

Monday, October 13, 2008

### **When a judge stops being an impartial adjudicator.**

Â Bill of RightsÂ (From public domain.)Â When I started working as a public defender lawyer in 1991, I observed about fifteen minutes of a felony jury trial being presided over by a then-longtime sitting judge. I was astounded to see the judge -- in front of the jury -- silently and emphatically mouthing words, apparentlyÂ to coach the prosecutor during the prosecutor's cross examination, without any objection from defense counsel.Â I could not tell what the judge was saying, so perhaps the jury could not, either. However, the judge's actions clearly could have made the jury think the judge was on the prosecutor's side. This was an older courtroom where the proceedings were only recorded by a court reporter's stenographic machine; there was no videocamera to record the judge's improper and silent actions. Â A few years later, I was questioning a witness in a civil litigation deposition when my opposing counsel entered several objections in a nasty tone of voice, and nearly screeched "GO AHEAD!" to try to cut me off from objecting to what I asserted was improper commentary to be presented by himÂ in front of his deponent client. However, when I read the deposition transcript, none of the opposing lawyer's nastiness shined through; he seemed like a master of avoiding a record of his nastiness, although I make it a practice to insist that the court reporter save the audiotaped proceedings for me to prevent such an escape. Â Thankfully, more courtrooms today are equipped with audiotaping to monitor judges' actions (although Virginia District Courts have no recordation of proceedings unless a party hires a court reporter). Sometimes judges' words alone show they have gone beyond the pale of providing a fair trial. Two such cases are last week's Antwan Derrell Smith v. MarylandÂ case and the eternally shocking John Howard Johnson v. Maryland case from 1999. Â In Antwan Derrell Smith v. Maryland, \_\_ Md. App. \_\_, 2008 Md. App. LEXIS 128(Oct. 6, 2008), the trial judge inÂ a murder case interjectedÂ suaÂ sponte with what the appellant counted to have been 125 questions of prosecution witnesses. Â Here is a prime example of the trial judge's interjections and his reply to objections thereto: Â THE COURT: Wait. Sir, that's the time that's recorded as to an incident occurring and I suspect that this might have occurred later than that incident. Is there any way you can double check to make sure exactly what time you encountered the car? Like, for example, when you got your central complaint number from the Dispatcher? You may be giving me an earlier time, is what I'm suggesting. Can you look it up?THE WITNESS:Â I would have to go back to the police station and look at the CAD information, but I think the time that was used is the time the actual complaint number was pulled, sir.THE COURT: But if the complaint number was pulled because of something that happened earlier that evening, is there a way that you can reconstruct exactly what time it was that you stopped this vehicle?THE WITNESS: No, sir.Â [The defense objects to the trial judge's interjections as favoring sides and as removing the judge from the role of an impartial adjudicator.Â TheÂ judge replies:]Â THE COURT: Thank you. I don't believe that clarifying this issue shows a preference for the State. I think it's mutual. My twenty years of experience tell me that if there's some ambiguity in the times, we're going to get peppered with notes from the jury long after the witnesses are capable of testifying, so we cannot create side issues or extend the length of the trial (inaudible) by having witness [sic] explain what's obvious to every lawyer and every policeman, but it's not obvious to the people that don't work in the field how dispatch numbers are obtained, in terms of timing. It will prevent the jury from going off on a tangent. Thank you.Â I would have to go back to the police station and look at the CAD information, but I think the time that was used is the time the actual complaint number was pulled, sir.Â Maryland's intermediate appellate court reversed Mr. Smith's conviction, but insodoing confirmed that judges have wide latitude to interject questions to witnesses so long as it is not done with the appearance of bias for either side:Â "[W]e distill the following principles regarding judicial intervention in the examination of witnesses. (1) The primary purpose of judicial interrogation of witnesses is to clarify matters elicited on direct or cross examination. (2) Judicial interference in the examination of witnesses should be limited and it is preferable for the trial judge to err on the side of abstention from intervention in the case. (3) Although the number of questions posed by the trial judge exceeds those normally asked by a trial judge, the sheer number, standing alone, is not determinative of whether reversal is warranted. (4) It is preferable for the presiding judge to afford counsel the opportunity to elicit relevant and material testimony prior to interceding. (5) Continued inquisitorialÂ participation in the questioning of witnesses runs afoul of the court's role as impartial arbiter, whether such questions are proper or improper, when they tend to influence the jury regarding the court's view of the testimony and evidence. (6) The most egregious manner of intervention is the trial court's personal injection of its views and/or attitude toward witnesses or parties or their theory of the case through intimidation, threatening, sarcasm, derision or expressions of disbelief, irrespective of the frequency or the point in time during or at the conclusion of direct or cross-examination of counsel. (7) If the direct and cross-examination of counsel is woefully inadequate, requiring extensive supplementation thereof, the preferred procedure is for the court to summons both counsel to the bench or in chambers and suggest how it wishes to proceed. (8) Greater latitude is granted to a trial judge based on the complexity of a case. Cardin v. State, 73 Md. App. 200, 232-33, 533 A.2d 928 (1987); Pearlstein v. State, 76 Md. App. 507, 515-16, 547 A.2d 645 (1988)." Antwan Derrell Smith v. Maryland.Â Maryland's Court of Special Appeals found the trial judge's questioning required reversal of Mr. Smith's conviction for the following reason: Â "The trial of a defendant must not only be fair -- it must give every appearance of

being fair. *Scott v. State*, 289 Md. 647, 655, 426 A.2d 923 (1981) (emphasis added). As we have stated previously, trial court questioning 'should be achieved expeditiously . . . if at all, for a protracted examination has a tendency to convey to a jury a judge's opinion as to the facts or the credibility of the witnesses.' *Bell*, 48 Md. App. at 678. The trial court's persistent questioning here, however well-intentioned, risked suggesting to the jury that the trial court wanted to elicit facts that fit into a distinct timeline that favored the State's case. As we mentioned, *supra*, the trial court's conduct, to be sure, in no way involved threatening, condescension, sarcasm, derision or visible disbelief of a witness' testimony. See *Vandegrift*, 237 Md. at 310-11; *Brown*, 220 Md. at 39. The court's interrogation was, however, acutely suggestive, coercive and manipulative. Neither Officer Goodwin nor Detective Bealefeld were evasive or equivocal witnesses, *c.f.* *Pearlstein*, 76 Md. App. at 515, and the trial court's protracted examination of both of these witnesses occurred before completion of direct and cross-examination. Moreover, the narrative and directive nature of the questions had the potential to divert testimony or sway the jury. Accordingly, we hold that, under the circumstances, the trial court abused its discretion in conducting the questioning of Officer Goodwin and Detective Bealefeld and, therefore, risked the appearance of partiality on the part of the court." *Antwan Derrell Smith v. Maryland*. In the above-discussed *Smith* case, the appellate opinion shows the defense attorneys always to have been non-confrontational with the trial judge in objecting and expressing their frustration with his improper and excessive intervention in the examination of witnesses. Fourteen years ago, a much more animated continuation of a long-running feud between a Baltimore City trial judge (who has been off the bench for a long time now) and a seasoned criminal defense lawyer played itself out before the jury's eyes, complete with the judge's not only finding the lawyer in summary criminal contempt of court several times in front of the jury, but even going as far as having him handcuffed and locked up in front of the jury (after having previously done the same to him out of the jury's view in the same trial). Fortunately, Maryland's highest court decried the trial judge's actions in no uncertain terms, and reversed the conviction, but only after Maryland's Court of Special Appeals had apparently affirmed the conviction. *John Howard Johnson v. Maryland*, 352 Md. 374, 722 A.2d 873 (1999). If the foregoing *Johnson* case were merely fictitious, it would make for pathetically dark comedy (and I lay the responsibility on the trial judge, even though the defense lawyer could have protected his client no worse had he toned down his language, as difficult as it probably was for him to have summoned a lower-key approach), including the following verbal duels between the defense lawyer and judge: [DEFENSE COUNSEL]: You want to take over the case? If you try the case for me ... you will lose it... [DEFENSE COUNSEL]: Judge, there's an extra chair down here if ... [DEFENSE COUNSEL]: Now, Mr. Jason, would you come to the jury box without pointing the gun at the jury and demonstrate --THE COURT: Maybe they'd like to point it at you as well as us. Come on, . . . let's not go back and forth.[DEFENSE COUNSEL]: You are unbelievable, Judge. Can I hold you in contempt of Court? *John Howard Johnson v. Maryland*, 352 Md. 374. I take it that the defense counsel previously had filed an unsuccessful motion(s) to have this trial judge recused from all his trials. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00