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Recent Developments: Wildermuth v. State: Defendant's Confrontation Right Not Violated By Allowing Alleged Abused Child To Testify Via Closed Circuit Television

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ALLEGED CONFRONTATION TESTIFY VIA CLOSED CIRCUIT TELEVISION

In *Wildermuth v. State*, 310 Md. 496, 530 A.2d 245 (1987), the Court of Appeals of Maryland held that Courts and Judicial Proceedings Article § 9-102, which allows the testimony of an alleged abused child to be taken via closed-circuit television, does not violate the right of the defendant to confront his accuser. Moreover, the judge must determine that the child's testimony in open court "will result in the child suffering serious emotional distress such that the child cannot reasonably communicate" as a condition precedent to the invocation of § 9-102.

Appellants Wildermuth and McKoy were separately tried and convicted of abusing a child in the Circuit Court for Anne Arundel County. At their respective trials, the judge allowed the alleged child victims to testify via closed-circuit television, pursuant to § 9-102, which provides in pertinent part that:

(a)(1) In a case of abuse of a child as defined in § 5-901 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed-circuit television if: (i) The testimony is taken during the proceeding; and (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.


While the Appellants' cases were pending in the Court of Special Appeals of Maryland, the Court of Appeals of Maryland granted certiorari and consolidated the cases to address the issues raised by both Appellants.

On appeal, the court addressed the issue of whether § 9-102 denies the defendant the right to confront his accuser under the sixth amendment to the United States Constitution and article 21 of the Maryland Declaration of Rights. Both Appellants argued that § 9-102 denies them the right of confrontation. In Wildermuth's case, the judge directed the use of closed-circuit television on the basis that two expert witnesses testified that the child witness would be traumatized if she were to testify in open court. In McKoy's case, the judge allowed the use of closed-circuit television after the child witness was called to testify in open court but became upset and unable to reasonably communicate.

The court had to determine whether actual physical confrontation was within the intended scope of the sixth amendment and article 21.

After discussing the history of the right of confrontation, the court concluded that when the Maryland Declaration of Rights and the sixth amendment to the United States Constitution were adopted, it was generally accepted that witnesses "ordinarily would meet the accused face-to-face in open court." *Wildermuth*, 310 Md. at 506, 530 A.2d at 280. For example, in *Mattix v. United States*, 156 U.S. 257 (1895), the United States Supreme Court noted that the use of physical confrontation was:

"... to prevent depositions or *ex parte* affidavits, such as were sometimes used in civil cases, being used against the prisoner in lieu of personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sift[ing] the conscience of the witness, but of compelling him to stand face to face with the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 504. Similarly, the court in *Crawford v. State*, stated that: "it is the primary object of the constitutional provision requiring confrontation to prevent depositions or *ex parte* affidavits from being used against a person accused of a crime in lieu of personal examination and cross-examination of the witnesses." *Crawford v. State*, 282 Md. 210, 214, 383 A.2d 1097, 1099 (1978).

The court went on to consider the purposes underlying the right of confrontation. It noted Wigmore's view that confrontation is a means to protect full cross-examination as well as to allow the judge and jury the opportunity to observe the witness' "deportment while testifying," which bears on credibility. *Wildermuth*, 310 Md. at 507, 530 A.2d at 281. The advantages from the witness' physical presence are more for the benefit of the tribunal than for the benefit of the accused. Id. Indeed, many courts have found that confrontation does not have to be in the nature of an "eyeball-to-eyeball" encounter between the defendant and his accuser. Id. But the essential purpose of confrontation is to facilitate the search for truth, which ordinarily requires cross-examination and the presence of the witness before the fact-finder and the defendant. Id. at 509, 530 A.2d at 281. The court found that these latter confrontation requirements were satisfied in the present cases since cross-examination did occur and the fact-finders as well as the defendants could view the witnesses during their testimony. Id. at 510, 530 A.2d at 282.

However, the question remained whether the defendants' confrontation rights were denied when the child witnesses were allowed to testify without having to view the defendants. The court examined cases where the denial of a face-to-face challenge was found to violate sixth amendment rights or article 21 of the Maryland Declaration of Rights. For example, in *United States v. Benfield*, the Eighth Circuit held that a procedure under which the witness' deposition was taken via a television monitor in a separate room from the defendant and then later shown to the jury, was a violation of the defendant's sixth amendment rights since "recollection veracity, and communication are influenced by face-to-face challenge." *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979). And in *Dutton v. State*, the court held that the right to confrontation, pursuant to article 21, was violated when the defendant was excluded from the room in which the witness testified. *Dutton v. State*, 123 Md. 375, 91 A. 417 (1914). Thus, the court concluded that the "right of confrontation ordinarily includes ... the right of the accused to be seen by his accuser ..." *Wildermuth*, 310 Md. at 512, 530 A.2d at 282. Moreover, if the accuser must see the defendant face-to-face, the search for truth will be enhanced since it "tends to impress upon the witness the seriousness and solemnity of the occasion, and as a consequence, the necessity for truthful testimony." Id.

Notwithstanding the benefits derived from face-to-face challenges, there are occasions when it is permissible to allow the accuser to testify without having to view the defendant. Essentially, there are limitations to the constitutional right of confrontation. The Supreme Court found support for the proposition in *Ohio v. Roberts*, 448 U.S. 56 (1980), where the transcribed testimony given by a witness during a preliminary hearing was held to have been properly introduced at trial, since the witness was "unavailable," and there was sufficient evidence to show that the testimony was "reliable." Id.

In the present case, the court had to determine whether the "unavailability"...
and "reliability" prongs of the Roberts test were satisfied. Reliability can be established by the ordinary aspects of confrontation such as "cross-examination, testimony under oath, [and the] ability of [the] judge, jury, and accused to view the witness during [his] testimony." Wildermuth, 310 Md. at 515, 530 A.2d at 285. The court found that these factors were satisfied in the present cases. Unavailability can be shown by establishing a sufficient necessity for allowing the child witness to testify without viewing the defendant. But, if the accuser should physically view the accused to enhance reliability, then it must be established that there is an overriding "necessity" for allowing the witness to testify without viewing the defendant, which results in the child's "unavailability" for a face-to-face encounter. Id. at 516, 530 A.2d at 285. The court went on to consider the "epidemic" of child abuse, and the obstacles to effective prosecution of an alleged offender when the principle witness is a young child. The court noted that the victim can be further traumatized by giving testimony, in open court, face-to-face with the alleged abuser. Id. Moreover, the legislature recognized the need to protect the child victim from the trauma associated with open court testimony by enacting § 9-102.

Notwithstanding the desirability of protecting child victims, there must be evidence that the particular child witness will be traumatized by testifying in open court. Id. at 519, 530 A.2d at 286. If there is a finding that the particular child victim will be traumatized by open court testimony, § 9-102 may be invoked and the child victim becomes "unavailable" for open court testimony. Id. But it is the judge who must determine "that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate," in accordance with the standard of § 9-102 (a)(i)(ii). Id. Therefore, subsection (a)(i)(ii) acts as a condition precedent to the general application of § 9-102. Id. at 520, 530 A.2d at 287.

The court had to determine whether the condition precedent of subsection (a)(i)(ii) had been satisfied in both cases. McKoy did not raise the issue of the child witness' ability to communicate in open court, and therefore, the court did not consider the effect of subsection (a)(i)(ii) as applied in his case. Wildermuth, however, raised the issue of whether the condition precedent had been established and the court limited its examination to the finding in his case.

In Wildermuth's case, two expert witnesses testified in general terms that children would find it "hard to respond" to questions in open court or would be "intimidated" which could result in a "greater likelihood of inability to respond." Id. at 521, 530 A.2d at 287. Additionally, the judge neither questioned nor observed the child witness before granting the use of closed-circuit television. Id.

The court concluded that the requisite finding of subsection (a)(i)(ii) had not been established absent a specific showing that the particular child witness would be traumatized such that the child could not reasonably communicate. Id. Moreover, the judge should observe and question the child witness in order to more fairly determine the need to invoke the statute. Id. Also, expert witnesses must be specific and discuss the detrimental effect of open court testifying on the particular child. Id. Since evidence of the necessity of allowing the child witness to testify via closed-circuit television was not established under the standards set forth in Roberts, the court reversed Wildermuth's conviction and remanded for further proceedings.

In McKoy's case, the judge had the opportunity to determine that the child could not reasonably communicate in open court. Therefore, the invocation of § 9-102 was proper, and for the reasons discussed previously, McKoy's conviction was affirmed since his right to confrontation was not violated.

As a result of the holding in Wildermuth v. State, there must be sufficient evidence that the particular child witness will suffer trauma to such an extent that it interferes with the child's ability to communicate before the invocation of § 9-102, and that ordinarily the judge must be given the opportunity to observe and question the child before that finding is made. The question remains whether the court's holding with respect to subsection (a)(i)(ii) is such a high standard that it substantially bars the invocation of § 9-102 and undermines the intent of § 9-102, which taken as a whole, is to "minimize" the trauma associated with open court testimony.

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