two minute and fifteen second story which aired that evening on the six o'clock local news. The story "identified the Helinskis by name," incorporated artist's courtroom sketches of Rosenberg and the parties, as well as stated the allegations made by Mrs. Helinski that were ultimately confirmed by Dr. Rosenberg in his on-camera interview. The story also contained three statements of Dr. Rosenberg wherein he reaffirmed his testimony regarding his evaluation of the child's injury.

As a result of the newscast, Mr. Helinski brought a defamation action against Dr. Rosenberg in the Circuit Court for Baltimore City. Dr. Rosenberg subsequently filed a motion for summary judgment. The court, granting Dr. Rosenberg's motion, held that "Rosenberg's comments were protected by the privilege given to those who recount in-court testimony." Mr. Helinski appealed, and the Court of Special Appeals of Maryland reversed and remanded the case to the circuit court. The Court of Appeals of Maryland subsequently granted Dr. Rosenberg's petition for certiorari, and reversed the decision of the court of special appeals.

First, the court of appeals held that in order to recover for defamation, the plaintiff must establish that the defendant made the defamatory statement, which was false, to a third person, that the defendant was legally at fault, and that the plaintiff suffered harm. *Rosenberg v. Helinski,* 328 Md. 664, 675, 616 A.2d 866, 871 (1992) (citing *Hearst Corporation v. Hughes,* 297 Md. 112, 120-125, 466 A.2d 486, (1983)). The court found that Dr. Rosenberg's statements to the reporters were defamatory, as they tended "to expose [Mr. Helinski] to public scorn, hatred, contempt or ridicule, thereby discouraging others . . . from having a good opinion . . . of [him]." *Rosenberg,* 328 Md. at 675, 616 A.2d at 872 (quoting *Batson v. Shiflett,* 325 Md. 684, 722-23, 602 A.2d 1191 (1992)). The court of appeals held, however, that the general rule in Maryland is that "statements made by a witness during the course of judicial proceedings are absolutely privileged, and . . . cannot serve as the basis for an action in defamation." *Rosenberg,* 328 Md. at 676, 616 A.2d at 872 (citing *Odyniec v. Schneider,* 322 Md. 520, 526, 588 A.2d 786 (1991)). Moreover, the witness is protected by this absolute privilege even if the statement was false, the motive malicious, or unreasonable. *Rosenberg,* 328 Md. at 676, 616 A.2d at 872 (quoting *Odyniec v. Schneider,* 322 Md. at 527, 588 A.2d 786).

The Court of Appeals of Maryland examined the reasons for this absolute privilege from liability, and found that the "need for witnesses to speak freely in court, without intimidation by the possibility of civil liability" outweighed a person's right to bring a defamation action against the witness for statements made by the same witness while testifying. *Rosenberg,* 328 Md. at 677, 616 A.2d at 872, (quoting *Odyniec v. Schneider,* 322 Md. at 528, 588 A.2d 786)).

The court also addressed the lesser, conditional privilege given to people who report "in-court proceedings containing defamatory material" if the reports are "fair and substantially correct or substantially accurate accounts of what took place." *Rosenberg,* 328 Md. at 677, 616 A.2d at 872 (quoting *McBee v. Fulton,* 47 Md. 403, 417, 426 (1878)). The privilege from liability, however, is conditional upon the report being found fair and substantially correct. *Rosenberg,* 328 Md. at 678, 616 A.2d at 873 (citing *Brush-Moore Newsp. v. Pollitt,* 220 Md. 132,138, 151 A.2d 530 (1959)). The court of appeals applied the conditional privilege to Dr. Rosenberg's statements to the news media, and found that Dr. Rosenberg had acted as an agent, and "recounted events at a judicial hearing [which was] entirely open to the public." *Rosenberg,* 328 Md. at 680, 616 A.2d at 873-74. The court held that Dr. Rosenberg could invoke this conditional privilege, due to the fact that journalists as well as non-journalists are treated the same under the Constitution with respect to potential liability for defamation when exercising their First Amendment right of free speech. *Id.* at 680, 616 A.2d at 874 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders,* 472 U.S. 749, 773 (1985) (White,J., concurring) (First Amendment gives no more protection to the press that it does to others exercising their freedom of speech)).

In concluding the aforementioned, the court recognized that this case came down to whether Dr. Rosenberg's statements to the news media were fair and accurate. Finding that Dr. Rosenberg's statements were virtually identical to his prior testimony and the fact he reported to the media about his testimony and the "most significant substance of the hearing" lead the court to conclude that the statements were accurate and fair. *Rosenberg,* 328 Md. at 681-82, 616 A.2d at 874-75.

The Court of Appeals of Maryland, however, added a caveat to the "fair reporting privilege." The person making the statement "cannot confer this privilege upon himself by making the original defamatory [statement], and then reporting to other people what he had stated." *Id.* at 684, 616 A.2d at 876 (quoting *Restatement (Second) of Torts*

§ 611, cmt. c). The court found that this caveat did not apply to Dr. Rosenberg because there was nothing in the record to suggest that he intended in bad faith to harm Mr. Helinski by his testimony or the statements made to the news media. Dr. Rosenberg testified as an expert witness and his statements to the news media "accurately and fairly recounted the substance of his testimony." *Rosenberg*, 328 Md. at 686, 616 A.2d at 877.

Rosenberg v. Helinski is significant because the Court of Appeals of Maryland addressed an issue which is certain to arise again; the right of the public to reports of judicial proceedings, and the legal privilege extended to those who make fair and accurate reports.

-Bonnie S. Laakso

Dawson v. State: ENFORCEMENT OF STATE'S DRUG-FREE SCHOOL ZONE STATUTE DURING NON-SCHOOL HOURS HELD CONSTITUTIONAL.

In *Dawson v. State*, 329 Md. 275, 619 A.2d 111 (1993), the Court of Appeals of Maryland upheld the constitutionality of the state's drug-free school zone statute, which prohibits the distribution of controlled dangerous substances within 1,000 feet of a school's perimeter. After reviewing whether the statute's objective of protecting children from the dangers of the drug trade is constitutionally achieved by the statute's broad imposition of criminal liability on offenders during non-school hours, the court found that the statute does not offend the due process requirements of either the United States Constitution or the Maryland Constitution.

During the course of an undercover drug operation in Harford County, county deputies purchased a quartergram of cocaine from Stacey Eugene Dawson ("Dawson"). The transaction occurred within 1,000 feet of Halls Cross Elementary School, at approximately 9:30 p.m. After the sale, a uniformed officer returned to the scene and arrested Dawson.

Dawson was indicted by the Grand Jury for Harford County for unlawful distribution of a controlled dangerous substance, under Md. Ann. Code art. 27, § 286(a)(1) (1957, 1992 Repl. Vol.), and for unlawful distribution of a controlled dangerous substance within 1,000 feet of school property, under Md. Ann. Code art. 27, § 286D ("§ 286D"). A jury in the Circuit Court for Harford County found Dawson guilty on both counts. Dawson appealed to the Court of Special Appeals of Maryland, but prior to its review of the case, the Court of Appeals of Maryland granted certiorari.

After first rejecting Dawson's contention that the evidence was insufficient to convict him, the court focused on Dawson's argument that § 286D, Maryland's drug-free school zone statute, violated the equal protection clauses of both the United States Constitution and the Maryland Declaration of Rights. Dawson argued that the statute's objective of protecting children from exposure to drug activities was not served by its imposition of criminal liability during non-school hours. The court explained that Dawson was alleging a "direct" substantive due process challenge by claiming that the statute was not reasonably related to the goal it intended to serve and that in the face of such a claim, a determination must be made whether the statute "'bears a real and substantial relation to the public health, morals, safety, and welfare of the citizens of this state.'" *Dawson*, 329 Md. at 283, 619 A.2d at 115 (quoting *Bowie Inn v. City of Bowie*, 274 Md. 230, 236, 335 A.2d 679, 683 (1975)). If this test is satisfied, the statute will be upheld.

In applying this test to § 286D, the court first examined the statutory language and found that the statute was aimed at decreasing schoolchildren's drug use and enriching their educational environment by creating a drug-free school zone. *Dawson*, 329 Md. at 285, 619 A.2d at 116. In addition, the court determined that the statute sought to limit schoolchildren's exposure to the negative environment and crime associated with the drug trade by shielding them from such activity. *Id.* In light of these purposes, the court rejected Dawson's substantive due process challenge and found that a twenty-four hour prohibition against drug activity in school zones was a legitimate method of accomplishing the statute's purposes. *Id.*

The court next considered Dawson's argument that the drug-free school zone statute was overbroad due to its imposition of criminal liability during non-school hours. *Dawson*, 329 Md. at 286, 619 A.2d at 116. The court, however, rejected Dawson's characterization of both school ground activities and the drug market, and found that the presence of children in school areas is not predictable, particularly in light of the