

IN THE COURT OF APPEALS OF

MARYLAND

No. 2

September Term, 1998

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STATE OF MARYLAND

v.

LARRY D. STANLEY

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Bell, C.J.  
Eldridge  
Rodowsky  
Chasanow  
Raker  
Wilner  
Cathell,

JJ.

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Dissenting Opinion by Raker, J.,  
in which Eldridge, J. joins

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Filed: November 18, 1998

Raker, J. dissenting:

I would affirm the judgment of the Court of Special Appeals. *Stanley v. State*, 118 Md. App. 45, 701 A.2d 1174 (1997). I believe that under the circumstances of this case, the prosecutor should have been required to testify at the evidentiary hearing, thereby affording Respondent the opportunity to cross-examine the prosecutor.

The majority holds that the Court of Special Appeals erred in vacating Respondent's convictions because, regardless of whether the prosecutor provided sworn testimony, her remarks to the victim did not deprive Respondent of his constitutional right to compulsory process. Maj. op. at 6. The majority explains that this is because the prosecutor's comment, assuming the truth of Ms. Jones's version of the comment, was not a constitutional violation, and thus, it was irrelevant whether the trial court obtained sworn testimony from the prosecutor. Maj. op. at 7 n.5.

The intermediate appellate court noted correctly that

[t]he circuit court has not developed a record that properly allows us to evaluate the constitutionality of the prosecutor's actions. The only evidence introduced regarding this subject is the testimony of the victim. We are unable to make any conclusions based on her testimony, however, due to the lack of clarity concerning the language the Assistant State's Attorney used. The Prosecutor did not take the witness stand and provide sworn testimony. The utter lack of factual determinations in the record necessitates that we remand this case to the circuit court in order that appellant's motion can be properly considered.

*Stanley*, 118 Md.App at 63, 701 A.2d at 1183. It is not so much the lack of the oath that troubles me; it is the lack of the opportunity to cross-examine the prosecutor and to explore with her exactly what she told the witness. Perhaps the prosecutor told the witness some

things that the witness forgot and thus failed to mention when questioned by the court. Simply because the trial court accepted as true the witness's account of her conversation with the prosecutor does not end the inquiry. As Judge Harrell noted, writing for the court, "the circuit court's colloquy with the victim was conducted with less than surgeon-like precision and contributed to the inconsistencies in the small amount of evidence that was in the record." *Id.*, 701 A.2d at 1183. The defense should have been permitted to question the prosecutor to determine whether she said anything to intimidate or threaten the witness that may have caused her to refuse to testify. The defense should not have been required to accept the prosecutor's denial.

The Court of Special Appeals reached the right result in this case in ruling that the case should be remanded and

[i]f, on remand, the court determines that the alleged conversation between the victim and Assistant State's Attorney did not occur or, if it did, it did not prejudice appellant, the court may reinstate the conviction and sentence for assault with intent to main. If the court, however, concludes appellant was prejudiced by the State's conduct, a new trial may be ordered.

*Id.*, 701 A.2d at 1183. For the reasons stated above and by the Court of Special Appeals, Respondent was denied his right of confrontation. Accordingly, I respectfully dissent.

Judge Eldridge has authorized me to state that he joins in the views expressed herein.