



1983

Recent Developments: Miller v. State

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Law Commons](#)

Recommended Citation

(1983) "Recent Developments: Miller v. State," *University of Baltimore Law Forum*: Vol. 13: No. 2, Article 10.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol13/iss2/10>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

(1971), "the Supreme Court shifted the emphasis from the words themselves to the context in which they were uttered and thereby limited the doctrine as announced in *Chaplinsky*." *Diehl*, 294 Md. at 475, 451 A.2d at 120.

In *Cohen*, the Supreme Court refused to classify the expression "Fuck the Draft" lettered on the back of a jacket worn in a courthouse as "fighting words" because they were not directed to the person of the hearer nor intentionally provoked a given group to hostile action. The Court of Appeals of Maryland applied this narrowed application of the "fighting words" doctrine in *Downs v. State*, 278 Md. 610, 366 A.2d 41 (1976), cert. denied, 431 U.S. 974 (1977). The court in *Diehl* adopted the *Downs* holding stating that "even though the views expressed might be offensive to someone who overheard them, they were not directed to such persons and, as a result, were not under the rubric of fighting words." *Diehl*, 294 Md. at 476-77, 451 A.2d at 121. However, *Diehl*'s words were directed toward someone, specifically, Officer Gavin. The court opted not to address the question whether a different and higher standard applies when the addressee is a police officer.

The court found direction from *Downs*, which "teaches us that the use of the word 'fuck' is not punishable in the absence of compelling reason." *Id.* at 477, 451 A.2d at 122. No such compelling reason was found in this case. The court held that *Diehl* had a right to verbally protest the unlawful exercise of police authority, and the utterance in question "though distasteful, forcefully conveyed the intensity of his objection." *Id.* at 478-79, 451 A.2d at 122. *Diehl*'s words were held to be no more than an emotional and emphatic response to Gavin's order. "In such moments, one man's vulgarity may well be another's vernacular." *Id.* at 479, 451 A.2d at 122.

* * *

State v. Randall Book Corp.

In *State v. Randall Book Corp.*, ___ Md. App. ___, 452 A.2d 187 (1982), the Court of Special Appeals of Maryland reviewed the dismissal of charges against the Randall Book Corporation, where the trial court found Article 27, §416D of the Annotated Code of Maryland to be unconstitutionally vague and overbroad. Section 416D is basically an obscenity statute, although the Maryland Legislature deleted the word "obscene" (primarily due to the confusion in the law on obscenity handed down by the United States Supreme Court). Section 416D, in essence, states that "advertising the human body depicting sado-masochistic abuse, sexual conduct or sexual excitement" is a crime. See *Randall Book Corp.*, ___ Md. App. at ___, 452 A.2d at 188.

The appellate court in *Randall Book Corp.* noted the recent court of appeals' opinion in *Blaine Wilson Smiley v. State*, ___ Md. ___, 450 A.2d 909 (1982) and found that case to be determinative of the constitutional issue before them. In *Smiley*, the court held that Section 416D was enacted to broadly prohibit advertising which depicted obscenity, enabling the court to apply the standards enunciated in *Miller v. California*, 413 U.S. 15 (1973). The court in *Smiley* found that:

[w]hen the *Miller* standards are embodied in section 416D, it becomes patent that the statute is not overbroad and vague. By requiring compliance with the *Miller* standards, "a person of ordinary intelligence [is given] fair notice that his contemplated conduct is forbidden by the statute," and the statute is not "so indefinite that 'it encourages arbitrary and erratic arrests and convictions.'"

Smiley, ___ Md. at ___, 450 A.2d at 912, citing *Colautti v. Franklin*, 439 U.S. 379 (1979).

The primary issue—the constitutional question—raised in *Randall*

Book Corp. was answered fully by the decision in *Smiley*, and the Maryland Court of Special Appeals reversed the trial court's decision and remanded the case against *Randall* for further proceedings.

Miller v. State

In *Miller v. State*, ___ Md. App. ___, ___ A.2d ___ (1982), *Miller* was indicted on charges of robbery with a deadly weapon, kidnapping, rape and various other sex offenses. The charges arose out of an incident that occurred on October 28, 1980. On June 16, 1981 *Miller*'s trial began and he was convicted by June 19, 1981. On appeal, the appellant raised issues based on lack of trial by impartial jury, lack of speedy trial and based on error in permitting a State witness to testify despite non-disclosure of the witness' name during the discovery process.

The appellate court addressed the speedy trial issue first, examining in detail the circumstances surrounding the appellant's arrest and trial in relation to Maryland Rule 746. Rule 746 provides in part that:

a trial date shall be set which shall be not later than 180 days after the appearance or waiver of counsel or after the appearance of defendant before the court pursuant to Rule 723 (hereinafter referred to as the "180 day rule").

Counsel for the appellant first entered his appearance on December 11, 1980 and pre-trial motions were heard on June 9, 1981. The appellant contended that June 9, 1981 constituted the 181st day after appearance of counsel. The court corrected this miscalculation, citing Maryland Rule 8 which in essence requires that the day which triggers the time period is not to be included in the calculation.

Upon further examination of the speedy trial issue, the court found the case of *State v. Lattisaw*, 48 Md. App. 20, 425 A.2d 1051 (1981) to be controlling. As a result of this case, the court held the appellant had

waived his right to a trial within the 180 day rule. The court cited from *State v. Hicks*, 285 Md. 310, 403 A.2d 356 (1979):

The Court of Appeals held that the 120 [180] day trial date requirement of Rule 746 was mandatory and absent extraordinary [good] cause, 'dismissal of the criminal charges is the appropriate sanction' (Bracketed material represents changes in the Rule since the decision in *Hicks*).

Miller v. State, ___ Md. App. ___, ___ A.2d ___ (1982).

The appellant's trial was first scheduled for March 9, 1981, however, at that time there was no court available to hear the case. The case was then assigned to the "move list" which gave it priority over other regularly scheduled cases. The trial judge, in a hearing in chambers attended by appellant, his counsel and the State, postponed the trial until June 8, 1981. The appellate court described the decision to postpone as follows:

He ruled from the bench that because of the magnitude of the 'move list', and the impossibility of keeping all witnesses waiting for weeks, perhaps months to get this case to trial, in his opinion the record demonstrated 'extraordinary cause' to justify a postponement of the June 8th trial date. No objection to this ruling was made by either party.

Id. at ___, ___ A. 2d at ___.

As no objection was raised by the defense at any time, the court held that the defendant had waived his right to the sanctions afforded by the *Hicks* case.

The appellate court next examined the appellant's contention that the jury was not impartial due to the systematic exclusion of young adults. The court held that the appellant failed to comply with Rule 754 as he did not object to the jury array until after completion of the trial in the appellant's motion for a

new trial. Rule 754 states in part that:

A challenge to the array shall be made and determined before any individual juror from that array is examined, but the court for good cause shown may permit it to be made after the jury is sworn but before any evidence is received.

Id. ___, ___ A. 2d at ___.

After studying the information on the composition of the jury array available to the defense, the court concluded that "[w]hatever objection the appellant may have had to the array was obvious to the appellant when the array of jurors first appeared in the courtroom." Thus the appellant's failure to timely challenge the jury array caused a waiver of his right to object later.

The court could have decided this issue solely on the appellant's failure to comply with Rule 754. However, the court's analysis continued on the basis that other cases pending before the court raised the same issue of systematic exclusion. The court went on to examine the constitutionality of the jury selection process stating that the process is presumed constitutional unless proven otherwise. In order to show that the right to trial by jury has been unconstitutionally denied, the appellant must show "(1) that a cognizable group or class of qualified citizens was excluded; (2) the exclusion was systematic and intentional." After considering testimony presented at the appellant's motion for a new trial, the court stated that the appellant had failed to show that the twenty to forty age group is a cognizable group. The court also determined that the appellant had failed to prove a prima facie case of systematic exclusion. Citing the Supreme Court cases, *Castaneda v. Partida*, 430 U.S. 482 (1972) and *Rose v. Mitchell*, 443 U.S. 545 (1979), the court stated that "[t]he Supreme Court has required that improper representation [by a cross-section of the community] must be proven over a significant period of time in order to establish a prima facie case

of unlawful discrimination." Thus, the jury selection process in the appellant's trial was entirely constitutional.

The effect of non-compliance with discovery Rule 741 was raised in the appellant's last issue. The appellant argued that allowing a State witness, whose name had not been disclosed during discovery, to testify constituted reversible error. The court held that although Rule 741 was not strictly complied with, the defense was given an adequate opportunity to talk to the witness during a recess granted by the trial court. The witness' name was also disclosed at the beginning of the trial, at which time the appellant's counsel could have requested a continuance but did not. The defense raised no objection concerning the witness. In the final analysis, the appellate court held that the error was harmless as the purpose of the witness' testimony was merely "cumulative to that of a previous State witness."

In this complete and well reasoned opinion, the Maryland Special Court of Appeals affirmed the judgments below.

BEIGHT BAR REVIEW SCHOOL

CLASSES IN
SILVER SPRING, MARYLAND
REGISTRATIONS ARE NOW BEING
TAKEN FOR THE JULY 1983

MARYLAND BAR EXAM

For Further Information
Contact:

THOMAS L. BEIGHT

594 NORTH FREDERICK AVENUE
GAITHERSBURG, MARYLAND 20760

PHONE 301-948-6555 or
301-460-8350



THE LAW FORUM

**is now seeking
professional articles.**

**For information regarding
submission contact:**

THE LAW FORUM

**Room 200
University of Baltimore
School of Law
Law Center
1420 N. Charles Street
Baltimore, Maryland 21202**

