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## *Hopkins v. State:*

### **In-Court Voice Exemplar Given for Non-Testimonial Purposes may be Admissible where the Exemplar is Relevant and Reliable**

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By Joseph H. D. Solomon

The Court of Appeals of Maryland held that a non-testimonial voice exemplar given by the defendant at trial did not violate the Fifth Amendment's prohibition against compelled self incrimination. *Hopkins v. State*, 352 Md. 146, 721 A.2d 231 (citing *United States v. Wade*, 388 U.S. 218, 222-23 (1969)). The court further held, in an issue of first impression in Maryland, that such in-court voice identification evidence may be admissible where such evidence is relevant and reliable.

On April 27, 1996, the defendant, Marquis Hopkins ("Hopkins"), robbed Mr. and Mrs. Franklin McQuay at gunpoint in a parking lot. *Id.* at 150, 721 A.2d at 233. While placing the gun to Mr. McQuay's head, Hopkins stated, "Yo, check it out." *Id.* Additionally, Hopkins made several threatening statements and made his escape with the couple's valuables. *Id.* After the robbery, Mrs. McQuay called the police and gave a physical description of Hopkins. *Id.* at 151, 721 A.2d at 233. A month later, Mrs. McQuay identified Hopkins from a photographic line-up, but indicated on the back of the photo that she needed to see him in person and hear him speak to be certain of her identification. *Id.*

At trial, Mrs. McQuay visually identified Hopkins as the robber. *Id.* The defense challenged the

identification, and on re-direct examination, the prosecution requested the court to compel Hopkins to stand and state, "Yo, check it out." *Id.* at 152, 721 A.2d at 234. The defense objected, arguing that the request was untimely. *Id.* The trial court ruled that any lapse in time affected the weight of the evidence, not its admissibility, and therefore allowed the voice exemplar. *Id.* at 153, 721 A.2d at 234. After hearing the voice exemplar, Mrs. McQuay reasserted her identification of Hopkins. *Id.* She said Hopkins's voice was distinguishable from that of other African Americans because he was "articulate." *Id.* The Baltimore County Circuit Court subsequently convicted Hopkins of robbery with a deadly and dangerous weapon and several other lesser offenses. *Id.* at 149, 721 A.2d at 233.

Hopkins appealed to the Court of Special Appeals of Maryland. *Id.* at 154, 721 A.2d at 235. Although the defense never made a Fifth Amendment objection at trial, or object to the characterization of Hopkins' voice as "articulate," it raised these issues on appeal. *Id.* The court of special appeals exercised its discretion to address the issues, and affirmed the conviction. *Id.* The Court of Appeals of Maryland granted certiorari on the same issues, and upheld the ruling of the court of special appeals. *Id.*

The court of appeals began its analysis by noting that the Fifth Amendment prohibition against self incrimination does not protect a defendant from being compelled to write or speak solely for identification purposes. *Id.* (citing *Schmerber v. California*, 384 U.S. 757, 764 (1966)). The Supreme Court, in *United States v. Wade*, held that voice identifications compelled during line-ups are admissible as evidence of an identifying characteristic, not as testimonial evidence, and therefore did not violate the Fifth Amendment. *Id.* at 155, 721 A.2d at 235 (citing *United States v. Wade*, 388 U.S. 218, 222-23 (1969)). Even requiring a defendant to recite the words spoken during the commission of a crime was not considered testimonial because the defendant's voice was used as an identifying characteristic, and not to disclose his knowledge of facts. *Id.* The court analogized this case to *Vandergrift v. State*, where the court of special appeals held that a court may order a defendant to read a transcript aloud at trial. *Id.* at 156, 721 A.2d at 236 (citing *Vandergrift v. State*, 82 Md. App. 617, 639, 573 A.2d 56, 66 (1990)). In both *Hopkins* and *Vandergrift*, the court determined that the voice exemplar was not used as testimonial evidence. *Id.*

Rejecting Hopkins' argument that the voice exemplar should have

been given prior to trial, the court noted that since the voice exemplar's purpose was for identification, it made no difference that the trial court compelled the exemplar at trial as opposed to before trial. *Id.* (citing *Doe v. United States*, 487 U.S. 201, 210 (1988)). This finding was consistent with the court's prior holding that requiring a suspect to display physical characteristics to aid identification did not cause a defendant to incriminate himself. *Id.* at 157, 721 A.2d at 236 (citing *Dyson v. State*, 238 Md. 398, 404, 209, A.2d 609, 619 (1965)).

Hopkins' claimed that the exemplar was unnecessary because the witness physically identified him prior to the voice exemplar, and it was therefore testimonial in nature. *Id.* (citing *Doe*, 487 U.S. at 210). The court, however, noted that a defendant's communications must convey factual information to be considered testimonial. *Id.* Furthermore, the court reasoned, the exemplar's purpose was not to elicit testimonial evidence, but rather to bolster the witness's testimony because the defense challenged the physical identification. *Id.*

After determining that the voice exemplar did not violate the Fifth Amendment, the court next addressed the admissibility of such evidence. The court found that it is within the trial judge's discretion to admit the voice exemplar. *Id.* at 158, 721 A.2d at 237 (citing *Vandergrift*, 82 Md. App. at 639, 573 A.2d at 66 (1990)). The decision to admit the voice exemplar may be reversed only where there was an abuse of discretion. *Id.* (citing

*Robinson v. State*, 348 Md. 104, 121, 702 A.2d 741, 749 (1997)).

Because the court had never before addressed when trial courts could admit in-court voice identification evidence, it looked to other jurisdictions for guidance. In *State v. Newman*, the Supreme Court of Nebraska held that non-testimonial voice exemplars were not automatically admissible, and may only be introduced at trial if such evidence is relevant and reliable. *Id.* at 159, 721 A.2d at 238 (citing *State v. Newman*, 548 N.W.2d 739, 752 (Neb. 1996)). In *People v. Scarola*, the court similarly held that the test of whether a voice exemplar is admissible depends on whether it is relevant and reliable. *Id.* (citing *People v. Scarola*, 71 N.Y.2d 769, 770 (1988)). After reviewing case law from other jurisdictions, the court examined evidentiary rules for the admissibility of the voice exemplar.

Maryland Rule 5-401 reads, in pertinent part, states that evidence is "relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable." *Id.* (citing Md. R. EVID. 5-401). Maryland Rule 5-403 also provides that relevant "evidence [may] be excluded if its probative value is substantially outweighed by its prejudicial affect." *Id.* The determination of whether the probative value of an in-court voice identification is substantially outweighed by its prejudicial effect is also within the trial court's discretion. *Id.* (citing *People v. Davis*, 502 N.E.2d 731 (1987)). Because relevance and reliability are

separate issues, as a threshold matter, the court noted that relevance should be determined first. *Id.* at 160, 721 A.2d at 238.

In *Hopkins*, the court found the exemplar relevant because the defense challenged the witness's visual identification of Hopkins. *Id.* at 163, 721 A.2d at 239. The court recognized the potential prejudicial effect of requiring a defendant to utter the same words a suspect used while committing a crime, however, the court did not believe the exemplar's prejudicial value substantially outweighed its probative value. *Id.* at 163-64, 721 A.2d at 239-40. (citing *Davis*, 502 N.E.2d at 783 (1987)).

After finding the exemplar relevant in this case, the court next addressed its reliability. *Id.* at 159, 721 A.2d at 238. In so doing, the court adopted the test set forth by the United States Supreme Court in *Neil v. Biggers*. *Id.* at 160, 721 A.2d at 238 (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)). Under the *Biggers* test, factors for courts to consider when determining the reliability of identification evidence include:

- (1) the ability of the witness to hear the assailant speak,
- (2) the witness's degree of attention,
- (3) the accuracy of any prior identifications that the witness made,
- (4) the period of time between the incident and the identification, and
- (5) how certain the witness was in making the identification.

*Id.* (citing *Biggers*, 409 U.S. at 199). In employing the *Biggers* test, the court followed the two-pronged test used by other jurisdictions. *Id.* First,

the exemplar was suggestive, the court examines the totality of circumstances to determine if the identification was reliable enough to avoid misidentification. *Id.* at 161, 721 A.2d at 238 (citing *Rodriguez v. Peters*, 63 F.3d 546, 556 (7th Cir. 1995)). The second prong requires the application of the *Biggers* factors. *Id.*

Hopkins argued the exemplar was unreliable and it was suggestive because he was the only African American in the courtroom. *Id.* at 165, 721 A.2d at 240. The court held that the prior visual identifications made the exemplar identification reliable. *Id.* The court dismissed the suggestiveness issue, citing *Webster v. State*, which held that a suggestive identification was admissible where it was reliable. *Id.* at 165-66, 721 A.2d at 240-41 (citing *Webster v. State*, 299 Md. 581, 601, 474 A.2d 1305, 1315 (1984)). Having found the exemplar “sufficiently reliable under the totality of circumstances,” the court of appeals applied the *Biggers* factors in *Hopkins*, and found the facts satisfied its requirements. *Id.* at 164-65, 721 A.2d at 240.

Relying upon the relevancy and reliability test set forth in *Biggers*, the court held the trial court did not abuse its discretion by admitting the exemplar into evidence. With this holding, the Court of Appeals of Maryland has crept its way to the edge of a very slippery slope upon which it must be cognizant not to cross, for fear of violating a defendant’s Fifth Amendment privilege against self incrimination by compelling him to essentially reenact the crime.