

IN THE COURT OF APPEALS OF MARYLAND

No. 117

September Term, 1994

JEFFREY D. EBB

v.

STATE OF MARYLAND

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker,

JJ.

Opinion by Raker, J.
Eldridge and Bell, JJ., dissent.

Filed: February 14, 1996

In this case we are asked to decide whether the trial court erred when it precluded cross-examination of the State's witnesses, in the jury's presence, about their pending criminal charges or charges of violation of probation. We shall hold that the trial judge did not abuse his discretion, and accordingly, we affirm.

Jeffrey Damon Ebb, the Petitioner, was tried and convicted in the Circuit Court for Montgomery County, for two counts of murder and related charges¹ arising out of an attempted robbery of Brodie's barbershop, which occurred on November 28, 1992. He was sentenced to life without parole on the murder convictions and concurrent sentences totaling 80 years imprisonment on the related charges. He appealed his conviction to the Court of Special Appeals, challenging, among other things, the trial judge's refusal to allow him to cross-examine, before the jury, two state's witnesses about their pending charges. In an unreported opinion, the intermediate appellate court affirmed. We granted Ebb's petition for writ of certiorari to determine whether the trial court properly limited the scope of the cross-examination of witnesses Todd Timmons and Lawrence Allen.

I.

¹ Petitioner was indicted by the Grand Jury for Baltimore County for two counts of first degree murder, attempted first degree murder, four counts of assault, attempted armed robbery and related handgun offenses. The case was transferred to the Circuit Court for Montgomery County pursuant to Maryland Rule 4-254, after the State filed notice of its intention to seek the death penalty.

On November 28, 1992, James Brodie, the owner of Brodie's Barbershop, and Michael Peters, a customer at the shop, were shot and killed during an attempted robbery at the barbershop. At Ebb's trial, three of the witnesses called by the State, Todd Timmons, Lawrence Allen, and Jerome House-Bowman, each faced pending criminal or probation violation charges. Timmons had a pending violation of probation, based on a conviction for possession of controlled dangerous substances, and a motion for reconsideration of a sentence. Allen had pending theft and handgun violation charges in Baltimore county. House-Bowman had a pending violation of probation charge based on two armed robbery convictions.

Before trial, Ebb filed a motion requesting that the State disclose whether any witness had been offered any promise, reward or inducement in exchange for testimony. In response, the State proffered that no promises had been made to any witness, but that one witness, Jerome House-Bowman nonetheless believed that his testifying for the State might reflect favorably upon him. The prosecutor stated:

I can tell you that we have not made any written promises of immunity or anything like that to any witness. The only one that I am aware of is the individual, Jerry House-Bowman believes that at some point he was told that somebody would speak on his behalf at a probation hearing that he has.

I have talked with him about that, and I have explained to him that his testimony in this case is only based on the fact that it is the truth and it is the right thing to do. I talked with him about it and made clear to him

that there is no express promise that that is going to happen.

. . .

But he believes that somebody told him that. So I am sure if he is asked, that is what he is going to say.

Notwithstanding the State's disclaimer, the Petitioner proposed to cross-examine Timmons, Allen, and House-Bowman about their pending charges. In that regard, the Petitioner contended that it is not what the State has promised, but rather the witnessess' motive to testify that is the proper subject of inquiry. Agreeing with the Petitioner, the court observed, "[i]t is not what the State has promised here. Sometimes the act itself is sufficient. In others, even without any promises, it is what is in the mind of the defendant." The court then ruled, "[f]irst of all, you have to lay some threshold that he does expect something." Pursuant to that ruling, hearings were conducted outside the presence of the jury to give the Petitioner the opportunity to "get [the] threshold foundation that would suggest that [the witness] expects any kind of lenience."

As the State predicted, House-Bowman acknowledged he had been told his testimony would not assist him in obtaining a favorable disposition of his pending probation matter. He still hoped, however, that testifying would help him to receive leniency. Allen and Timmons, on the other hand, not only confirmed the prosecutor's statement that no promises had been made to anyone, but they also denied expecting anything in return for their testimony.

In a hearing outside the presence of the jury, the examination of Timmons was as follows:

[Defense Counsel]: Has anyone made any promises to you in exchange for your testimony today?

MR. TIMMONS: No.

[Defense Counsel]: Have you discussed with [the State] any reward that you will receive in return for your testimony here today?

MR. TIMMONS: No.

[Defense Counsel]: Have you requested any?

MR. TIMMONS: No.

[Defense Counsel]: Has anyone expressed to you that under no circumstances could they make you any promises?

MR. TIMMONS: Yes.

[Defense Counsel]: Explain to me how that situation occurred?

MR. TIMMONS: The last time I came here --

[Defense Counsel]: The motions hearing in August?

MR. TIMMONS: Yes.

[Defense Counsel]: What happened?

MR. TIMMONS: [The State] let me know that there would be no promises made at all.

[Defense Counsel]: Did she tell you anything else?

MR. TIMMONS: No.

[Defense Counsel]: Did she tell you at any time that although she could not make you any promises that there was a possibility that something could happen down the road?

MR. TIMMONS: No.

[Defense Counsel]: Do you have any expectation, whether an express promise has been made or not, that you will receive some reward for your testimony here today?

MR. TIMMONS: No.

Defense counsel also questioned Lawrence Allen out of the jury's presence. The inquiry was as follows:

[Defense Counsel]:
Do you expect to receive any assistance for your testimony here today?

[MR. ALLEN]: Not to my knowledge.

[Defense Cou: Have you sought assistance from the State's Attorney's Office?

[MR. ALLEN]: No.

[Defense Counsel]: Do you expect that somehow your testimony here today will reflect favorably in your pending case in Baltimore County?

[MR. ALLEN]: Not to my knowledge.

[Defense Counsel]: Well, I am asking what you expect.

[MR. ALLEN]: No.

At the conclusion of the hearings, as to Timmons and Allen, the court ruled that because no promises of leniency had been made and the witnesses denied any expectation of leniency, the Petitioner could not inquire in the jury's presence about pending charges. A different conclusion was reached as to House-Bowman; because he stated that even though no promise of leniency had been made, he thought that his testifying for the State might reflect favorably upon him, and therefore, the court ruled that the Petitioner could pursue the matter before the jury.

The Petitioner was convicted and noted an appeal to the Court of Special Appeals. Before the intermediate appellate court, Ebb argued that Judge Cave erred in restricting the cross-examination of Timmons and Allen. Rejecting his claim, the intermediate appellate court stated,

We agree with the appellant that the pendency of criminal charges can be a source of possible bias. *Pettie v. State*, 316 Md. 509, 512-18 (1989); *Brown v. State*, 74 Md. App. 414, 415-22 (1988). As we explained in the *Brown* case, however, it is not even an explicit agreement between the State and a witness with respect to the witness's testimony that is the relevant factor. It is, rather, the case that, in order to show bias or motive to fabricate, the cross-examination must focus on the witness's state of mind. We observed, 74 Md. App. at 421:

[T]he crux of the inquiry insofar as its relevance is concerned, is the witness's state of mind. What is essential to the preservation of the

right to cross-examine is that the interrogator be permitted to probe into whether the witness is acting under a hope or belief of leniency or reward.

See also Fletcher v. State, 50 Md. App. 349, 359 (1981). In dealing with the cross-examination of a witness in an effort to show bias or motive, the trial judge retains the discretion to impose reasonable limitations. *Smallwood v. State*, 320 Md. 300, 307 (1990).

The Court of Special Appeals affirmed the conviction, holding that "[i]n the balanced handling of this issue, we see no abuse of discretion on the part of Judge Cave." We agree and hold that the trial judge did not abuse his discretion in precluding the cross-examination of the witnesses about their pending charges.

II.

The Petitioner argues that the trial court's ruling precluding cross-examination of Timmons and Allen, in the jury's presence, with regard to their pending charges was error. He maintains that, because it is the jury's responsibility to assess whether a witness is truthful, he has a constitutional right to cross-examine the witness in the jury's presence and that it is not necessary to first make a showing that the cross-examination will yield facts tending to discredit the witness' testimony. Essentially, he is arguing that whenever a witness for the State has a pending criminal charge, the defendant is entitled to inquire, before the jury, whether the witness has an expectation of leniency as a

result of his testimony. He concludes, therefore, that notwithstanding a witness's denial of an expectation of leniency, whether the witness **in fact** hoped to gain favorable treatment was for the jury to determine.

The State contends that the trial judge did not abuse his discretion by precluding cross-examination about the witness' pending charges. Alternatively, the State contends that even if the trial judge erred in restricting Ebb's cross-examination, the error was harmless.

III.

The Confrontation Clause of the Sixth Amendment and Article 21 of the Maryland Declaration of Rights guarantee a defendant in a criminal case the right to confront the witnesses against him. *Delaware v. Van Arsdall*, 475 S. Ct. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); *Simmons v. State*, 333 Md. 547, 555-56, 636 A.2d 463, 467, *cert denied*, 115 S. Ct. 70 (1994). This guarantee affords the defendant the right to cross-examine witnesses about matters relating to the witnesses' bias, interests, or motive to falsify. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). This right, however, is not unlimited. See *Smallwood v. State*, 320 Md. 300, 307, 577 A.2d 356, 359 (1990). We have recognized that "trial judges retain wide latitude insofar as

the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Smallwood*, 320 Md. at 307, 577 A.2d at 359 (quoting *Van Arsdall*, 475 U.S. at 679).

Trial judges have considerable discretion in determining what evidence is relevant and material. *State v. Cox*, 298 Md. 173, 183-84, 468 A.2d 319, 324 (1983). The general rule is that the extent to which a witness may be cross-examined for the purpose of showing bias rests with the sound discretion of the trial judge. *Bruce v. State*, 328 Md. 594, 624, 616 A.2d 392, 407 (1992), *cert. denied*, 113 S. Ct. 2936 (1993); *Shields v. State*, 257 Md. 384, 392, 263 A.2d 565, 569 (1970); *Shupe v. State*, 238 Md. 307, 310, 208 A.2d 590, 592 (1964); *Fletcher v. State*, 50 Md. App. 349, 357, 437 A.2d 901, 906 (1981); *see also Kruszewski v. Holz*, 265 Md. 434, 440, 290 A.2d 534, 538 (1972). The cross-examiner must, however, be given wide latitude to establish bias or motive of a witness. *Bruce*, 328 Md. at 624, 616 A.2d at 407. Whether there has been an abuse of discretion necessarily requires consideration of the particular circumstances of each individual case; if the limitations placed upon cross-examination inhibit the ability of the defendant to receive a fair trial, the general rule vesting the court with discretion to disallow the inquiry does not apply. *Cox*, 298 Md. at

183-84, 468 A.2d at 324 (quoting *DeLilly v. State*, 11 Md. App. 676, 681, 276 A.2d 417 (1971)). The judge must balance the probative value of the proposed evidence against the potential for undue prejudice, keeping in mind the possibility of embarrassment to or harassment of the witness and the possibility of undue delay or confusion of the issues.

As a general rule, pending criminal charges are not admissible to impeach a witness. An exception to that rule, however, is when the pending charges are offered to show bias, prejudice or motive of the witness in testifying. In determining whether to admit the evidence, the judge must engage in a balancing test giving wide latitude to cross-examine for bias or prejudice but not permitting the questioning "to stray into collateral matters which would obscure the trial issues and lead to the factfinder's confusion." *Smallwood*, 320 Md. at 308, 577 A.2d at 359 (citing *Cox*, 298 Md. at 178, 468 A.2d at 321). The trial judge is in the best position to balance the probative value of the unrelated pending charges against the prejudicial effect and to decide when their admission would enmesh the trial in confusing or collateral issues.

In *Watkins v. State*, 328 Md. 95, 613 A.2d 379 (1992), we were asked to consider whether a defendant may cross-examine a State's witness about potential interest or bias in favor of the State under two circumstances -- when that evidence pertains to the witness' probationary status and when that evidence pertains to a

pending criminal charge in an unrelated cause. The defendant in *Watkins* was charged with shooting several people with the intent to disable them. He appealed the trial court's restriction of his cross-examination of several of the State's witnesses. He attempted to show that two of the State's witnesses were on probation, and that their probationary status colored their testimony. Specifically, he wished to show "that it was their connection with the criminal justice system, *i.e.*, the pending charges or probation status, and the risks of revocation or unfavorable treatment, that accounted for their lack of candor regarding the cause of the shootings." *Watkins*, 328 Md. at 118, 613 A.2d at 390 (Bell, J., dissenting). We found no basis for appeal of the trial court's ruling excluding the evidence concerning the pending theft charge because defense counsel acquiesced in the court's ruling and the issue was not preserved for appeal. As to the probationary status, we held that the decision to permit cross-examination about a witness' probationary status rests within the sound discretion of the trial judge. *Id.* at 103, 613 A.2d at 382-83.

Watkins argued that *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), "compels the admission of evidence that any State's witness is on probation for any crime, if that evidence is offered by the defendant." *Watkins*, 328 Md. at 100, 613 A.2d at 381. We rejected such a broad reading of *Davis*,

suggesting instead that the holding of *Davis* was narrower.² We recognized that the witness against Davis might have been motivated to testify favorably for the State because he was potentially a suspect in the crime for which Davis was charged. Watkins did not suggest that the State's witnesses had committed any offense for which the defendant was charged. Thus, while we recognized that there was some merit in Watkins' contention that the proposed testimony went to bias, we held that the trial judge, after weighing the potential relevance of this information against the potential misuse of the evidence, did not abuse his discretion in excluding the testimony. In this regard, we also noted "had the trial judge exercised his discretion to allow the evidence, that would not have constituted error."³ *Id.* at 103, 613 A.2d at 382.

² Writing for the Court, Judge McAuliffe observed that "[t]he facts of *Davis*, and other language in the Court's opinion, suggest, however, that the holding of that case was narrower" than Watkins suggested. *Watkins v. State*, 328 Md. 95, 100, 613 A.2d 379, 381 (1992). Quoting from *Davis*, we noted

Since defense counsel was prohibited from making inquiry as to the witness' being on probation under a juvenile court adjudication, Green's protestations of unconcern over possible police suspicion that he might have had a part in the Polar Bar burglary and his categorical denial of ever having been the subject of any similar law enforcement interrogation went unchallenged.

Id. at 101-02, 613 A.2d at 382.

³ Likewise, in this case, it would not have constituted an abuse of discretion if the judge had allowed the evidence.

The State reads *Watkins* to stand for the proposition that "where the subject of the proposed inquiry is of limited probative value and could brand the witness with prior bad acts not otherwise admissible as bearing on credibility, a trial court's decision not to permit cross-examination on the subject will not be deemed an abuse of discretion." See also J. Murphy, Jr., *Maryland Evidence Handbook*, § 1302(E)(1)(c) at 667 (2d ed. 1993) (*Watkins* held that "the trial judge has discretion to permit or prohibit questions about probation and/or pending charges"). We agree with the State.

In the instant case, the trial judge conducted a hearing outside the presence of the jury, allowing Ebb to question the witnesses extensively. On voir dire, Timmons and Allen testified that the State had not offered and that they did not expect leniency in exchange for their testimony. They denied any expectation of leniency in return for their testimony and there was no basis for any expectation of leniency. The trial judge ruled Ebb's proposed cross-examination inadmissible. On the other hand, the judge allowed Ebb to cross-examine House-Bowman about his pending charges because he had some subjective expectation of leniency.

Applying the principles of *Watkins* to the instant case, we conclude that the trial judge did not abuse his discretion in precluding the Petitioner from cross-examining the witnesses about their pending charges before the jury. See *Gutierrez v. State*, 681

S.W.2d 698, 705-07 (Tex. Ct. App. 1984) (holding that a trial judge has discretion to exclude evidence of pending charges, and that where the defendant was given a full opportunity outside the presence of the jury to develop a foundation for bias but failed to do so, the trial judge did not abuse its discretion); *State v. Grace*, 643 So.2d 1306, 1307-09 (La. Ct. App. 1994). In fact, Judge Cave did what we suggested in *Smallwood* and *Watkins*. He held a hearing outside the presence of the jury, engaged in a balancing process and determined that the evidence had little or no probative value. See *Grace*, 643 So. 2d at 1308 (holding trial court properly conducted hearing outside jury's presence to determine admissibility of the evidence and the existence of a deal). In determining the admissibility of the evidence, the trial judge considered the testimony of the witnesses, i.e., that they were not offered and did not expect leniency. He made a preliminary finding that based on the denial of the witnesses and the uncontroverted representation of the prosecutor that there was no offer of leniency, there was a complete lack of probative value or that the value for impeachment was so slight as to be overcome by the probability that the testimony would be unduly prejudicial or confusing to the jury. This we believe, is a proper matter for the trial court's discretion.

Under the circumstances of this case, and particularly because the witnesses testified unequivocally that they expected no benefit

from their testimony, and there was no basis to infer an expectation of any benefit, we hold that the trial judge did not abuse his discretion in excluding the evidence and in finding that the fact that charges were pending had little or no probative force.

JUDGEMENT OF THE COURT OF SPECIAL
APPEALS AFFIRMED. COSTS TO BE PAID
BY PETITIONER.