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Recent Developments: Davis v. State: Pretrial Silence Is Relevant to the Impeachment of an Alibi Witness's Testimony at Trial

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Davis v. State

In a case of first impression, the Court of Appeals of Maryland held that, in criminal cases, an alibi witness's pretrial silence regarding information that could exculpate a defendant may be used to impeach that witness at trial. More significantly, the court's ruling in *Davis v. State*, 344 Md. 331, 686 A.2d 1083 (1996), established the foundations necessary to allow an inquiry into the impeachment evidence. This decision creates a conditional presumption of impaired credibility because of a witness's prior silence and places upon a defendant the burden of rehabilitating the witness's credibility.

The victim of an attempted robbery identified Tyrone Davis, ("Davis") as the offender. Davis pleaded not guilty and contended that he never attempted to rob the victim. Kabacca Bey ("Bey") took the stand as an alibi witness for Davis. Bey testified that Davis was either with him or within his view at the time that the officer alleged Davis had committed the attempted robbery. The prosecution, in an attempt to impeach Bey for not previously informing the authorities of this exculpatory evidence, cross-examined him, exposing that in fact he was not with Davis at the time of the robbery.

The Circuit Court for Baltimore City found Davis guilty of attempted robbery. Davis appealed the conviction. The Court

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of Special Appeals of Maryland affirmed the decision. The Court of Appeals of Maryland granted certiorari to determine whether the trial court had correctly allowed cross-examination of the witness concerning his failure to inform the authorities of exculpatory evidence prior to the trial.

The court began its analysis by reviewing the holdings of the majority of the courts that have considered whether prior silence may be the basis for impeachment of a witness's testimony at trial. *Davis*, 344 Md. at 335-36, 686 A.2d at 1085. Those courts have recognized that there are instances when pretrial silence is relevant to an alibi witness's credibility. *Id.* If the "natural impulse" of the witness would have been to inform the authorities of exculpatory evidence, then the witness's failure to report such information prior to trial would be seen as a prior inconsistent statement of that witness. *Id.* at 336-37, 686 A.2d at 1085. In the event that a witness's pretrial silence is seen as a prior inconsistent statement, the use of this silence as evidence for impeachment purposes would be

proper. *Id.*

The court next faced the dilemma of how to establish whether this pretrial silence is relevant to a witness's credibility. *Id.* at 338, 686 A.2d at 1086. Although other courts have established a list of foundational requirements that the prosecution must meet, the court of appeals established only limited requirements. *Id.* at 343, 686 A.2d at 1089. In order for the prosecution to be allowed to initiate an inquiry into the impeachment evidence, that party must preliminarily meet one threshold requirement. *Id.* at 338, 686 A.2d at 1086.

The prosecution can meet that requirement by laying a foundation "that the natural response of the witness, assuming the witness was in possession of exculpatory evidence, would have been to disclose that information to the proper authorities." *Id.* at 338, 686 A.2d at 1086. Moreover, it is the trial court's responsibility to conduct a hearing to determine if there is enough evidence presented by the prosecution through direct evidence or permissible through inference to warrant an inquiry into the witness's silence. *Id.* Once this requirement is met, the prosecution then may cross-examine the witness regarding the pretrial silence. *Id.* at 346, 686 A.2d at 1090. The burden is thus placed on the defendant to rebut the prosecution's allegations and rehabilitate the witness by explaining the reasons behind the silence.

Id. Barring an absolute “abuse of discretion” the trial court’s determination that the proper foundation has been laid will not be overturned. *Id.* at 338, 686 A.2d at 1086. After the foundation has been laid and the silence is used as evidence for impeachment, it is ultimately the trier of fact who will determine the credibility of the witness’s testimony.” *Id.* at 339-40, 686 A.2d at 1087.

The court of appeals next applied its reasoning to the instant case and affirmed Davis’s conviction. *Id.* at 348-50, 686 A.2d at 1091-92. The court determined that the prosecution had met its burden of demonstrating a relationship between Davis and Bey, and that because of this relationship it would have been natural for Bey to have informed the authorities of exculpatory information. *Id.* at 348-49, 686 A.2d at 1091. Based on its review of the lower court’s findings, the court of appeals concluded that Bey’s pretrial silence constituted a prior inconsistent statement, and affirmed the prosecution’s use of this silence for impeachment purposes. *Id.*

Although concurring with the decision in this case, Judge Raker expressly denounced the majority’s premise and the application of its newly established test in the instant case. *Id.* at 350-51, 686 A.2d at 1092-93. Judge Raker disagreed with the majority’s assumption that the failure of an alibi witness to report exculpatory information to the authorities necessarily has pro-

bative value in determining that witness’s credibility. *Id.* at 350-51, 686 A.2d at 1092. She rejected the test established by the majority and instead urged the adoption of a test used in other states. *Id.* at 351-52, 686 A.2d at 1093. In reconciling her concurrence with the majority’s holding, Judge Raker reasoned that the error of allowing the cross-examination had been harmless, and thus warranted the affirmation of Davis’s conviction. *Id.* at 350, 686 A.2d at 1092.

In a dissenting opinion, Judge Eldridge vehemently rejected the majority’s rationale and asserted that with the current distrust of government and more specifically the police, it is not surprising that a potential witness would be reluctant to contact the police with any information. *Id.* at 353, 686 A.2d at 1094. Furthermore, Judge Eldridge argued that the relationship between Davis and Bey had been shown to be merely that of acquaintances, and that it was very unlikely that the natural response of such an acquaintance would be to go to the authorities. *Id.* at 355, 686 A.2d at 1095. Judge Eldridge maintained that the use of such a witness’s reluctance against a defendant would “create an unfair presumption in favor of the state.” *Id.* at 357, 686 A.2d at 1095. Judge Eldridge concluded that the trial court had erred in allowing the use of the witness’s pretrial silence for impeachment purposes. *Id.* at 358, 686 A.2d at 1096.

In *Davis v. State*, the court has established the foundation that the prosecution must lay in order to

conduct an inquiry into the reasons for a witness’s pretrial silence. By establishing such a broad foundation, however, the court has facilitated the State’s ability to discredit alibi witnesses. All the prosecution needs to show is that the defendant and the witness are mere acquaintances. Thus, the burden placed on the defendant to rebut this presumption of unreliability is an onerous one that defense attorneys will have to face head on.

