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RECENT DEVELOPMENT

STATE V. WILSON: IF A DEFENDANT MARRIES A POTENTIAL STATE WITNESS WITH THE INTENT TO INVOKE THE SPOUSAL TESTIMONIAL PRIVILEGE AT UPCOMING CRIMINAL PROCEEDINGS, SUCH CONDUCT IS SUFFICIENT TO SUPPORT DEFENDANT’S CONVICTIONS FOR WITNESS TAMPERING AND OBSTRUCTION OF JUSTICE; THE CONVICTIONS DO NOT MERGE FOR SENTENCING PURPOSES.

By: Meaghan Farnham

The Court of Appeals of Maryland held that lawful actions, such as marriage and the invocation of the spousal testimonial privilege, become unlawful when the defendant attempts to impede the administration of justice. *State v. Wilson*, 471 Md. 136, 167-68, 240 A.3d 1140, 1158 (2020). Evidence of “corrupt means” is sufficient to support the defendant’s convictions for witness tampering and obstruction of justice when defendant married a state witness with the intent to preclude her testimony at upcoming criminal proceedings. *Id.* at 145, 240 A.3d 1145. Convictions for witness tampering and obstruction of justice may not merge for sentencing purposes. *Id.* at 145, 182, 240 A.3d at 1145, 1167.

In June of 2015, Darrayl John Wilson (“Wilson”) and Raymond Posey (“Posey”) were separately indicted for the 2011 first-degree murder of Crystal Anderson (“Anderson”). New evidence surfaced four years after Anderson’s murder when detectives spoke to Wilson’s girlfriend, Kearra Bannister (“Bannister”). Bannister claimed that Wilson advised her of his and Posey’s involvement in Anderson’s murder. Wilson was incarcerated pending trial from July 2015 through February 2017.

While awaiting trial, Wilson participated in multiple phone calls and video visits with Bannister. The recordings of these conversations show that Wilson and Bannister were organizing a marriage ceremony with the intent to preclude Bannister’s testimony as a state witness; the defendant never used the word “marriage,” spoke in codes, and sought information about Bannister’s role as a potential state witness. Wilson and Bannister were married on February 9, 2017. The marriage ceremony occurred just one day before Posey’s trial and eighteen days before Wilson’s trial date.

During direct examination at Posey’s trial, Bannister testified that she and Wilson got married for the purpose of invoking the spousal testimonial privilege and that she did not wish to incriminate her husband. The trial court indicated that Bannister did not have such a privilege at Posey’s trial and directed her to respond. Before Wilson’s trial, the State filed a motion to

preclude Bannister from invoking the spousal privilege, which the circuit court granted. Wilson pled guilty. He was then charged with witness tampering and obstruction of justice as to both his and Posey's murder trials but was only found guilty of the charges pertaining to his trial.

The Court of Special Appeals of Maryland reversed Wilson's witness tampering and obstruction of justice convictions for lack of sufficient evidence to prove corrupt means. The State appealed. In its petition for writ of certiorari, the State raised the following issues: (1) whether evidence that the defendant-spouse married the witness-spouse to suppress testimony under the cloak of spousal privilege was sufficient to satisfy the "corrupt means" element of the witness tampering and obstruction of justice statutes, and (2) whether a party to a collusive marriage is precluded from invoking the spousal testimonial privilege. Wilson cross-petitioned for writ of certiorari. The court granted the state's petition in its entirety and limited Wilson's petition to: "[i]f Wilson's convictions are affirmed, does his conviction and sentence for witness tampering merge into his conviction and sentence for obstruction of justice, where both convictions are predicated upon one act[?]"

The Court of Appeals of Maryland first addressed whether the State had sufficient evidence to prove "corrupt means." *Wilson*, 471 Md. at 168, 240 A.3d at 1158. Since the statutes neglect to define "corrupt means," the court resorted to state and federal treatment of the phrase. *Id.* After evaluating the Maryland judiciary's treatment of "corrupt means", the court held that "engaging in otherwise lawful conduct [such as marriage] with the intent of precluding a state witness from testifying at a criminal proceeding may constitute corrupt means." *Wilson*, 471 Md. at 168, 240 A.3d at 1158 (citing *State v. Romans*, 178 Md. 588, 16 A.2d 642, 644 (1940)). Furthermore, the court noted the importance of intent: otherwise, lawful conduct done with the intent of precluding a witness from testifying at a criminal proceeding satisfies the corrupt means element of the statutes. *Wilson*, 471 Md. at 168-69, 240 A.3d at 1158-59 (citing *Romans*, 178 Md. at 588, 16 A.2d 644 (1940)).

To supplement its interpretation of "corrupt means," the court evaluated the federal obstruction of justice statute. *Wilson*, 471 Md. at 163-64, 240 A.3d at 1155-56 (citing 18 U.S.C. § 1503(a)). A federal comparison enhances the court's understanding of "corrupt means" because Maryland's original obstruction statute was identical to the federal government's, and Maryland's current obstruction statute is "still very similar[.]" *Wilson*, 471 Md. at 168-69, 240 A.3d at 1158-59.

The federal definition of "corrupt means" is predicated upon the malintent of the actor. *Wilson*, 471 Md. at 168-69, 240 A.3d at 1158-59. The federal courts have held that although it is lawful for a government witness to invoke the spousal testimonial privilege, obstruction is apparent when a defendant,

with a corrupt motive, advises the witness-spouse to invoke the privilege. *Id.* 169, 240 A.3d at 1159. Ultimately, the defendant-spouse's conduct is corrupt when his or her motive is "self-serving." *Wilson*, 471 Md. at 169-70, 240 A.3d at 1159 (citing *United States v. Cintolo*, 818 F.2d 980, 989 (1st Cir. 1987); *United States v. Cioffi*, 493 F.2d 1111, 1119, (2nd Cir. 1974)).

The Court of Appeals of Maryland held that Wilson's knowledge of Bannister's status as a key state witness, his use of euphemisms or code language about the marriage in the recordings, and the frequency of Wilson's conversations about the upcoming marriage provided the jury with sufficient evidence of "corrupt means." *Wilson*, 471 Md. at 173, 240 A.3d at 1161. The court clarified that although Bannister was precluded from asserting the spousal privilege at trial, Wilson's conviction for obstruction required only "proof of an endeavor, irrespective of its success," to obstruct or impede the administration of justice. *Wilson*, 471 Md. at 174, 240 A.3d at 1162; (citing *United States v. Baker*, 611 F.2d 964, 967 (4th Cir. 1979); 18 U.S.C. § 1503).

The court declined to address whether a party to a sham marriage may invoke the spousal testimonial privilege. *Wilson*, 471 at 167, 240 A.3d at 1158. Though this issue is largely unresolved, the State did not contend that the marriage between Wilson and Bannister was a sham, making it a non-issue. *Id.*

After upholding Wilson's convictions for witness tampering and obstruction of justice, the court concluded that the two sentences may not merge. *Wilson*, 471 at 177, 182, 240 A.3d at 1164, 1167. The court deferred to the plain language of the statute, which unequivocally relays the General Assembly's intent "to allow separate sentences, either consecutively or concurrently," for witness tampering and obstruction of justice convictions. *Wilson*, 471 Md. at 182-83, 240 A.3d at 1167 (citing CR § 9-305(d)). The State referred to the witness tampering statute as an "anti-merger provision," which the court ultimately endorsed. *Id.* at 178, 240 A.3d at 1164.

Prior to the court's ruling in *Wilson*, there was a valid impression that a defendant may marry a potential state witness with the intent of invoking the spousal testimonial privilege at trial. Practitioners must properly advise their clients that otherwise legal acts (such as marriage and the invocation of the spousal testimonial privilege) become unlawful when the State can prove that the defendant intended to impede the administration of justice. As a consequence, a defendant can face years of additional imprisonment for convictions of witness tampering and obstruction of justice, which do not have merger provisions and constitute two separate offenses.