Maryland Court of Special Appeals Rules a Death Bed Blink an Admissible Identification

On May 27, 2014, in ***State v. Hailes***,the Maryland Court of Special Appeals made important rulings regarding several evidentiary issues. The *Hailes* court held that a "hard blink" can be a statement, that a "**Dying Declaration**" does not require *actual* imminent death, only a belief of imminent death, and that the **Confrontation Clause** of the Sixth Amendment does not suppress a dying declaration.[1]

Melvin Pate was shot in the face on November 24, 2010. His injuries were severe; Pate was told he would live a few days at most. On November 26th and 27th, detectives showed Pate photo arrays. Pate blinked hard when shown a photo of Jermaine Hailes and another individual, identifying them as his assailants. Miraculously, Pate survived for several more years, but eventually passed away on November 27, 2012 as a result of his injuries. Hailes was indicted for first-degree murder on December 11, 2012.[2]

Hailes moved to suppress Pate's out-of-court identification, alleging that Pate could not communicate and that it violated Hailes's **rights under the Confrontation Clause**.[3] Hailes prevailed on his motion and, in an unusual twist of procedure, the State took an interlocutory appeal.[4] For the first time in Maryland, the court had to determine whether Pate's hard blink was an admissible Dying Declaration, and whether its use violated Hailes's **Sixth Amendment rights**.

Prior to *Hailes,* "Maryland ha[d] not yet directly ruled on blinking as a form of communication by a witness."[5] While hard blinking is not the traditional means of communication, the court said, this does not make it an ineffective means. It was clear that "Pate understood the questions asked and communicated the answer the only way he could."[6] Without further ado, the court concluded that, "we now hold that blinking is a legally acceptable mode of communication."[7]

A Dying Declaration is a statement made by a victim who believes his/her death is imminent.[8] To be admissible, the statement must concern the cause or circumstances giving rise to the impending death.[9]

Somewhat uniquely, Pate made his Dying Declaration, but lived for two more years. The court determined that it is the belief of imminent death that determines whether it is a Dying Declaration.[10] What occurs thereafter is of little significance. Pates' subsequent survival did not negate his belief that he would die soon at the time he made the identification.

The court declared Pate's Dying Declaration "in robust health" before turning its analysis to ***Crawfordv. Washington***and the Confrontation Clause.[11] *Crawford* requires "a prior opportunity for the cross-examination of all out of court declarations that [are] 'testimonial' in nature."[12]

After a foray into the history of dying declarations, the court determined that the Confrontation Clause does not apply to Dying Declarations, and so the Confrontation Clause's requirements need not be satisfied. The court found a nearly unanimous approach, beginning with *Crawford*[13]and expanded by ***Giles v. California*****,*****[14]*** and sixteen other jurisdictions,[15] The court quoted *Giles* and reasoned that, "the statements were admissible only if the witness apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertion."[16] The *Hailes* Court found this "juggernaut of persuasive authority irresistible," and Maryland "join[ed] the ranks" and declared that a "Dying Declaration…is exempted from the coverage of the Confrontation Clause."[17]

Because the Confrontation Clause does not apply in the first place, further related analysis is unnecessary. A court considering a Dying Declaration need not analyze whether the statement is testimonial, the purpose of the statement, whether it is an excited utterance, or other indicia of the reliability of the identification process.[18]

Hailes may appeal this ruling.

[1] *State v. Hailes*, No. 2384, Sept. Term, 2013, 2014 WL 2191405 (2014).

[2] *Id.*

[3] *Id.*

[4] The court determined that the State's appeal is authorized because it arises from constitutional grounds. *Id.* at p 2, *citing to* Md. Code, Courts and Judicial Proceedings § 12-302(c)(3).

[5] *Hailes* at p. 9.

[6] *Hailes* at p. 10.

[7] *Hailes* at p. 10.

[8] Md. Rule 5-804(b)(2).

[9] *Id.*

[10] *Hailes, supra*.

[11] *Id.*at p. 11.

[12] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

[13] *Crawford*, 541 U.S. at 56. (“The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are.”)

[14] *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678 (2008).

[15] *Hailes* at p. 17.

[16] *Giles*, 554 U.S. at 362.

[17] *Hailes* at p. 18.

[18] *Hailes* at p. 19-23.

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