

Filed 11/9/09

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

-----X
STATE OF MARYLAND :
v. : **Case No. 109210015**
SHEILA ANN DIXON :
-----X

**DEFENDANT’S MOTION IN LIMINE
TO EXCLUDE EVIDENCE OF OTHER ACTS
INVOLVING TRANSACTIONS WITH GLEN CHARLOW**

Defendant, Sheila Dixon (the “Defendant”), by and through her undersigned attorneys, hereby files this motion in limine, to exclude evidence at trial of other alleged acts or transactions involving Glen Charlow, and for reasons submits the following.

I. BACKGROUND

On January 9, 2009, the State Prosecutor obtained from the grand jury an indictment charging the Defendant with twelve counts of perjury, theft, misappropriation and misconduct in office. After several of those counts were dismissed by the Court in response to the Defendant’s pretrial motion, the State Prosecutor on July 29, 2009, obtained two new Indictments – the first of which, Indictment No. 109210015 (the “Theft Indictment”), realleges the very same seven counts of theft, misappropriation and misconduct that had not been previously dismissed. Since the original indictment was returned in January, the parties have been engaged in extensive discovery in preparation for the trial of the Theft Indictment, which is scheduled to commence Monday, November 9, 2009. On the last business day before trial, Friday, November 6, at 6:20 p.m., and after a four-year investigation, the State provided the defense with last minute discovery of new evidence related to certain gift cards allegedly purchased by Glen

Charlow (“Mr. Charlow”). The State intends to offer this evidence pursuant to Rule 5-404(b) as evidence of “other crimes, wrongs or acts.” Despite its 11th-hour disclosure, the information underlying this new evidence has been available to the State since at least June of 2008, some sixteen (16) months ago. The State’s last minute disclosure is without justifiable excuse and is precisely the sort of evidence that the defense requested notice of many months ago. The State’s dilatory production fails to comply with Rule 4-263(d)(4), and, further, the State’s prior production of grand jury testimony relating to the new evidence, which contained unequivocal statements from a State Investigator that the State was never able to locate this evidence and suggested that locating it would be “impossible,” has exacerbated the prejudice inflicted upon the defense. The Court should not countenance the State’s dilatory conduct and, pursuant to the Court’s discretion contained in Maryland Rule 4-263(n), should exclude the new evidence from trial

Additionally, the new evidence is not relevant to the pending charges and is based on hearsay. Mr. Charlow is a business partner of Patrick Turner (“Mr. Turner”), a Baltimore real estate developer who allegedly provided gift cards to Ms. Dixon in December 2005. Indictment No. 109210015 at ¶¶ 26-33. In discovery provided by the State, the State intends to show that the Turner gift cards were used in early 2006. According to the information provided by the State, Mr. Charlow claims to have had a telephone call with Mr. Turner in December 2006, in which Mr. Turner requested that Mr. Charlow purchase gift cards for Ms. Dixon in connection with her church activities. Mr. Charlow claims to have made purchases of gift cards at Target with cash, and has advised the State that he dropped off the cards at Ms. Dixon’s office in City Hall in December 2006. The State interviewed Mr. Charlow in June 2008, when Mr. Charlow

first reported this information to the State. The State has now provided documents (again on Friday, November 6, 2009) which appear to be from Target, allegedly demonstrating the use of those Charlow gift cards. This evidence clearly does not constitute prior conduct and none of the exceptions to Rule 5-404(b) would apply to evidence of these transactions.

Because the Defendant will be prejudiced by the admission of this evidence, and because the evidence is not relevant or admissible, the Court should exclude it from trial.

II. ARGUMENT

A. The Charlow Evidence Should Not Be Admitted Because the State Failed To Comply With Maryland Rule 4-263(d)(4) And The Admission Of The Evidence Will Prejudice The Defense.

Maryland Rule 4-263 governs discovery in the Circuit Court and requires that the State provide the Defendant with timely notice of evidence of prior alleged acts of misconduct. In particular, Maryland Rule 4-263(d) provides:

(d) Disclosure by the State's Attorney. Without the necessity of a request, the State's Attorney shall provide to the defense:

* * *

(4) *Prior Conduct.* All evidence of other crimes, wrongs, or acts committed by the Defendant that the State's Attorney intends to offer at a hearing or at trial pursuant to Rule 5-404 (b).

Rule 4-263(d) requires that the State to provide this evidence within thirty (30) days of the appearance of counsel or the first appearance of a Defendant before the court pursuant to Rule 4-213. MD. RULE 4-263(h).¹ Despite the State's mandatory obligations, the

¹ Notably, Maryland Rule 4-263(d)(4) requires significantly more than its Federal counterpart. While Rule 404(b) of the Federal Rules of Evidence merely requires that the prosecution "provide reasonable notice in advance of trial ... of the general nature of any such evidence it intends to introduce at trial", Rule 4-263(d)(4) requires the production of *all evidence* that the State intends to offer at trial. *Cf. Johnson v. State*, 360 Md. 250, 267-68 (2000)(rejecting the State's argument that it need only provide the "substance" of a Defendant's oral statement pursuant to Rule 4-263).

Defendant also specifically requested this information months ago in a letter to the State Prosecutor. The State's response to this request was to coyly state that any such 5-404(b) evidence was included within the materials made available to the defense, which then consisted of more than ten thousand pages of documents. Among those documents previously provided in discovery is a memorandum of interview of Mr. Charlow from June 2008, during which he informed the State of his alleged purchase of gift cards in December 2006. The State also produced the following testimony to the grand jury, on July 22, 2009, from Investigator John C. Poliks discussing Mr. Charlow's alleged purchases:

Poliks: We were never able to locate those cards or find out who used them....

Poliks: [In response to a grand juror's questions] [W]e checked Charlow's credit cards. The possibility may have been that they were purchased in cash, which again would have the same problem we had earlier. With the purchase of the cards in cash you wouldn't be able to get the card numbers. So it would make it almost impossible, no, impossible to trace if you didn't have the card numbers to begin with.

Juror: If they were ever bought?

Poliks: Right, if they were ever bought.

Juror: But they were never found or located, so how do we know he even bought them?

Poliks: Only as to what he testified to.

Now, some sixteen months after its June 2008 interview and on the eve of trial, the State has produced new evidence, which includes a new memorandum of interview of Mr. Charlow from November 6th along with numerous documents which appear to be from Target, allegedly related to Mr. Charlow's cash purchases. Even though the Defendant has known about Mr. Charlow and has had an opportunity to speak with him,

this new documentary evidence, and the State's characterization of it as relevant pursuant to 5-404(b), will so prejudice the Defendant that the evidence should not come in.

The main objectives of the discovery rules are to assist the Defendant in preparing her defense and to protect her from surprise. *Collins v. State*, 373 Md. 130, 146-47, (2003); *Brown v. State*, 85 Md. App. 523 (1991), *aff'd*, 327 Md. 81 (1992). To achieve that goal, "Maryland Rule [4-263] requires that certain materials be disclosed to the defense without the necessity of a request." *Collins*, 373 Md. at 145 (addressing prior rule); *Warrick v. State*, 302 Md. 162, 170 (1985). Maryland Rule 4-263(n) then provides the trial judge with the authority to impose appropriate sanctions should the State fail to comply, including the exclusion of the evidence. In determining the appropriate sanction, the Court should exercise its discretion by considering: (1) the prejudice to the Defendant; (2) the reason for the dilatory disclosure; (3) the feasibility of curing any prejudice with a continuance; and (4) other relevant circumstances including the weight of the evidence. *See Thomas v. State*, 397 Md. 557, 570-71 (2007); *Taliaferro v. State*, 295 Md. 376, 390, *cert. denied*, 461 U.S. 948 (1983); *Middleton v. State*, 49 Md. App. 286 (1981).

In this case, there is no genuine dispute that the State violated Rule 4-263 by failing to timely disclose 5-404(b) evidence; the only question before the Court is the appropriate remedy so as to preserve the policy goal behind Rule 4-263, "to assist Defendants in preparing their defense and to protect them from unfair surprise." *See Collins*, 373 Md. at 146-47. In light of that objective, the most compelling factors relevant to the State's discovery violation are the prejudice faced by the Defendant, the State's lack of justification for its dilatory production, and the weight of the evidence.

First, and most importantly, the prejudice to the Defendant caused by the State's discovery violation is significant. Not only was the evidence undisclosed as required by Rule 4-263(d)(4), but the State previously produced grand jury testimony that stated, as of July 22, 2009, that no such evidence existed and that further suggested that the evidence would be "impossible" to obtain. Therefore, the defense prepared its theory and strategy in connection with the defense of the case, based upon the discovery provided by the State prior to Friday evening at 6 p.m. The defense conducted extensive factual investigation and identified numerous witnesses she intends to call. The defense prepared cross-examination of the State's witnesses and has gathered other related information for use at trial. The Defendant should not be forced to scramble to adjust her theory and strategy simply because the State was dilatory in its investigation and/or disclosure of information.

More directly, the defense has absolutely no opportunity to investigate any of the facts relating to the newly-produced evidence including, but not limited to, how the newly-produced evidence was purportedly traced to Mr. Charlow after it was deemed "impossible" to do so and what, if anything, the documents purport to show. As it is, the information regarding the cards is barely decipherable, and leaves many unanswered questions. It is impossible to tell, for example, what use was made of most of the alleged Charlow gift cards, or by whom. Indeed, the documents themselves do not demonstrate any connection to Mr. Charlow at all.

Second, the State has no justification for its failure to timely disclose evidence pursuant to Rule 4-263(d)(4). The State was aware of the scope of Mr. Charlow's allegations as early as June 2008. To the extent that the State wished to introduce Mr.

Charlow's testimony, or any evidence related to transactions purportedly made by him in December 2006, the State should have disclosed that evidence and its intentions pursuant to Rule 5-404(b) long before 6:20 p.m. on the last business day before trial. There is simply no justification or legitimate excuse for the State's lack of diligence and last minute disclosure of information that was in its possession for the last year and a half.

Further, as set forth below, even if the State were not barred from introducing evidence of the Charlow transactions pursuant to Maryland Rule 4-263(n), the evidence is otherwise inadmissible and collateral to the State's case. The evidence is not of such weight that the State's countervailing interest in the evidence otherwise outweighs the substantial prejudice that will be inflicted upon the Defendant by its admission.

In light of the foregoing, the appropriate sanction is to prohibit the State from introducing into evidence any matter related to Mr. Charlow pursuant to Maryland Rule 5-404(b). Rule 5-404(b) is an exception to the general rule prohibiting evidence of other crimes, wrongs, or acts. Because the State failed to comply with the disclosure requirements to utilize this exception (*i.e.* Maryland Rule 4-263(d)(4)), the State should be precluded from offering the Charlow transactions into evidence at trial. *See, e.g., Smith v. State*, 62 Md. App. 627, 630, *cert. denied*, 304 Md. 96 (1985)(affirming trial judge's decision to suppress evidence that was not disclosed pursuant to 4-263 as the "appropriate" sanction for the State's violation). While exclusion is generally disfavored, in this instance the remedy is narrowly crafted to rectify the violation and ensure compliance with the policy goals that the State violated. Under Rule 4-263, a Defendant is prejudiced when she is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation is capable of substantially influencing the jury. *Collins*,

373 Md. at 146-47. The prejudice that is contemplated is the harm resulting from the nondisclosure. *See Thomas*, 397 Md. at 571.²

Finally, while a continuance is often a viable alternative, the Defendant should not be forced make a Hobson's choice between her right to a speedy trial and her right to a fair trial, particularly when the State has known of the substantive allegations underlying the new evidence since at least June 2008. The charges in this case have been pending since January, and involve a sitting Mayor. This case has cast a pall not just over the Mayor, but the City as well, and deserves to go forward. The Court has specially scheduled this case and indicated that it is otherwise unavailable until at least February 2010. Any lack of diligence by the State should not inure to the Defendant's detriment. This case should not be further delayed because of the State's failure to diligently pursue its case and comply with the Maryland Rules. While any consideration of a discovery violation or a Defendant's right to a speedy trial involves a certain balancing by the Court³, in this case the State's misconduct, whether intentional or not, should not punish the Defendant and force her to accept a postponement. Therefore, the only sanction that will insure that the Defendant receives a fair trial and that satisfies the policy goals of Rule 4-263 is to exclude this 11th-hour evidence.

² The Court of Appeals has further held that a violation of Maryland Rule 4-263(d), without an appropriate remedy, can constitute reversible error. *See, e.g., Hutchinson v. State*, 406 Md. 219, 226-27 (2008)(holding that admission of expert testimony that was not disclosed pursuant to Rule 4-263(d) was not merely cumulative and constituted reversible error); *Cole v. State*, 378 Md. 42 (2003)(State's failure to provide evidence to the defense pursuant to 4-263, and trial court's denial of motion to compel, was not harmless error and required remand).

³ *See, e.g., Epps v. State*, 276 Md. 96 (1975)(providing factors to be evaluated when considering whether delay has violated Defendant's constitutional right to a speedy trial).

B. In Any Event, The Charlow Evidence Is Not Admissible Under Maryland Rule 5-404(b).

The Defendant has previously submitted a Motion to Exclude other evidence pursuant to Rule 5-404(b), making a lengthy dissertation on the basic legal principles that the Maryland courts have applied in considering such evidence unnecessary. A defendant's prior acts of alleged misconduct may not be introduced to prove her guilt of the offense for which she is on trial. *See Straughn v. State*, 297 Md. 329, 333 (1983); *State v. Faulkner*, 314 Md. 630, 633 (1989), and her Sixth Amendment right to a fair trial generally compels the exclusion of evidence of other bad acts. *See Merzbacher v. State*, 346 Md. 391, 407 (1997).

Consistent with these principles, Maryland Rule 5-404(b) dictates that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” As the Court of Appeals explained in *Straughn*:

There are two reasons for the rule [excluding evidence of prior bad acts]. First, if a jury considers a defendant's prior criminal activity, it may decide to convict and punish him for having a criminal disposition. Second, a jury might infer that because the defendant has committed crimes in the past, he is more likely to have committed the crime for which he is being tried.

Straughn, 297 Md. at 333. The Court of Appeals has stated that “there are few principles of American criminal jurisprudence more universally accepted than the rule that evidence which tends to show that the accused committed another crime independent of that for which he is on trial, even one of the same type, is inadmissible.”“ *State v. Taylor*, 347 Md. 363, 369 (1997), *quoting*, *Cross v. State*, 282 Md. 468, 473(1978).

Although evidence of other bad acts by an accused is generally inadmissible, it may be introduced for some purpose other than to suggest that, because the accused is a person of criminal character, it is more probable that she committed the crime for which she is on trial. *See Streater v. State*, 352 Md. 800, 806 (1998); *Taylor*, 347 Md. at 369. There are exceptions to the general rule excluding other bad acts evidence, as when the evidence tends to establish motive, intent, absence of mistake, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and the identity of the person charged with the commission of a crime on trial. *See* MD. RULE 5-404(b); *Ross v. State*, 276 Md. 664, 669-70 (1976).

When a trial court determines whether to admit evidence of another bad act, pursuant to Maryland Rule 5-404(b), the proper test for admissibility has three prongs. *See State v. Faulkner*, 314 Md. 630, 634-35 (1989). First, the proponent of the other bad acts evidence must demonstrate that it has special relevance unrelated to the defendant's predisposition to commit a crime.⁴ *See Streater*, 352 Md. at 808; *Harris v. State*, 324 Md. 490, 497-98 (1991). In other words, the other bad acts evidence must meet one of the aforementioned exceptions to Rule 5-404(b). *See id.* Second, the trial court must determine whether the State has shown by clear and convincing evidence that the defendant actually committed the other bad acts.⁵ *See id.* at 809; *Ayers*, 335 Md. 602, 632-34 (1994). Third, the proponent of the evidence must demonstrate that the probative

⁴ This first determination of whether the evidence fits within a legitimate exception to the rule of presumptive exclusion is a legal determination. *See Faulkner*, 314 Md. at 634-35.

⁵ This determination protects the Defendant against the risk that unsubstantiated charges of past misconduct will unduly influence the jury. *See Streater*, 352 Md. at 809; *Lodowski v. State*, 302 Md. 691, 728 (1985), *rev'd on other grounds*, 307 Md. 233 (1986).

value of the bad acts evidence outweighs any undue prejudice likely to result from its admission.⁶ *See Streater*, 352 Md. at 810; *Harris*, 324 Md. at 500-01.

These substantive and procedural protections are necessary to guard against the potential misuse of other bad acts evidence and to avoid the risk that the evidence will be used improperly by the jury against a defendant. *See Streater*, 352 Md. at 807. “The evidence may not be used merely as a ruse to accomplish the prohibited objective’ of proving a person acted in conformity with his or her character.” *Id.* (citation omitted). The rule acknowledges the risk presented by a jury’s tendency to improperly infer from unrelated bad conduct that the defendant committed the crime for which she is charged. *See Streater*, 352 Md. at 810; *Taylor*, 332 Md. at 334. Thus, the trial court must carefully examine the nature and purpose of the evidence sought to be introduced. *See Streater*, 352 Md. at 807-08; *Ayers*, 335 Md. at 632. In order to be admissible, therefore, the other bad acts evidence must be reasonably necessary to establish the elements of the charged offense. *See Streater*, 352 Md. at 810; *Faulkner*, 314 Md. at 642-43.

None of the exceptions to Rule 5-404(b) apply in this case to any evidence related to the Charlow transaction. The alleged Charlow transaction does not tend to establish motive, intent or the absence of mistake in connection with the alleged theft of the gift-cards, and identity is plainly not at issue in the pending Theft case. While Rule 5-404(b) is not limited to prior acts, in this case evidence of a subsequent act in December 2006 has no relevance to the Defendant’s knowledge, state of mind, intent or absence of

⁶ Underlying this prong of the *Faulkner* test is the concern that other bad acts evidence is generally more prejudicial than probative. *See Streater*, 352 Md. at 810; *Taylor*, 347 Md. at 369. Prejudice may result from a jury’s inclination to convict the Defendant, not because it has found the Defendant guilty of the charged crime beyond a reasonable doubt, but because of the Defendant’s unsavory character or criminal disposition, as illustrated by the other bad acts evidence. *See Streater*, 352 Md. at 810; *Taylor*, 347 Md. at 369.

mistake one year earlier. The Theft Indictment charges offenses related to gift cards donated in 2004, 2005 and 2006 by the developers Lipscomb and Turner, while the remaining counts involving gift cards allegedly purchased by the City Housing Authority are alleged to have occurred from December 2007 into June 2008.

The Charlow gift transactions are totally unrelated to the Housing Authority gift cards that were allegedly purchased in connection with the Holley Trolley tour, and similarly have no relationship to any Lipscomb gift cards. Therefore, the Charlow evidence could only be offered in connection with the earlier Turner gift card transactions in 2005. Whatever evidentiary value there might be in offering this evidence, the events of December 2006 can have no bearing on the Defendant's knowledge, state of mind, intent or absence of mistake one year earlier in December 2005.

It is also clear that the Charlow evidence does not satisfy the other two prongs for admissibility articulated in *Streater*. The State cannot demonstrate any misconduct with regard to the Charlow evidence by clear and convincing evidence, as their evidence is riddled with hearsay and would require its own "minitrial." Further, there is no necessity for the introduction of this evidence.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the Defendant respectfully requests that its motion in limine be granted.

Respectfully submitted,

Arnold M. Weiner
Barry L. Gogel
Norman L. Smith
Jeffrey E. Nusinov
LAW OFFICES OF ARNOLD M. WEINER
2002 Clipper Park Road, Suite 108
Baltimore, Maryland 21211
(410) 769-8080

Dale P. Kelberman
Donald E. English
MILES & STOCKBRIDGE, P.C.
10 Light Street
Baltimore, Maryland 21202-1487
(410) 727-6464

Melissa Phinn
Law Office of Melissa Phinn
10 N. Calvert Street, Suite 142
Baltimore, Maryland 21202
(410) 244-0850

Attorneys for Defendant

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

-----X
STATE OF MARYLAND :
v. : Case No. 109210015
SHEILA ANN DIXON :
-----X

ORDER

Upon consideration of Defendant, Sheila Ann Dixon's Motion in Limine to Exclude Evidence and its accompanying Memorandum of Law in support thereof; any Opposition thereto; and any oral argument on the issue; it is on this _____ day of _____, 2009, hereby:

ORDERED that Plaintiff's Motion in Limine is **GRANTED**; and it is further

ORDERED that no evidence relating to any gift card transactions involving Glen Charlow shall be admitted or mentioned in evidence or any argument of counsel.

Judge, Circuit Court for Baltimore City

CERTIFICATE OF SERVICE

I HEREBY certify that on this ___ day of November, 2009, copies of the foregoing Motion in Limine were sent, via email and first class mail, postage prepaid, to:

Robert A. Rohrbaugh, State Prosecutor
Thomas M. McDonough, Deputy State Prosecutor
300 E. Joppa Road, Suite 410
Towson, Maryland 21286

Dale P. Kelberman