



2014

Recent Developments: Derr v. State: An Expert's Reliance on DNA Analysis Did Not Offend the Confrontation Clause Because the Underlying Report Was Not Sufficiently Formal to Be Considered Testimonial

James Hetzel

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



Part of the [Law Commons](#)

Recommended Citation

Hetzel, James (2014) "Recent Developments: Derr v. State: An Expert's Reliance on DNA Analysis Did Not Offend the Confrontation Clause Because the Underlying Report Was Not Sufficiently Formal to Be Considered Testimonial," *University of Baltimore Law Forum*: Vol. 44 : No. 2 , Article 8.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol44/iss2/8>

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 editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

RECENT DEVELOPMENT

DERR V. STATE: AN EXPERT'S RELIANCE ON DNA ANALYSIS DID NOT OFFEND THE CONFRONTATION CLAUSE BECAUSE THE UNDERLYING REPORT WAS NOT SUFFICIENTLY FORMAL TO BE CONSIDERED TESTIMONIAL.

By: James Hetzel

The Court of Appeals of Maryland held that the defendant's right to confrontation under the Sixth Amendment ("Confrontation Clause") was not invoked when the State presented expert testimony based on DNA testing not performed by the expert because the testing in question lacked the requisite formality to be "testimonial." *Derr v. State*, 434 Md. 88, 73 A.3d 254 (2013). The court further held that a defendant's statutory and constitutional discovery rights were not violated when the trial judge refused to order production of coincidental matches in the FBI's Combined DNA Index System ("CODIS"), as the State was not required to create potentially exculpatory evidence for the defendant. *Id.* at 97-98, 73 A.3d at 259. The court finally concluded that the DNA evidence presented was sufficient to sustain the defendant's conviction and that the trial court did not err in refusing to use the defendant's proposed jury instruction. *Id.*

In December of 1984, an unknown man attacked and raped a woman in Charles County, Maryland. Following the rape, the victim was transported to a hospital where medical personnel used a rape kit to collect biological evidence. The collected evidence was sent to the FBI for testing, but the case remained unsolved and became inactive. In 2002, the evidence was resubmitted to the FBI for additional analysis, and the newly generated DNA profile was entered into CODIS. Two years later, Derr's existing profile in CODIS was matched to the DNA profile generated from the rape kit. Derr was subsequently indicted by a Charles County Grand Jury for the 1984 attack.

In 2006, Derr was tried in the Circuit Court for Charles County for several counts of rape and sexual offense. At trial, the State presented Jennifer Luttmann ("Luttmann") to testify as an expert in forensic serology and DNA analysis. Luttmann outlined, among other things, background information regarding DNA analysis, testing procedures, and the creation of DNA profiles. Luttmann and her team were involved in conducting DNA profile comparisons, and some of the testing in the instant case was performed by Luttmann's team. She acknowledged, however, using the "bench work" of others to aid in making a final assessment regarding the present case. The testimony by Luttmann was introduced over Derr's objection.

Derr was convicted of first and second degree rape and first and second degree sexual offense, and appealed to the court of Special Appeals of

Maryland, challenging his conviction. The Court of Appeals of Maryland granted certiorari on its own motion before the intermediate appellate court rendered a decision, and the Court of Appeals of Maryland reversed the decision of the circuit court and remanded for a new trial. The State then petitioned the United States Supreme Court for certiorari and requested that the petition be held pending until the Court decided *Williams v. Illinois*. (Later cited as *Williams v. Illinois*, 132 S. Ct.2221 (2013).) In 2012, the Supreme Court granted the State's petition for certiorari, vacating the judgment of the Court of Appeals of Maryland and remanding in light of *Williams*.

The Court of Appeals began its analysis by addressing whether preventing Derr from questioning the creators of the DNA reports, which Luttmann relied upon in her testimony, violated the Confrontation Clause. *Derr*, 434 Md. at 103, 73 A.3d at 266. The Confrontation Clause provides a criminal defendant with the right to confront witnesses who testify against him or her and "only applies when an out-of-court statement constitutes testimonial hearsay." *Id.* at 103-06, 73 A.3d at 265-66 (citing *Cox v. State*, 421 Md. 630, 642, 28 A.3d 687, 694 (2011); *Crawford v. Washington*, 541 U.S. 36 (2004)). The critical inquiry was whether the statement was "testimonial" and whether it was offered for the truth of the matter asserted. *Derr*, 434 Md. at 107, 73 A.3d at 265.

The court determined that to be "testimonial" under the Confrontation Clause, an out-of-court statement must be sufficiently formalized. *Derr*, 434 Md. at 111-12, 73 A.3d at 267-68 (citing *Williams v. Illinois*, 132 S. Ct.2221 (2013)). The court concluded that although in *Williams* there was no majority opinion, the controlling standard was the position taken by five Justices, which "require[ed] that a statement be, at a minimum, formalized to be testimonial." *Derr*, 434 Md. at 115, 73 A.3d at 270 (determining that under *Marks v. United States*, 430 U.S. 188 (1977), where there was a fragmented decision, the holding could be viewed as the position of the Justices who concurred on the narrowest grounds).

The court found that the DNA reports, which were the basis for Luttmann's opinion, were not "testimonial" because they lacked the requisite formality. *Derr*, 434 Md. at 118, 73 A.3d at 272. The reports lacked formality because they had no certifications regarding their procedures or accuracy. *Id.* at 119, 73 A.3d at 272. Therefore, since the statements were not "testimonial," the Confrontation Clause was not implicated. *Id.*

Having determined there was no Confrontation Clause violation, the court next addressed Derr's discovery rights. *Derr*, 434 Md. at 121, 73 A.3d at 273-74. In a pre-trial motion that the trial court subsequently denied, Derr requested that the State be compelled to produce statistics on the probability of coincidental matching DNA profiles occurring within CODIS. *Id.* On appeal, Derr argued that the denial precluded him from proving any potential errors in the reports. *Id.* The court held that "the trial court's refusal to order the FBI to conduct a research project and create potentially useful evidence

for Derr [did] not violate either his constitutional right to discovery, as defined by *Brady* and its progeny, or Maryland Rule 4-263.” *Id.* at 124, 73 A.3d at 275.

Derr further argued that “there was insufficient evidence as a matter of law to sustain [his] convictions” because the DNA evidence identifying him was faulty. In examining the sufficiency of evidence, the court explained that it looked to whether any “rational trier of fact could have found the essential elements beyond a reasonable doubt,” deferring to any inferences made. *Id.* at 129, 73 A.3d at 278 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The court determined a rational juror could conclude beyond a reasonable doubt that Derr was indeed the victim’s attacker, therefore the State had presented sufficient evidence to sustain the conviction. *Derr*, 434 Md. at 131, 73 A.3d at 280.

Additionally, the court held that the trial court’s refusal to give Derr’s requested jury instruction was not erroneous. *Derr*, 434 Md. at 134, 73 A.3d at 281. The court noted that proposed instructions need not be given where the jury instructions protect the defendant’s rights and cover the theory of the defense. *Id.* (citing *Cost v. State*, 417 Md. 360, 368-69, 10 A.3d 184, 189 (2010)). Here, the court determined the jury instructions passed this test by instructing the jury members that it was their right to determine the weight and credibility of the evidence. *Derr*, 434 Md. at 134, 73 A.3d at 281.

The dissent took issue with the court’s Confrontation Clause analysis, and noted the troubling fact that only one member of the *Williams* Court voted for a characterization of “testimonial” that was eventually adopted by the *Derr* majority. *Derr*, 434 Md. at 140, 73 A.3d at 285 (Eldridge, J., dissenting). The dissent further pointed out that the *Williams* decision ordered the Maryland and Federal provisions to be considered separately, yet the court did not do so. *Id.* at 143-46, 73 A.3d at 286-89 (Eldridge, J., dissenting). Therefore, rather than attempting to interpret and apply the fragmented *Williams* decision, the dissent simply would have elected to decide *Derr* solely on state constitutional grounds. *Id.* at 141, 73 A.3d at 285 (Eldridge, J., dissenting).

In *Derr v. State*, the Court of Appeals of Maryland held that the Confrontation Clause was not violated by expert testimony that relied upon DNA reports which the expert did not personally compile. Thus, the State may potentially shield questioning of those who conduct underlying reports if they are kept informal. Further, while the policy of not forcing the State to produce evidence for defendants is certainly logical, and perhaps fiscally responsible, the decision of the court is problematic in that it makes challenging DNA testing increasingly difficult for Maryland practitioners in cases where DNA testing is at issue.