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Recent Developments: Baltimore Sun Co. v. Goetz: Press Has Common Law Right of Access to Affidavit Supporting Search Warrants between Execution of Warrants and Indictment

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ing under the principles of due process, equal protection and effective assistance of counsel. *Id.* The prosecution replied that the purpose of the hearing was to permit the state to explain its use of the challenges and that under these circumstances it was not necessary to require an oath or cross-examination. The trial judge agreed and quashed the subpoena. *Id.*

The trial judge ruled that no prima facie case of racial discrimination had been established. *Id.* In the interest of prudence, however, the court addressed the second step of the *Batson* test (that the state must proffer a non-discriminatory explanation for the exercise of the challenge) and found the prosecutor's explanation would have been sufficient if a prima facie showing had been made. *Id.*

Gray again appealed, and this time the court of special appeals upheld the lower court, finding that Gray had not shown that the ruling of the trial court had been clearly erroneous. Gray petitioned the court of appeals for certiorari, raising two issues: 1) whether "[t]he trial court erred in ruling that the defense failed to establish a prima facie showing of racial discrimination in the prosecutor's exercise of peremptory challenges"; and 2) whether "[t]he trial court erred in refusing to require the prosecutor to testify under oath and be subject to cross-examination." *Id.* at 255, 562 A.2d at 1281.

Initially, the Court of Appeals of Maryland assumed that the defendants had established a prima facie case of racial discrimination and, therefore, moved directly to the second issue: whether the prosecutor should be required to testify under oath and be subject to cross-examination. *Id.* at 256, 562 A.2d at 1281. The court noted that in *Batson* the Supreme Court refused to specify procedures to be followed when a defendant objected to a prosecutor's challenges. *Id.* at 256-57, 562 A.2d at 1281. The majority of courts that have faced the issue, however, left the procedure to the trial judge's discretion. The *Gray* court deemed this to be the better view, especially in light of the broad variety of circumstances under which a prosecutor may be required to offer an explanation and that the trial judge is to be accorded broad discretion in conducting a trial. *Id.* The court noted, however, one limitation on the discretion of the trial judge: only a "compelling justification" would justify an ex parte proceeding sufficient to meet the dictates of *Batson*; under "normal" circumstances an adversary proceeding should be utilized to consider *Batson* challenges. *Id.* at 257-58, 562 A.2d at 1282.

The court held the justifications offered by the defense in support of administration of an oath to the prosecutor were insufficient to remove the decision from the discretion of the trial judge. All attorneys are officers of the court, bound by Maryland Lawyers' Rules of Professional Conduct and "[a] trial judge calling upon the prosecutor to explain his challenges has every right to expect total candor without resorting to the administration of an oath." *Id.* at 258, 562 A.2d at 1282.

Examining the defendant's right to cross-examine the prosecutor, the court noted "[i]n our adversary system of justice, cross-examination enjoys an exalted position." *Id.* at 258-59, 562 A.2d at 1282. The court held that a judge faced with a request for a cross-examination in a *Batson* situation has the discretion to grant the request, but only after a careful weighing of all the relevant factors in that particular case. *Id.* at 259, 562 A.2d at 1282. The court, however, made clear that the favored procedure under these circumstances is not a formal adversary proceeding but rather a relatively informal proceeding similar to that which occurs during the voir dire examination of a juror at the bench. *Id.*

Finally, the court opined that in a post-trial hearing, as opposed to a hearing at the trial level, factors such as the passage of time and impairment of memory may require an explanation under oath and cross-examination. *Id.* at 261, 562 A.2d at 1284. On the facts before the court, however, the court held that the actions of the trial court did not amount to an abuse of discretion. *Id.*

The decision of the court of appeals in *Gray* has left the door open for trial judges to use the formalities and additional safeguards afforded by a formal adversarial proceeding when it is faced with a *Batson* allegation of discrimination in the selection of a jury. More importantly, the *Gray* decision preserves the discretionary power of the trial judge to determine the proceeding that is best suited to the circumstances of the particular case before the court.

—Greg Swain

Baltimore Sun Co. v. Goetz: PRESS HAS COMMON LAW RIGHT OF ACCESS TO AFFIDAVIT SUPPORTING SEARCH WARRANTS BETWEEN EXECUTION OF WARRANTS AND INDICTMENT

In *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit

held that the press's common law right of access to a sealed affidavit supporting search warrants during the interval between execution of the warrants and indictment was within the sound discretion of the judicial officer. As a result, in certain circumstances, the press may force the government to unseal warrant papers which could expose continuing criminal investigations.

On January 27, 1988, a federal magistrate issued three search warrants based on the affidavit of an FBI agent, and then sealed the papers. After execution of the warrants, the magistrate unsealed the warrants and the returns, but left the affidavit sealed. On May 4, 1988, the Baltimore Sun Company (Sun) petitioned to unseal the affidavit. However, the magistrate denied the Sun's petition concluding that the public interest in the investigation of crime would not be best served by allowing the Sun to publish the affidavit. The Sun then sought a writ of mandamus from the United States District Court for the District of Maryland to compel the magistrate to unseal the affidavit. The government offered to disclose a redacted version of the affidavit, but the district court declined. Without examining the affidavit, the district court agreed with the magistrate's conclusion and denied the Sun's petition. However, while the Sun's appeal of the district court's decision was pending, the magistrate unsealed the affidavit after indictments were returned.

After deciding that the affidavit was a judicial record, the court noted the superior distinction between the first amendment and common law rights of access. Only upon a showing of a "compelling government interest" and proof that the denial is "narrowly tailored to serve that interest" may a court deny the first amendment right of access. *Id.* at 64 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982)). On the other hand, a court may at its discretion deny the common law right to access. *Id.*

The court began its analysis with the question of whether the Sun had a first amendment right of access to the affidavit. The court noted that the test for making such a determination is: "1) 'whether the place and process have historically been open to the press and general public,' and 2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (quoting *Press-Enterprise v. Superior Court*, 478 U.S. 1, 8-10 (1986)). The court held that the Sun's claim failed the first prong of the test

because the Supreme Court had twice held that proceedings for the issuance of search warrants are not open. *Id.* (citing *Franks v. Delaware*, 438 U.S. 154, 169 (1978); *United States v. United States Dist. Court*, 407 U.S. 297, 321 (1972)). Although the Supreme Court addressed the issue in reference to the public, the court of appeals stated that "the common sense reason why proceedings for search warrants are not open to the public convinces us that the same principles apply when the press seeks disclosure." *Id.*

After rejecting the Sun's claim of a first amendment right of access, the court examined the press's common law right of access. The court held that at common law the press and the public have a qualified right to judicial records. *Id.* at 65 (relying on *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978)). "Federal Rule of Criminal Procedure 41(g) facilitates observance of this right by directing the judicial officer to file all papers relating to the search warrant in the clerk's office." *Id.*

The court held that "the common law qualified right of access to warrant papers is committed to the sound discretion of the judicial officer who issued the warrant." *Id.* The court noted that an abuse of discretion standard applied to the judicial officer's decision. When someone seeks to inspect sealed papers, the judicial officer may deny access if sealing is "essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 65-66 (quoting *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1984)). In the instant case, the magistrate and the district court both decided that the public interest in the investigation of crime outweighed the Sun's interest in publishing the affidavit. However, the court of appeals noted that "conclusory assertions are insufficient to allow review; specificity is required." *Id.* at 66. Moreover, the district court failed to examine the affidavit. *Id.*

Upon denying access to sealed papers, the judicial officer must consider alternatives. "This ordinarily involves disclosing some of the documents or giving access to a redacted version." *Id.* In the instant case, the magistrate complied by unsealing the warrants and the returns. However, the district court erroneously declined the government's offer to disclose a redacted version of the affidavit. *Id.*

The court of appeals resolved what was an ongoing dispute between the press and the government. By recognizing the Sun's common law right of access to the affidavit, the court broadened the free-

dom of speech and granted greater privileges to the press. No longer can a judicial officer rely on the government's position and summarily seal warrant papers. Rather, the judicial officer must exercise independent judgment in reaching such a decision.

—Richard E. Guida

Kosmas v. State: UNSOLICITED STATEMENT BY WITNESS INADMISSIBLE AS EVIDENCE OF DEFENDANT'S REFUSAL TO TAKE LIE DETECTOR TEST

The Court of Appeals of Maryland recently reversed a defendant's murder conviction "because the introduction of evidence that he refused to take a lie detector examination prejudiced his case beyond the point that an instruction to disregard the testimony reasonably could be expected to effect a cure." *Kosmas v. State*, 316 Md. 587, 589, 560 A.2d 1137, 1138 (1989). In so ruling, the court of appeals reversed the court of special appeals. Moreover, this case reflects the continuing trend in Maryland that evidence of a defendant's refusal to submit to a lie detector exam is inadmissible and remains inadmissible even if it is the result of a witness's unsolicited "blurt out."

Stanley Kosmas suspected his wife Maria was committing adultery. He hired a private detective, retired Baltimore City police sergeant Edward Mattson, to follow her. In early 1985, Mattson discovered Maria and her employer in a hotel room. Two months later, Kosmas saw his wife with the same man in her car. In December, 1985, Maria was discovered murdered within a mile of her home.

The eldest of the Kosmas children testified that his father subjected Maria to verbal and physical abuse and that Kosmas once threatened to kill her if she left him. *Id.* at 590, 560 A.2d at 1139. Mattson testified that Kosmas offered him \$10,000 to murder Maria. *Id.* Kosmas, who had an excellent reputation in his business and home communities, denied these allegations.

The case turned on Mattson's testimony at trial. He testified that on December 20th, Maria had been missing for four days. That morning he went to the defendant's home where he found a detective interviewing Kosmas. While Mattson was on the stand, the prosecutor asked him if he heard the content of the conversation between Kosmas and the detective. Mattson responded that it was "[j]ust the typical police interview" in which the detective asked Kosmas if he had seen his

wife or knew of her whereabouts. *Id.* at 592, 560 A.2d at 1140. The prosecutor next asked Mattson, "[a]nd then you talked to the defendant?" *Id.* Mattson replied, "[t]hen I talked to [Kosmas]. . . . I said, 'Would you take a lie detector?' He said no." *Id.* The defendant's attorneys immediately requested a mistrial. The trial judge denied the motion, then instructed the jury to ignore any testimony concerning a lie detector test. *Id.* at 591-92, 560 A.2d at 1139-40.

The court of appeals first noted that evidence that the defendant refused to submit to a lie detector test was inadmissible. *Id.* at 592-93, 560 A.2d at 1140. Having established this premise, the court concentrated on the damage done to the defendant by the inadmissible evidence and the extent to which the jury instruction cured this damage. *Id.* at 594, 560 A.2d at 1141. As a result, the precise question before the court was "whether the prejudice to the defendant was so substantial that he was deprived of a fair trial." *Id.* at 595, 560 A.2d at 1141.

The recent decision of *Guesfeird v. State*, 300 Md. 653, 480 A.2d 800 (1984), established factors to help answer this question. These factors include:

whether the reference to a lie detector was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; whether a great deal of other evidence exists; and whether an inference as to the result of the test can be drawn.

Kosmas, 316 Md. at 594, 560 A.2d at 1141 (quoting *Guesfeird*, 300 Md. at 659, 480 A.2d at 803).

The state emphasized that the lie detector test was mentioned only once and that this reference was unsolicited by the prosecutor. The court, however, responded that the state was not entirely blameless for this "blurt-out" because Mattson testified on behalf of the state. *Id.* at 595, 560 A.2d at 1141. The court suspected that Mattson's fifteen years as a police officer should have made him aware of the inadmissibility of his statement. The court was also wary of Mattson's motives for disclosing this evidence since he was once suspected for the murder. *Id.* at 595-96, 560 A.2d at 1141-42.

Nonetheless, the court was more con-