

## RECENT DEVELOPMENT

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***STODDARD V. STATE*: TRIAL COURT’S REQUIREMENT THAT THE DEFENDANT TESTIFY BEFORE THE FINAL DEFENSE WITNESS WAS A VIOLATION OF THE CONSTITUTIONAL RIGHT TO DUE PROCESS AND RIGHT AGAINST COMPELLED SELF INCRIMINATION; IT WAS NOT ERROR TO ADMIT EVIDENCE OF A DEFENDANT’S PRIOR BAD ACTS TO REHABILITATE A WITNESS OR PERMIT A QUESTION IMPLYING THE DEFENDANT POSED A THREAT TO A CHILD TO SHOW A WITNESS’S MOTIVE TO FALSIFY TESTIMONY.**

**By: Kayleigh Toth**

The Court of Appeals of Maryland held that a criminal defendant has a constitutional right to decide when to testify, and may use that right as a tactical advantage. *Stoddard v. State*, 423 Md. 420, 31 A.3d 603 (2011). Due to the unique procedural circumstances, the trial court’s error in ordering the defendant to testify at a particular time was harmless. *Id.* at 441, 31 A.3d at 615. Additionally, the court held that the admission of evidence concerning the defendant’s prior assaults and the State’s questions regarding a witness’s motive to testify falsely were not unfairly prejudicial. *Id.* at 443-46, 31 A.3d at 616-18.

On June 15, 2002, Nick Dieter (“Dieter”) found his ex-wife’s daughter, Calen DiRubbo (“Calen”), dead in her home. The police arrested Dieter under the assumption that Calen’s fatal injuries occurred immediately prior to her death while in Dieter’s care. Subsequently, the medical examiner determined the cause of death was blunt force injuries resulting in internal bleeding and estimated that the fatal injuries were inflicted during a period when Calen was with Erik Stoddard (“Stoddard”). Shortly after Calen’s death, Cheryl DiRubbo (“DiRubbo”), Calen’s mother and Stoddard’s girlfriend, gave a recorded statement to the police stating that Stoddard abused her and Calen, which she later recanted at trial.

A jury in the Circuit Court for Baltimore City convicted Stoddard of second-degree murder and child abuse resulting in death, but the Court of Appeals of Maryland reversed and remanded for a new trial. After a second jury convicted Stoddard, the trial court granted Stoddard’s Motion for a New Trial due to its failure to ask a mandatory voir dire question. During Stoddard’s third trial,

scheduling issues arose when the trial did not finish before the judge's out of state judicial conference. Defense counsel requested to call the remaining witnesses after the trial resumed because an expert was unavailable and the defense wanted to avoid a split in Stoddard's testimony. The judge then instructed defense counsel to call Stoddard if he wished to testify. Stoddard elected not to testify at that time and reserved his right to do so before the close of the defense's case. However, the judge did not permit this reservation and explained that by declining to testify at that moment Stoddard would forfeit his right to testify altogether. After he adamantly objected, Stoddard took the stand.

Stoddard also objected to statements concerning his prior bad acts and the State's question to DiRubbo, "[a]nd you wouldn't want anything to happen to [your son], would you," after playing the recorded statement. At the trial's conclusion, the jury found Stoddard guilty of child abuse and manslaughter. Stoddard appealed and the Court of Special Appeals of Maryland affirmed. The Court of Appeals of Maryland granted Stoddard's petition for a writ of certiorari to determine two issues. First, whether the trial court erred in forcing Stoddard to testify before the last defense witness or lose his right to testify. Second, whether the trial court erred in admitting evidence of prior bad acts and a question implying Stoddard posed a threat to a child.

The Court of Appeals of Maryland began its analysis by addressing whether the court may compel a defendant to testify at a particular time. *Stoddard*, 423 Md. at 433, 31 A.3d at 611. The court adopted the analysis in *Brooks v. Tennessee* to determine if a violation occurred and if the violation constituted harmless error. *Id.* at 435, 31 A.3d at 612 (citing *United States v. Rantz*, 862 F.2d 808, 812 (10th Cir. 1988)). In *Brooks*, despite a legitimate state interest to prevent testimonial influence, the Supreme Court struck down a statute requiring the defense to call a defendant as the first witness. *Stoddard*, 420 Md. at 433-34, 31 A.3d at 611 (citing *Brooks v. Tennessee*, 406 U.S. 605 (1972)). The Supreme Court held the statute violated a defendant's right to due process, effective assistance of counsel, and right against compelled self-incrimination. *Stoddard*, 420 Md. at 433-34, 31 A.3d at 611 (citing *Brooks*, 406 U.S. 605).

With the *Brooks* decision in mind, the court balanced the trial court's ability to exercise discretion in scheduling cases to prevent delay against a defendant's constitutional rights. *Stoddard*, 423 Md. at 436, 31 A.3d at 612. Specifically, the court highlighted that precluding a defendant from testifying after he refused the trial judge's

request to take the stand is not a “constitutionally permissible” method of preserving judicial economy and preventing delay. *Id.* at 436, 31 A.3d at 613 (citing *Brooks*, 406 U.S. at 611). The court found a defendant’s decision when to testify is a constitutional right that the defendant may use strategically, even if, as the State contends, it is for a tactical advantage. *Stoddard*, 423 Md. at 437, 31 A.3d at 613 (citing *Brooks*, 406 U.S. at 612).

Despite finding a *Brooks* violation occurred, the court performed an independent review of the record and concluded the error was harmless and did not influence the verdict. *Stoddard*, 423 Md. at 438, 31 A.3d at 614 (citing *Morse v. State*, 418 Md. 194, 221-22, 13 A.3d 1206, 1222 (2011)). The court found that because the defense’s theory of the case relied on Stoddard’s testimony, Stoddard would have testified regardless of the judge’s demand. *Stoddard*, 413 Md. at 439-40, 31 A.3d at 614-15. Additionally, the court noted that whether a defendant previously indicated an intention to testify is a key consideration in evaluating a *Brooks* violation. *Id.* at 439, 31 A.3d at 614 (citing *State v. Turner*, 751 A.2d 372, 384 (Conn. 2000)). In light of the procedural history, including the fact that Stoddard retained the same counsel and expert witness in his third trial as in the prior two trials, the court inferred Stoddard had knowledge of the expert witness’s testimony. *Stoddard*, 413 Md. at 440, 31 A.3d at 615. Although the trial court erred in demanding Stoddard to testify before the defense’s last witness, the court held the error was harmless because it did not affect Stoddard’s testimony or influence the jury’s verdict. *Id.* at 440-41, 31 A.3d at 615.

The court then addressed the admissibility of Stoddard’s prior bad acts and the State’s question implying that Stoddard posed a danger to DiRubbo’s son. *Stoddard*, 423 Md. at 442-45, 31 A.3d at 616-18. The court found the trial court properly admitted Dieter’s statement that Stoddard assaulted him on several occasions. *Id.* at 442-43, 31 A.3d at 616-17. Maryland Rule 5-616(c) permitted the statement to rehabilitate Dieter’s credibility after the defense’s cross-examination revealed Dieter omitted information to the police. *Id.* at 442, 31 A.3d at 616. The court determined the trial court correctly found Dieter’s statements were not unfairly prejudicial and simply provided an explanation as to why he originally omitted facts to the police. *Id.* at 443, 31 A.3d at 617.

Finally, since DiRubbo recanted her previous statements to the police during direct-examination, the trial court properly allowed the State’s line of questioning and admission of DiRubbo’s recorded statement. *Stoddard*, 423 Md. at 443-44, 31 A.3d at 617-18. The

court held that the circuit court did not err in admitting the evidence under Maryland Rule 5-616(b) for the limited purpose of impeaching DiRubbo's recantation and to show her motive for testifying falsely. *Id.* at 444, 31 A.3d at 617.

In *Stoddard*, the Court of Appeals of Maryland found that defendants have a constitutional right to control the strategic decisions relating to their case. As a result, in Maryland, a criminal defendant has a constitutionally protected right to decide, not only whether to testify, but when to testify. Given the court's recognition of the unique procedural posture of this particular case, the finding of harmless error should not be over emphasized. Although courts possess broad discretion in scheduling trials and preventing delay, *Stoddard* stresses that a defendant's constitutional rights outweigh considerations of judicial efficiency.