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Facts: On June 9, 2006, a jury in the Circuit Court for Harford County found Petitioner guilty of possession of a regulated firearm after having been convicted of a disqualifying crime, driving under the influence of alcohol, and other driving and weapon offenses. The convictions stemmed from Petitioner's involvement in a single-vehicle accident that occurred in the early morning of January 9, 2005, in which he apparently lost control of his sports utility vehicle and drove it off the road. During their investigation of the accident, police officers found a nine millimeter Beretta handgun on the passenger's seat of the vehicle. At trial, Petitioner conceded that he was driving under the influence of alcohol when the accident took place, and he further stipulated that he had committed a prior offense that would make it illegal for him to possess a handgun. Therefore, the focus of the trial was whether Petitioner had knowingly possessed the handgun found in the truck.

During the trial, State's witness Deputy Sheriff Ronald Randow testified about events that took place on June 1, 2005, the date Petitioner's trial was originally scheduled to go forward. Over defense objection that the testimony was not admissible as "flight" evidence, Deputy Randow testified that he saw Petitioner in the courtroom on June 1, 2005, Petitioner later left the courtroom, police officers could not locate him during a search of the courthouse, and consequently, the trial was postponed.

Petitioner was convicted and sentenced. He then noted an appeal to the Court of Special Appeals arguing, *inter alia*, that the trial court abused its discretion by admitting Deputy Randow's testimony. The intermediate appellate court affirmed Petitioner's sentence and held, *inter alia*, that the lower court had not erred by admitting Deputy Randow's testimony because it was relevant as evidence of Petitioner's consciousness of guilt. The Court of Appeals granted a writ of certiorari to address whether the trial court had erred when it admitted Deputy Randow's testimony.

Held: Affirmed. The trial court did not err or abuse its discretion in allowing the testimony about Petitioner leaving the courtroom on a prior trial date, because the testimony was admissible as evidence of flight and its probative value outweighed any prejudice to Petitioner.

Relying on previous Maryland cases pertaining to the admission of consciousness of guilt evidence and flight evidence, the Court of Appeals concluded that the evidence of Petitioner's leaving the courtroom was relevant as consciousness of guilt, because the jury could have reasonably inferred from Petitioner's actions that he was fleeing the courtroom out of a concern that the trial would not turn out well for him. The Court emphasized that, on the date of the originally scheduled trial, Petitioner was well aware of the charges he was facing, he then departed from the courtroom where his trial was about to occur, and where at least one witness for the State, Deputy Randow, was present. These facts distinguished the case *sub judice* from cases in which defendants simply fail to appear for trial. The facts provided the necessary foundation for admitting Petitioner's actions as relevant evidence of flight, under Maryland Rule 5-401. Moreover, the trial court did not abuse its discretion in determining, under Maryland Rule 5-403, that the probative value of the evidence was not outweighed by the prejudicial effect that it might have on Petitioner.

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Kyeron Michael Church v. State of Maryland, No. 53, September Term, 2008. Opinion filed on May 13, 2009 by Adkins, J.

http://mdcourts.gov/opinions/coa/2009/53a08.pdf

CRIMINAL LAW – REVIEW – PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW

EVIDENCE – PRIVILEGES – GOVERNMENT PRIVILEGES – SURVEILLANCE LOCATION PRIVILEGE

Facts: A police officer covertly observed defendant Church engage in a drug transaction. Church was charged with possession with intent to distribute a controlled dangerous substance and possession of a controlled dangerous substance. The Circuit Court granted the State's motion *in limine*, which asked the court to "prohibit the Defense from asking [the surveilling officer witness] or having the State disclose the actual location of where th[e] surveillance was taking place."

During cross-examination, Church's counsel asked the officer about the circumstances under which he viewed the transaction – binocular magnification, distance, lighting, and obstructions – but refrained from asking about the exact surveillance location.

A jury convicted Church on both counts and he was sentenced to ten years in prison without parole.

Held: Remanded. As a preliminary matter, the State argued that Church was precluded from challenging the motion *in limine* because he acquiesced to the trial judge's ruling on the motion. The Court of Appeals ("COA") rejected this argument because Church stated clearly the ground for his objection to application of the privilege and the type of questions he sought to ask the officer. When Church's counsel prefaced his questions about the officer's vantage point with the caveat: "And I don't want to know where your location was, but I do want to ask you how was the lighting like in the area where you were set up to observe[.]", he did not acquiesce to the ruling on the motion *in limine* , but was acting within the appropriate bounds of professionalism by pursuing questions in a manner consistent with the court's ruling. The State's suggestion that Church had to ask questions during the trial as to the exact location of the surveillance, notwithstanding the court's pre-trial ruling, is foreclosed by *Prout v. State*, 311 Md. 348,356-57, 535 A.2d 445, 449 (1988): "when a trial judge, in response to a motion *in limine*, makes a ruling to exclude evidence that is clearly intended to be the final word on the matter, and that will not be affected by the manner in which the evidence unfolds at trial,

and the proponent of the evidence makes a contemporaneous objection, his objection ordinarily is preserved[.]"

The State asserted, and Church did not challenge, that there exists a surveillance location privilege that permits non-disclosure of a police officer's watch post when certain policy considerations favor keeping the location a secret when weighed against a defendant's Sixth Amendment right to confront witnesses against him.

The COA adopted the qualified privilege for reasons similar to those stated in *Johnson v. State*, 148 Md. App. 364, 811 A.2d 898 (2002), *cert denied*, 374 Md. 83, 821 A.2d 370 (2003) because it takes into account the privacy concerns of private citizens, the tools necessary for police officers to conduct routine surveillance, and the importance of a defendant's right to cross-examine witnesses and paint an accurate factual picture of the circumstances under which he or she was observed. These policy concerns provide the criteria for trial courts in considering whether the public interest served by non-disclosure is greater than the defendant's Sixth Amendment cross-examination rights.

The State has a limited initial burden: its privilege does not arise just because it invokes a blanket non-disclosure policy. Such burden allocation appropriately safeguards the rudimentary right of a defendant to cross-examination of witnesses against him. Here, the State failed to show that the police are continuing to use the surveillance location or that any individual needs protection because of his or her association with the location. Accordingly, the trial court erred in refusing to allow Church to cross-examine about the precise location when the State had not demonstrated a threshold interest in protecting against such disclosure. The case was therefore remanded to the Circuit Court.

This remand is limited in scope, and the COA did not order a new trial unless and until the trial court makes certain determinations. First, the Circuit Court should hold a hearing at which the State bears the initial burden to demonstrate that it has some legitimate interest in protecting the surveillance location. If the State produces evidence believed by the trial court to demonstrate such interest, then the court shall take such additional evidence from either party as it deems necessary to balance the interest of Church in disclosure for purposes of cross-examination against the interest of the State in concealing the surveillance location. The question of whether Church is entitled to a new trial will abide the outcome of these two steps.

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Garry Dennis Crosby, Jr. v. State of Maryland, No. 91, September Term, 2008. Opinion filed on May 7, 2009. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2009/91a08.pdf

CRIMINAL LAW - SEARCH AND SEIZURE - REASONABLE SUSPICION - SHERIFF'S DEPUTY DID NOT HAVE REASONABLE SUSPICION SUFFICIENT TO JUSTIFY DETAINING PETITIONER WHERE DEPUTY OBSERVED PETITIONER'S CAR PULLING IN AND OUT OF PARKING SPACES, PETITIONER "SLUMPED DOWN" IN HIS CAR SEAT WHILE DRIVING PAST THE DEPUTY, AND PETITIONER TOOK A ROUTE TO HIS DESTINATION THAT THE DEPUTY CONSIDERED CIRCUITOUS - WITHOUT MORE, THE FACTS WERE NOT SUGGESTIVE OF CRIMINAL ACTIVITY - DEPUTY DID NOT EXPLAIN HOW HIS TRAINING AND EXPERIENCE LED HIM TO A CONCLUSION DIFFERENT FROM THAT OF AN UNTRAINED OBSERVER.

Facts: Garry Dennis Crosby was charged in the District Court of Maryland, sitting in Harford County, with wearing, carrying, and transporting a handgun in violation of Maryland Code (2002 Repl. Vol., 2008 Supp.), Criminal Law Article, § 4-203. He moved to suppress the handgun's admission into evidence, but the court ruled against him. Crosby pleaded guilty, and appealed to the Circuit Court for Harford County, where his appeal was heard *de novo*. In the Circuit Court, Crosby again moved to suppress the handgun's admission into evidence, claiming that the police did not have a reasonable articulable basis for detaining him initially and, therefore, that the subsequent search of his person, which revealed the handgun, violated the Fourth Amendment.

At the suppression hearing in the Circuit Court, the arresting officer testified as to what made him suspicious of Crosby. According to the officer, he was on patrol in an unmarked police vehicle when he spotted Crosby in a high-crime area of Edgewood, Maryland, where a homicide recently occurred. Crosby, who was unknown to the officer at the time, was driving a gold-colored Cadillac and was maneuvering in and out of parking spaces in the parking lot of an apartment complex. Believing this to be suspicious, the officer drove his cruiser toward the Cadillac. As he drove past it, the driver (Crosby) slouched down in his seat. The officer interpreted this as an attempt to avoid being identified by the officer. The officer then ran the Cadillac's tags, which revealed that it was owned by a seventy year old woman and a forty-six year old man sharing a Bel Air address. The car, however, was not reported stolen.

Still suspicious, the officer broadcast a description of the Cadillac to other officers in the area. The officer received a call from another deputy who informed him that the Cadillac was

at a nearby gas station. The officer proceeded to that location, where he observed the driver (Crosby) pumping gas. The driver got back into the car and drove off the lot. According to the officer, he became even more suspicions as he continued following the Cadillac because the driver signaled a left turn, but then, before turning left, stopped signaling left and began signaling a right turn. The Cadillac turned right. The officer followed the car until it stopped in front of a house in a residential area. He believed that the route taken by the driver was circuitous and, thus, suspicious.

The officer called for back-up and approached the Cadillac. He collected the driver's licenses and vehicle registration from the two occupants. While the officer was running warrant checks on the occupants (which did not reveal any active warrants), a K9 unit arrived at the scene and conducted a drug scan of the Cadillac. The dog gave a positive alert for the presence of narcotics. The officer who initiated the stop searched the vehicle to no avail, then searched its driver, revealed by his driver's license to be Garry Dennis Crosby. He found a handgun on Crosby's person and charged him accordingly.

Based on the officer's testimony, the Circuit Court denied Crosby's motion to suppress, noting that the behavior observed by the officer leading up to his decision to detain Crosby and his passenger constituted reasonable suspicion that criminal activity was afoot. On an agreed statement of facts, Crosby was convicted of wearing and carrying a handgun. He petitioned the Court of Appeals for a writ of certiorari, which the Court granted, to review the denial of the suppression motion. *Crosby v. State*, 406 Md. 192, 957 A.2d 999 (2008).

Held: Reversed and remanded. The Court of Appeals observed that the detention at issue was in the nature of a "Terry stop," pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), which allows an officer to conduct a brief investigative detention of an individual if the officer has a reasonable suspicion that the individual is engaged in criminal activity. The Court next recounted some of the guiding principles governing a reasonable suspicion analysis. The Court observed that an assessment of reasonable suspicion must be based on a common sense view of the totality of the circumstances, but must amount to more than a mere hunch. The Court noted that it is appropriate to defer to the experience and training of a law enforcement officer if she or he can articulate the logic behind her or his conclusion that the observed conduct was indicative of criminal behavior.

Applying the appropriate standards to the instant case, the

Court resolved that the officer did not observe a totality of circumstances that gave rise to reasonable suspicion. The officer did not provide a reason for believing that Crosby's slouching in his seat was an attempt to avoid being seen. Additionally, the peculiar and circuitous driving behavior described by the officer was not, without more, indicative of criminal behavior.

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COURT OF SPECIAL APPEALS

Wells Fargo Bank, N.A., Trustee v. Diamond Point Plaza Limited Partnership, et al., No. 666, September Term, 2008, filed May 8, 2009. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2009/66s08.pdf

CIVIL PROCEDURE - DIRECT ESTOPPEL - TRIAL COURT PRECLUDED FROM RECONSIDERING ISSUE CONTAINED IN FINAL JUDGMENT AFFIRMED BY COURT OF APPEALS

Facts: Bank, as trustee, brought an action against a series of entities which owned a shopping center ("owners"). The circuit court ruled in favor of the bank on the merits, and entered judgment against the owners. That judgment contained a detailed calculation of damages, which included a specific amount identified as a "prepayment premium" due under the lease between the parties. Despite evidence of contractual provisions in that lease providing for attorney's fees, the circuit court denied the bank an award of such fees because it had failed to itemize and apportion its fees among the various owners.

The Bank appealed, and the Court of Special Appeals affirmed the circuit court's calculation of damages but vacated the judgment regarding attorney's fees. The Court of Appeals affirmed the Court of Special Appeals' judgments on the calculation of damages and attorney's fees.

On remand, the circuit court found that the bank had met its burden of proof regarding attorney's fees to which it was contractually entitled, but nevertheless denied the bank's request because the court determined that it had erroneously included the prepayment premium into its original calculation of damages.

Held: Reversed. The circuit court's calculation of damages, which included the prepayment premium, was part of a judgment that was affirmed by the Court of Appeals and had therefore become final. The circuit court was therefore directly estopped from reconsidering the issue of the prepayment premium in determining the bank's request for attorney's fees. Furthermore, because the circuit court had already made a detailed finding regarding the amount of attorney's fees to which the bank was entitled, there was no need to remand the case for any further determinations on that issue. Rather, the bank was entitled to those fees to which the bank had sufficiently proven it was

entitled.

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Miller v. State, No. 645, September Term, 2007, filed May 4, 2009. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2009/645s07.pdf

CONSTITUTIONAL LAW - VALIDITY OF GUILTY PLEA - DEFENDANT'S KNOWLEDGE OF THE NATURE AND ELEMENTS OF THE CRIME ON WHICH THE PLEA IS ENTERED.

Facts: Chad Everette Miller, the appellant, was charged in a 9-count criminal information arising from an alleged burglary of the apartment of his 89-year-old grandmother, Gilda Jeraldine Henry. He entered a guilty plea to a single count of first-degree burglary. In return, the State *nolle prossed* the 8 remaining charges, and recommended a sentence of 15 years' imprisonment, all but 5 suspended, plus probation.

The appellant was represented by counsel at the plea hearing. The colloquy shows that the appellant was informed of important procedural rights he was waiving as a result of his guilty plea. The trial court also verified pertinent information such as the appellant's age and education, and determined that he was not under the influence of drugs or otherwise was incompetent to enter his plea. At no time, however, did the trial court or counsel explain the nature and elements of the crime charged, nor did the appellant state on the record that he had been so advised. Moreover, the crime to which he pleaded guilty, first-degree burglary, is a statutory crime that includes a specific intent element that cannot be presumed "simple."

The trial court imposed a 15-year sentence of imprisonment, with no period suspended, relying on the fact that it was not bound by the terms of the plea agreement. The appellant filed a notice of appeal, which the appellate court treated as an application for leave to appeal, and granted.

Held: The appellate court vacated Miller's guilty plea, holding that, in the absence of an affirmative indication in the record that he had been apprised of the nature and elements of the crime charged, the mere fact that he had been represented by counsel was insufficient to create a presumption that he had been so informed. Thus the appellate court applied its considered *dicta* in *Abrams v. State*, 176 Md. App. 600 (2007), and the holding of the Supreme Court in *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), to restrict the scope of *State v. Priet*, 289 Md. 267 (1981), which previously had recognized such a general presumption.

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Ashton v. State, No. 3064, September Term, 2007, filed May 12, 2009. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2009/3064s07.pdf

CRIMINAL LAW – ADMISSION OF DNA EVIDENCE

Courts and Judicial Proceedings Article § 10-915. Under CJP § 10-915 a party intending to use DNA evidence at trial must notify the opposing party or parties at least 45 days prior to the start of trial of its intent to use DNA evidence. If the opposing party wishes to receive the items listed in CJP § 10-915(c)(2)(i)-(v) it must make a written request to the party intending to use the DNA for production of the items. The party intending to use the evidence must then deliver, if applicable, the items listed in CJP § 10-915(c)(2) within 30 days of the start of trial.

In the instant case, the State gave the required statutory notice to appellant. Appellant did not respond with a request for production of the DNA evidence, relying instead on a general discovery request contained in an earlier filed "omnibus motion." When the DNA evidence was produced five days before trial, appellant objected successfully to the State's request for a continuance and moved to exclude the DNA evidence at trial. The trial court denied his motion to exclude, but granted appellant a continuance which exceeded his *Hicks* date.

Held: The circuit court's denial of the appellant's motion to exclude DNA evidence is affirmed, as well as its decision to grant his request for a continuance beyond *Hicks*. Appellant's failure to substantially comply with CJP § 10-915(c)(2) relieved the State of its obligation to produce the DNA evidence at least 30 days before trial.

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Andre Jerome Elliott v. State of Maryland, No. 1963, September Term, 2007, filed May 11, 2009. Opinion by Hollander, J.

http://mdcourts.gov/opinions/cosa/2009/1963s07.pdf

CRIMINAL LAW - GENDER-BASED PEREMPTORY STRIKES - BRADY MATERIAL - ARIZONIA V. YOUNGBLOOD, 488 U.S. 51 (1988) - PRESERVATION OF EVIDENCE; DUE PROCESS - BAD FAITH - INDICTMENT

Facts: Kellie McCullough, the estranged wife of Andre Jerome Elliott, appellant, suffered multiple stab wounds when she was attacked by appellant on February 5, 2006. Following a jury trial in the Circuit Court for Montgomery County in July 2007, appellant was convicted of attempted second-degree murder, in violation of Md. Code (2002, 2006 Supp.), § 2-206 of the Criminal Law Article ("C.L."); first-degree burglary, in violation of C.L. § 6-202; and first-degree assault, in violation of C.L. § 3-202.

During jury selection, the State exercised the first six of seven strikes against men, and, in total, exercised eight of its nine peremptory strikes (88.8%) against men. After the State had exercised seven of its ten allotted strikes, the following ensued at the bench:

> [DEFENSE COUNSEL]: . . . I'm not certain, but I believe the State used six of its seven . . . strikes on men. . . . [T]he issue I'm raising is whether they've used a disproportionate number of those strikes on men. I believe it may be six out of seven but I would need to consult the official records. I just don't want to waive the issue, Your Honor. That's all.
>
> THE COURT: Very well. I'll consider that an objection. Overruled.

Twelve jurors and two alternates were seated. The following colloquy transpired at the bench, before the jury was sworn:

> [DEFENSE COUNSEL]: I just want to preserve the issue of using strikes on men . . .
>
> THE COURT: Is there any specific reason[?]

> [DEFENSE COUNSEL]: I believe they used all but one of their strikes on men. I would have to look at my notes to verify that.
>
> [PROSECUTOR]: I'd actually like to respond to that point.
>
> THE COURT: Yes, Go ahead, Madam State.
>
> [PROSECUTOR]: First of all, they have to show a pattern of discrimination and they haven't. And I would also like to say that they used most of their strikes on women[] and then when we started using our strikes, *we had a panel of men and felt the need to balance out the jury. So if we did use more strikes on men, it would be because we wanted a balanced jury, which I believe we have.* I guess it's more men than women on the jury now.
>
> THE COURT: Yes. Okay. Very well.

The State never objected to the defense's strikes. Nor did it particularize its contention as to the defense's alleged misuse of its peremptory strikes.

On appeal, appellant claimed that the "court erred by failing to remedy the constitutional violations arising from the State's gender-based exercise of its challenges." According to appellant, the State "proffer[ed] a patently gender-based explanation for its strikes against men" and "admitted that it was striking men <u>because they were men</u>," which "was <u>not</u> gender-neutral," as required by *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny. As to "[t]he State's unfounded suggestion that defense counsel exercised gender-based strikes," appellant noted that "the State never raised a *Batson* objection."

In addition, the State disclosed the existence of the victim's diary, recovered from the scene, but it was returned to the victim, who destroyed it. The court below declined to dismiss the charges on this basis. On appeal, appellant argued: "The trial court erred in refusing to dismiss the indictment based on the State's intentional non-preservation of evidence."

Held: Judgment vacated. The State's desire to obtain a gender-balanced jury violated *Batson* and its progeny. In the Court's view, the State's explanation did not pass muster under *Batson*. The State had the burden of providing a gender-neutral explanation for its strikes. It failed to do so. Instead, it remarked that "when [the State] started using [its] strikes," there was "a panel of men," and it felt the "need to balance out the jury." By striking men to reduce the number of men on the jury, "a discriminatory intent [was] inherent in the prosecutor's explanation," and that explanation could not be deemed gender-neutral. Because the State acknowledged its gender-based motives, a limited remand was neither necessary nor appropriate. The State was not entitled to a second chance to provide a gender-neutral explanation.

However, the State's decision to return the diary to McCullough was not proof of bad faith. The court below found that the State did not act in bad faith; that finding was not clearly erroneous. Without proof of bad faith, appellant did not establish a due process violation under *Arizona v. Youngblood*, 488 U.S. 51 (1988).

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Height v. State, No. 1021, September Term, 2007, filed May 6, 2009. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2009/1021s07.pdf

CRIMINAL LAW - JURY SELECTION - *VOIR DIRE* PROCEDURE IN CRIMINAL TRIAL - IMPROPER/PREJUDICIAL REMARKS BY PROSECUTOR IN OPENING STATEMENT.

Facts: Andrew Height, the appellant, was convicted of first-degree assault and related handgun crimes involving the shooting of Bernard Cure at an east Baltimore bar on March 15, 2005. During *voir dire*, the trial court asked 15 questions to the entire venire, and asked the venirepersons not to respond to any of the questions at that time. Afterward, the trial court examined potential jurors individually. The appellant objected to this procedure, maintaining that it improperly shifted the burden of determining one's fitness to serve on the jury from the trial judge to the individual venirepersons in violation of *Dingle v. State*, 361 Md. 1 (2000).

During opening statement, the prosecutor predicted that State's witness Bernard Cure would be uncooperative in his upcoming testimony because he followed "the law of the street," and that "Rule number one on the street is you do not snitch." The trial court overruled the appellant's objection to these remarks.

During cross-examination of a police detective, the appellant attempted to impeach the officer with evidence he had been suspended from the police force. Because there was no evidence to support the underlying allegations (which were unrelated to the present trial), and because the police department had not determined whether the officer actually had engaged in wrongdoing, the trial court refused to permit the appellant's attempt to impeach the police officer's testimony.

Held: The trial court acted within its discretion in conducting *voir dire*. The trial judge stated a reasoned basis for his preferred procedure: to reduce the chance that potential jurors would discover "successful" rationales for avoiding jury service by observing the answers of previous venirepersons. Moreover, the appellate court held the present case was more closely analogous to *White v. State*, 374 Md. 232 (2003), in which the Court of Appeals upheld a *voir dire* procedure when the trial court posed general questions to the entire panel, including four compound questions (of the type held objectionable in *Dingle*), but then examined the venirepersons individually. *Dingle v. State*, 361 Md. 1, distinguished.

The appellate court held there was no error in permitting the prosecutor to refer in one isolated instance to "the law of the street." In the present case, the prosecutor immediately defined the expression in terms of not "snitching." By contrast, in *Lee v. State*, 405 Md. 148 (2008), the prosecutor referred repeatedly to "the law of the street," without definition, and in a manner held prejudicial; furthermore, in *Lee*, the prosecutor engaged in an impermissible "golden rule" argument, unlike in the present case. *Lee v. State*, 405 Md. 148, distinguished.

The trial court correctly applied Md. Rule 5-608(b) to exclude the appellant's attempt to impeach the police officer, because there was no factual basis to support the allegations against the officer. Even assuming, *arguendo*, that the trial court erred in limiting cross-examination, any possible error was harmless beyond a reasonable doubt because two other witnesses testified that they had seen the appellant beating the victim, that the appellant was armed with a handgun, and that they heard gunfire.

The trial court erred in imposing separate sentences for wearing, carrying, or transporting a handgun in violation of Md. Code, Criminal Law section 4-203 ("CL"), and use of a handgun in the commission of a crime of violence in violation of CL section 4-204. *See Wilkins v. State*, 343 Md. 444 (1996) (per curiam); *Hunt v. State*, 312 Md. 494 (1988). The appellate court vacated the sentence for wearing, carrying, or transporting a handgun.

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Omar Parker v. State of Maryland, No. 1469, September Term, 2007, filed May 7, 2009. Opinion by Hollander, J.

http://mdcourts.gov/opinions/cosa/2009/1469s07.pdf

CRIMINAL LAW - RETALIATION FOR TESTIMONY - JURY QUESTION - *APPRENDI* - DUE PROCESS - ELEMENTS OF OFFENSE - ENHANCED SENTENCE

Facts: In an incident that occurred on November 29, 2005, Omar Parker, appellant, threatened Kya Hicks with a gun. Appellant was arrested in Baltimore City on February 17, 2006, with respect to that incident and charged, *inter alia*, with retaliation for testimony. At the trial in May 2007, the court instructed the jury, in part:

> Lastly, the defendant is charged with retaliation of testimony. In order to convict the defendant with retaliation of testimony, the State must prove; (1) that the defendant intentionally harmed another or threatened to harm another, or damaged or destroyed property and; (2) that the defendant did so with the intent of retaliating against the victim or witness because the victim or witness either gave evidence in an official proceeding or reported a crime or delinquent act.

The jury convicted Parker of second-degree assault, in violation of Md. Code (2002 Repl. Vol., 2005 Supp.), § 3-203 of the Criminal Law Article ("C.L."), and retaliation for testimony, in violation of C.L. § 9-303. The court sentenced appellant to five years' incarceration for second-degree assault and, pursuant to C.L. § 9-303(c)(2), to a concurrent term of twenty years for retaliation.

At sentencing, the State claimed that appellant "was charged under the felony retaliation for testimony" and faced a maximum penalty of twenty years in prison. The defense claimed that the maximum sentence was five years. Noting that appellant "was charged under C2 not C1," the court stated that "the penalty that exists under the charge of retaliation, as charged in this particular case, the maximum sentence is twenty years." It said: "I'm going to sentence him [under] the felony retaliation statute."

On appeal, appellant challenged, *inter alia*, his sentence for retaliation under C.L. § 9-303(c)(2), claiming the court improperly imposed an enhanced sentence because a jury should have determined the underlying factual issues. In appellant's view, the court erred by failing to instruct the jury as to its

duty to determine "the facts necessary to establish the sentencing enhancement," as required by Maryland common law. He asserted that "the trial court did not have in its arsenal the option of the twenty year sentencing enhancement," because the court did not instruct the jury to determine whether "the sentencing enhancement contained in [§ 9-303](c)(2) existed beyond a reasonable doubt." In addition, appellant maintained that "the trial court failed to instruct the jury on every element of the crime charged." In particular, he claimed that the court "did not instruct the jury that it must find that 'the official proceeding or report [that was the subject of retaliation] relates to a felonious violation of Title 5 . . . or the commission of a crime of violence as defined in § 14-101 . . . or a conspiracy or solicitation to commit such a crime.'" Appellant also contended that the enhancement of his sentence "violates due process principles" under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny.

Held: Affirmed and sentence for retaliation vacated. The court erred in imposing an enhanced sentence of 20 years' incarceration for the offense of retaliation for testimony under C.L. § 9-303(c)(2). The issue of whether appellant's conduct related, *inter alia*, to "a felonious violation of Title 5," constituted an element of the offense under C.L. § 9-303(c)(2). Therefore, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, it should have been submitted to and decided by the jury.

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Deron Maurice Webb v. State of Maryland, No. 2711, September Term, 2007, decided May 12, 2009. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2009/2711s07.pdf

CRIMINAL LAW - SINGLE LARCENY DOCTRINE (providing that when theft is committed in violation of § 7-103 (f) under one scheme or continuing course of conduct, whether from the same or several sources, (1) the conduct may be considered as one crime; and (2) the value of the property or services may be aggregated in determining whether the theft is a felony or a misdemeanor.).

Md. Code Ann., (C.L.) § 7-104 (c), Captioned "Possessing Stolen Personal Property," (providing that (1) A person may not possess stolen personal property knowing that it has been stolen, or believing that it probably has been stolen, if the person: . . . (iii) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property).

Facts: Appellant was tried and convicted of three counts of felony theft and related offenses. Pursuant to each of the three theft convictions, the trial court imposed a ten-year prison sentence, each to run consecutively for an aggregate of thirty years. There was evidence that police observed appellant enter a stolen van that contained stolen motorcycles establishing only that he was simultaneously *in possession* of the stolen property, but the State failed to adduce evidence that appellant was involved in the theft of the property.

Held: Reversed and Remanded. Regarding whether appellant waived the right to challenge his sentence because his counsel did not join in the recommendation in the Memorandum in Aid of Sentencing, submitted by the Division of Parole and Probation (DPP) at his sentencing hearing, to treat the three theft counts as a single event for sentencing purposes, the issue was tried and decided in light of the State's opposition thereto and the court's ruling. In addition, the Court of Special Appeals having been unable to "conceive of circumstances" which would have inured to the benefit of appellant to refrain from joining the recommendation of DPP, "refusal to address [appellant's] claim on direct appeal, rather than at a Post Conviction hearing, would constitute a waste of judicial resources" because failure to adopt DPP's argument, on its face, constituted ineffective assistance of counsel. *Wilkins v. State*, 343 Md. 444, 447 (1996).

Because the State provided no evidence that appellant

initially stole the property, appellant's actions constituted one scheme or continuing course of conduct; the circuit court, accordingly, erred in not applying the single larceny doctrine and in sentencing appellant to three consecutive ten-year sentences.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated May 1, 2009, the following attorney has been indefinitely suspended by consent from the further practice of law in this State:

JOHN DOUGLAS LAWRENCE, JR.
*

By an Order of the Court of Appeals of Maryland dated May 5, 2009, the following attorney has been disbarred by consent from he further practice of law in this State:

DAVID HOWARD ZIMMER
*

By and Opinion and Order of the Court of Appeals dated April 14, 2009, the following attorney has been indefinitely suspended, effective May 14, 2009, from the further practice of law in this State:

THOMAS F. PAWLAK
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