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RECENT DEVELOPMENT

BOMAS v. STATE: EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION IS ADMISSIBLE IF THE EXPERT OFFERS REAL APPRECIABLE HELP TO THE TRIER OF FACT.

By: Michael Tanner

The Court of Appeals of Maryland held that the proper test for courts to use in evaluating the admissibility of expert testimony on eyewitness identification is whether the testimony will be of real appreciable help to the trier of fact in deciding the issue presented. *Bomas v. State*, 412 Md. 392, 987 A.2d 98 (2010). The court further held that the application of this test is largely within the discretion of the trial court, but that trial courts should take into account recent scientific advances in exercising their discretion. *Id.* at 416, 987 A.2d at 112.

On April 18, 2004, off-duty detective Kenneth Bailey (“Bailey”) witnessed a fatal shooting near the Tower Lounge bar in Baltimore City. As Bailey sat in traffic, he observed an individual shoot the victim and flee the scene, passing within a car’s length of Bailey’s truck. A week later, Bailey filed a report in which he described the shooter as “a black male.”

On October 14, 2004, police arrested Jimmy Dower (“Dower”) on drug charges. Dower offered to provide the police with information as to the identity of the shooter at the Tower Lounge. He claimed to have witnessed the killing as well as the argument that led up to it. Dower identified the shooter as Henry Low a/k/a Tavon Bomas (“Bomas”). On October 26, 2004, police showed Dower a photo array from which he identified Bomas as the killer. The other eyewitness, Bailey, also identified Bomas’ picture from the array. Based on the identifications by Bailey and Dower, police arrested Bomas and charged him with murder.

At a pre-trial hearing and at trial, Dower retracted his identification of Bomas, claiming that he did not want to be a “snitcher.” In an attempt to discredit Bailey’s eyewitness account, Bomas proffered testimony from David Schretlen, Ph.D. (“Dr. Schretlen”), an expert in neuropsychology. Dr. Schretlen testified that: (1) a “trained observer”

has no more capacity to remember faces than a layperson; (2) a witness' confidence in an identification does not correlate with the accuracy of that identification; (3) memory is affected by stress and time; (4) photo arrays can influence identifications; and (5) even effective cross-examination does not lead juries to disbelieve eyewitness testimony. The motions judge declined to admit Dr. Schretlen's testimony on the grounds that it would be unhelpful to the jury and that the jury was able to weigh eyewitness testimony without expert guidance.

Bomas was subsequently convicted in the Circuit Court for Baltimore City of second-degree murder and the use of a handgun during the commission of a crime of violence or felony. Bomas appealed the judgment to the Court of Special Appeals of Maryland on the grounds that the trial court abused its discretion by refusing to admit Dr. Schretlen's testimony. The Court of Special Appeals of Maryland affirmed. Bomas then filed a petition for writ of certiorari in the Court of Appeals of Maryland, which the court granted.

The Court of Appeals of Maryland considered two questions: (1) whether the standard for the admissibility of expert testimony on eyewitness identification adopted in *Bloodsworth v. State* should be reconsidered; and (2) whether the trial court abused its discretion in finding that Dr. Schretlen's testimony would not be helpful. *Bomas*, 412 Md. at 403, 987 A.2d at 104 (citing *Bloodsworth v. State*, 307 Md. 164, 512 A.2d 1056 (1986)). The standard set forth in *Bloodsworth* for the admissibility of expert testimony on eyewitness reliability is whether the testimony will be of "real appreciable help" to the trier of fact, a standard that the trial court has wide discretion in applying. *Id.* at 406, 987 A.2d at 106, (citing *Bloodsworth*, 307 Md. at 184-85, 512 A.2d at 1066-67). The court in *Bloodsworth* criticized expert testimony on eyewitness identification, suggesting that a flood of such testimony would "invade the province of the jury" and noting that a majority of jurisdictions at the time had rejected expert testimony on eyewitness identification. *Id.* at 409, 987 A.2d at 108 (quoting *Bloodsworth*, 307 Md. at 181-83, 512 A.2d at 1064-65).

The Court of Appeals of Maryland re-examined the *Bloodsworth* standard in light of recent advances in the science of memory, a trend towards admission of expert witnesses on eyewitness identification in other jurisdictions, and disturbing statistics arising from post-conviction DNA testing. *Id.* at 411, 416, 987 A.2d at 109, 112. The court noted that, although most jurisdictions have abandoned a blanket exclusion of expert testimony on eyewitness identification, few have

gone so far as to create a presumption of admissibility. *Id.* at 411-12, 418 n.13, 987 A.2d at 109, 113 n.13 (citing *United States v. Smithers*, 212 F.3d 306, 311-12 (6th Cir. 2000); *State v. Copeland*, 226 S.W.3d 287, 299-301 (Tenn. 2007)). The court recognized studies finding that a majority of inmates exonerated by DNA evidence, including Kirk Bloodsworth, were convicted based, in part, upon mistaken eyewitness identifications. *Id.* at 410-11, 987 A.2d at 108-10 (citing *United States v. Brownlee*, 454 F.3d 131, 141-42 (3d Cir. 2006); The Innocence Project, *Know the Cases: Kirk Bloodsworth*, <http://www.innocenceproject.org/Content/54.php> (last visited Jan. 04 2010)).

Based upon these considerations, the court evaluated the test announced in *Bloodsworth* separately from the tone of the opinion in that case. *Bomas*, 412 Md. at 416, 987 A.2d at 112. The court held that the test set forth in *Bloodsworth* is correct, and that it comports with the general rule of admissibility of expert testimony set forth in Maryland Rule 5-702. *Id.* Though the court upheld the central holding of *Bloodsworth*, it was critical of the negative tone of the decision, and it stated that a trial court should take into account scientific advances when exercising its discretion in deciding whether to admit expert testimony. *Id.*

The Court of Appeals of Maryland, having reiterated the standard by which courts should evaluate the admissibility of expert testimony on eyewitness identification, held that the trial court properly applied this standard and was not influenced by the negative tone of the *Bloodsworth* opinion. *Id.* at 410, 987 A.2d at 108. The court examined the testimony proffered by Dr. Schretlen and found it “general, vague, and inconclusive,” and that, on each point, the testimony would either offer no appreciable help to the jury or would be confusing to the jury. *Id.* at 420, 987 A.2d at 114. The Court of Appeals of Maryland held that the trial court was entitled to find that each element of the testimony either “(1) lacked adequate citation to studies or data, (2) insufficiently related to the identifications at issue, and/or (3) addressed concepts that were not beyond the ken of laypersons.” *Id.* at 423, 987 A.2d at 116.

By reiterating the standard stated in *Bloodsworth*, the Court of Appeals of Maryland upheld the discretion of trial judges to decide issues of admissibility of expert testimony on eyewitness identification on a case-by-case basis. By acknowledging the negative tone of *Bloodsworth* and urging trial courts to recognize scientific advances in the field, the court emphasized that trial courts must carefully consider

the evidence proffered and its application to the facts in each particular case. Rather than relying upon general arguments as to the merits of expert testimony on eyewitness identification, Maryland practitioners proffering such testimony must be prepared to show that the testimony is scientifically grounded, that it relates directly to the circumstances of the identification at issue, and that the issues addressed by the testimony are beyond the knowledge of a layperson.