IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

NO. 2747, SEPTEMBER TERM, 2008

LORENZO VAIDES A/K/A JULIO VALDES, WILL RIVERS,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(THE HONORABLE JOHN P. MILLER, PRESIDING WITH A JURY)

APPELLANT'S REPLY BRIEF

JENNIFER S. WINDOM
Assigned Public Defender

Robbins, Russell, Englert, Orseck,
Untereiner & Sauber LLP
1801 K Street, N.W. Suite 411L
Washington, DC 20006
Phone: (202) 775-4527
jwindom@robbinsrussell.com

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

ARGUMENT

The State's responses to Vaides' arguments fall short in every respect. The State attempts to characterize Vaides' first two challenges as evidentiary decisions committed to the trial court's broad discretion. They were not. Detective Cannida may have been properly qualified as an expert, but that did not authorize him to offer speculative testimony about what *this* defendant "would have" done (but, it was undisputed, did not do). Such testimony was inadmissible as a matter of law. Nor did the trial court have "discretion" to violate Vaides' constitutional confrontation rights by preventing defense counsel from probing Vaides' alleged co-conspirator and the key witness against him on the critical issue of his motivation for testifying against Vaides.

The State fares no better on Vaides' *Hicks* and speedy trial challenges. The State first abandons the theory on which both it and the lower courts relied in rejecting Vaides' challenges, but then claims that *Vaides* somehow did not preserve his arguments for appeal. That maneuver must fail. On the merits, the State cannot explain why it waited nearly two years to bring Vaides to trial on charges alleging a simple, two-person street crime, nor can it justify its attempt to consolidate this case with a completely unrelated case that it then dismissed.

I. Detective Cannida's Unsupported Testimony About Vaides' Alleged Involvement Exceeded The Scope Of Proper Expert Opinion

The State completely misconstrues Vaides' challenge to Detective Cannida's testimony. As Vaides' opening brief made clear, his challenge is to the crucial exchange about what Vaides *himself*—not a hypothetical lookout—"would have" done had police

approached the area where Giles was selling drugs. See Vaides Br. at 16 (discussing 1T. 139-40). Contrary to the State's characterizations, that testimony did ***not*** address only "how a 'look out' *generally* reacts when the police are present." State Br. at 12 (emphasis added); *id.* at 13 (arguing that it was "proper" for Detective Cannida to "testify that 'look outs' generally alert when police are present"). Rather, Detective Cannida's testimony ultimately focused specifically on Vaides: Detective Cannida testified that, if police had driven into this particular Baltimore neighborhood, during this particular afternoon, Vaides himself "would have alerted Mr. Giles" by calling out code words such as "time-out, -5-0-, jump out" to inform Giles that "the police are coming." (1T. 139-40.) The court allowed this testimony even though it was undisputed that ***Vaides never attempted to alert Giles to the police***. Worse still, the court permitted Detective Cannida's speculative, unsupported testimony to masquerade as "expert" opinion, grounded in his "training, knowledge, and experience" (1T. 139), thereby confirming that the jury would afford it extra weight. The court's decision to allow this exchange was improper and highly prejudicial.[1]

There can be no doubt that Vaides properly preserved his challenge to this key portion of Detective Cannida's testimony. (See 1T. 139-40.) And the fact that Vaides' counsel chose not to object to other parts of Detective Cannida's testimony (*e.g.*, 1T. 151-

[1] The State makes much of the fact that Vaides did not challenge Detective Cannida's initial qualification as an expert in street level drug distribution. See State Br. at 8, 13. But the fact that Detective Cannida was qualified generally to testify as an expert does *not* mean that any possible testimony he might have offered was necessarily proper. See Md. Rule 5-702(2) (testimony must be "appropriate[]" "on the particular subject") & (3) (testimony must be "support[ed]" by "sufficient factual basis").

52) only underscores the impropriety of this particular exchange. It is one thing to allow an expert to testify as to how lookouts *generally* behave, but it is quite another to allow an expert to testify about what a *specific* lookout *would* (but did not) do.

The State argues that Detective Cannida's testimony was proper because it "logically followed from his observations that Vaides was, in fact, a look out." State Br. at 13. That argument begs the critical question. It also misses the point entirely. In his capacity as a fact witness, Detective Cannida was entitled to testify as to what he had observed. As an expert witness, he could testify as to how drug operations are typically conducted. But the court reversibly erred when it permitted him to stray beyond both areas and speculate that Vaides "would have" alerted Giles if police had approached. That determination was reserved for the jury and the jury alone.

Accordingly, the State is wrong in arguing that the decision to admit Detective Cannida's testimony was "'a matter largely within the discretion of the trial court.'" See State Br. at 12 (quoting *Clemons v. State*, 392 Md. 339, 359 (2006)). *Clemons* and cases like it stand for the unremarkable proposition that the trial court is typically in the best position to assess the validity and reliability of genuine expert opinion. But Detective Cannida's testimony was *not* a proper subject of expert opinion, and therefore was inadmissible as a matter of law. See *Bohnert v. State*, 312 Md. 266, 278-79 (1988) (expert's opinion that child had been sexually abused was tantamount to declaration that child had told truth and that defendant was lying; opinion encroached on jury's function to resolve contested facts and judge credibility); see also *Gauvin v. State*, 411 Md. 698,

710 (2009) ("a trial judge does not have discretion to make an erroneous ruling that results in the admission of incompetent and unfairly prejudicial expert testimony"). Detective Cannida's "opinion was inadmissible as a matter of law, [so] it was beyond the range of an exercise of discretion." *Bohnert*, 312 Md. at 279.

This Court's decision in *Cook*—which the State fails even to address—is squarely on point. See Vaides Br. at 18-19 (discussing *Cook v. State*, 84 Md. App. 122 (1990)). In *Cook*, this Court held that it was reversible error for the trial court to have admitted a police officer's "expert" testimony regarding the role that each defendant had supposedly played in an alleged drug conspiracy. As in this case, the officer's testimony effectively expressed an opinion on guilt, without providing anything more than rank speculation to the jury. *Cook*, 84 Md. App. at 137-38.

Moreover, the evidence in *Cook* squarely contradicted the officer's "expert" conclusion as to one defendant. *Id.* at 143-44. So too here. The undisputed evidence was flatly at odds with Detective Cannida's opinion about what Vaides "would have" done. It bears repeating that Vaides *never* attempted to alert Giles. It is no answer, as the State suggests, that Detective Cannida had observed Vaides "look up and down the street." State Br. at 11-12. Even if true, such conduct is hardly sufficient to make one a lookout in a drug conspiracy. See *Fleming v. State*, 373 Md. 426, 433 (2003). As Detective Cannida himself testified, a lookout is characterized by behavior alerting another person to the approach of authorities. (See 1T. 152.) The State had no evidence of the sort here. By permitting Detective Cannida to testify, in an expert capacity, that

Vaides "would have" alerted Giles to the approach of police, the court allowed him to supply the crucial missing link for conviction. But see *Bohnert*, 312 Md. at 274-75 (expert's opinion cannot supply the facts necessary to support expert's conclusion).

The trial court's error in admitting Detective Cannida's improper testimony was extremely prejudicial. See Vaides Br. at 17, 19-21. The State acknowledges that it bears the heavy burden of showing "'*beyond a reasonable doubt*, that the error did not influence the verdict.'" State Br. at 13 (quoting *Corbett v. State*, 130 Md. App. 408, 428 (2000)) (emphasis added); see also *Bellamy v. State*, 403 Md. 308, 333 (2008) ("Harmless error review is the standard of review most favorable to the defendant short of an automatic reversal."). But the State comes nowhere close to satisfying that onerous standard. For one thing, it is well-established that jurors view expert evidence with particular deference. *Cook*, 84 Md. App. at 140.

Moreover, it does not follow that Detective Cannida's testimony was harmless because "the concept of a 'look out' is arguably one of common knowledge." State Br. at 13. That the concept is supposedly easily understood only proves Vaides' point: The jurors—armed with Detective Cannida's proper expert testimony as to how a drug lookout generally acts, and fact testimony as to how Vaides specifically acted—were well-equipped to draw their own conclusions concerning whether or not Vaides had acted in service of Giles. Expert testimony on that ultimate conclusion was inappropriate.

The State's argument that the trial court's error was harmless because "Giles confirmed Detective Cannida's observations about Vaides' role" (State Br. at 13) is

similarly flawed. First of all, Giles never testified that Vaides alerted him to the police presence. In any event, Giles' testimony about Vaides' supposed role was hopelessly unconvincing. Giles admitted that he had never even met Vaides before the day in question (1T. 206), and he implicated Vaides only after the State's counsel repeatedly reminded him of his prior statement to prosecutors (1T. 187, 190.). If Giles' testimony "confirmed" anything, it was only that Giles was willing to say whatever he deemed necessary to satisfy the prosecution's persistent attempts to point the finger at Vaides. Giles' vague and unreliable testimony cannot possibly mitigate the prejudice resulting from the court's improper admission of Detective Cannida's "expert" opinion.

Finally, the State offers no response to the fact that Detective Cannida's improper testimony laid the foundation for the jury's only path to conviction. See Vaides Br. at 19. The prosecution had argued that Vaides should be found guilty both because he supplied drugs to Giles *and* because he had acted as Giles' lookout. But the jury necessarily concluded that Vaides had not supplied drugs to Giles, because it acquitted Vaides on the two possession charges (which encompassed liability for constructive possession). The jury convicted Vaides *only* on the State's lookout theory. The court's error in allowing Detective Cannida's improper testimony thus had a decisive impact on the verdict, and cannot be considered harmless. The State disputes none of this.

II. Vaides' Probing Of Giles' Bias And Motivation Was Proper And Constitutionally Required

The State cannot defend Vaides' challenge to the trial court's improper decision to prevent defense counsel from questioning Giles about his motivation for testifying

against Vaides. Here again, the trial court's decision to prohibit this inquiry was not reserved to its unfettered "discretion." Contra State Br. at 15. Courts may not impose restrictions on cross-examination until after the defendant has reached a "'constitutionally required threshold level of inquiry.'" Vaides Br. at 22 (quoting *Smallwood v. State*, 320 Md. 300, 307 (1990)); see also *Reese v. State*, 54 Md. App. 281, 286-87 (1983) ("What is referred to as a 'broad discretion' of the trial judge, upon examination becomes a rather narrow one. The right to discredit an accuser being one of constitutional dimension can be but limitedly circumscribed.") (internal citation omitted). The trial court erred by preventing Vaides' counsel from reaching that constitutionally required threshold.

The State fails even to acknowledge the numerous decisions cited in Vaides' opening brief explaining that the critical issue—which the defense must be allowed to explore on cross-examination—is "whether the witness is acting under a hope or belief of leniency or reward." Vaides Br. at 22-23 (quoting, among other decisions, *Brown v. State*, 74 Md. App. 414, 421 (1988) (internal quotation omitted)). Nor does the State confront those decisions explaining that criminal defendants must be granted especially wide latitude when cross-examining co-defendants or accomplices. Vaides Br. at 21-22 (citing, for example, *Smallwood*, 320 Md. at 307-08).

The State offers only a single response. The State contends that defense counsel's questioning of Giles was "improper" because it "implied that the State entered a plea agreement with Giles for his testimony in this case for the purpose of receiving testimony against Vaides, instead of obtaining the truth." State Br. at 15-16. That argument

entirely misapprehends Vaides' position. Vaides did not need to show that the *State* had intentionally disregarded the "truth" by entering into a plea agreement with Giles in order for Giles' testimony to have been relevant. Again, what mattered most was *Giles'* subjective belief about the value of his plea agreement. And the only way for the jury to learn anything about *that* issue was for Giles himself to explain whether or not he believed he would have received the same deal had he not implicated Vaides. For that reason, allowing the question was not only proper—it was constitutionally mandated.[2]

Moreover, the State's entire argument here rests on the dubious assumption that "Giles swore to testified [*sic*] truthfully about Vaides' involvement," and therefore defense counsel's question was "immaterial." State Br. at 16; see also *id.* (characterizing counsel's question as asking Giles how he might have fared had he "testified falsely"). That is question-begging of the worst sort. Vaides, of course, contends that Giles *did* falsely implicate him in order to curry favor with the State. And, tellingly, the State does not contend that Giles would have received the same sentence—which allowed him to walk out of prison almost immediately after testifying against Vaides—had he not implicated Vaides.

---

[2] The State observes that trial courts may "'impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" State Br. at 15 (quoting *Smallwood*, 320 Md. at 307). But the State completely fails to explain how or why that general statement of the law is relevant here. The State does not (and cannot) show that defense counsel's proposed questioning of Giles was somehow "harass[ing]," "prejudic[ial]," or "repetitive," or that the trial court prohibited it for similar prudential reasons. Any argument to that effect would be baseless, and, in any event, is waived. See *Diallo v. State*, 186 Md. App. 22, 34 (2009).

If the jury had been allowed to hear and assess Giles' response to this inquiry, it easily could have concluded that he was heavily motivated to falsely implicate Vaides. The police had observed Giles—and only Giles—walk twice around the street corner, behind a truck, and hand packages to individuals in exchange for cash. (See 1T. 138, 162.) When the officers moved in to arrest Giles, they watched him hide two bags of cocaine in a bystander's baby stroller. (See 1T. 144-45; 2T. 9.) Giles was clearly in a tough spot, and the State does not deny that Giles was offered a plea deal mere days before Vaides' trial. (See 1T. 219-20.) The defense was entitled to press Giles on his obvious motivation to shift some of the blame to Vaides.

The court's improper exclusion of that topic was highly prejudicial. Numerous decisions have held that a court's improper restriction of cross-examination requires reversal where the witness's credibility is a "central issue" in the case. See Vaides Br. at 24. Here, Giles' credibility could not have been more squarely in dispute. His testimony about Vaides' supposed involvement was inconsistent and utterly unreliable.[3] Yet, the prosecutor repeatedly acknowledged that Giles was the State's key witness (1T. 126, 2T. 51), and the State does not dispute that it sought to bolster Giles' standing before the jury. (*E.g.*, 2T. 50-51.) Had the jury been allowed to hear evidence about Giles' subjective views of his plea agreement, it could have taken a very different view of his credibility.

[3] At least one aspect of Giles' testimony was patently absurd: Giles persisted in claiming that the "wind" had blown his bags of cocaine into the baby stroller, even though that account contradicted the sworn testimony of both detectives. (See 1T. 144, 200; 2T. 8-9.)

Certainly, it cannot be said *beyond a reasonable doubt* that this information would not have influenced the jury's thinking. *Corbett*, 130 Md. App. at 428.

The State argues that the court's error was harmless because the jury had already heard evidence about Giles' potential and maximum sentence terms. See State Br. at 16-18. But as Vaides explained in his opening brief (at 23-24), evidence about the length of Giles' sentence gave jurors only one piece of the information to which they were entitled. It did not shed any light on *what* Giles had to do or say in order to receive a reduced sentence, or what he believed his chances were for receiving such a sentence. Defense counsel's question sought to elicit this information, which was uniquely probative of Giles' motivation for testifying against Vaides.

The State also argues (at 18) that the court's error was harmless because jurors received the standard instruction that they should consider the testimony of a cooperating witness with caution, and because defense counsel was permitted to make one remark during summation concerning Giles' desire to leave jail. This essentially concedes that defense counsel's proposed line of questioning was proper. In any event, neither of those circumstances cured the prejudice resulting from the trial court's error: What good is an instruction or argument without the witness testimony to support it? Jury instructions and arguments of counsel are not evidence, and the jury was entitled to hear straight from the horse's mouth how Giles valued his own plea agreement. The court violated Vaides' constitutional cross-examination guarantees when it denied defense counsel the opportunity to establish the factual predicate for Giles' lack of credibility.

III. Vaides' *Hicks* And Speedy Trial Challenges Were Both Preserved, And The State Offers No Justification For The Excessive Pre-Trial Delay Resulting From The State's Improper Decision To Consolidate This Case With An Unrelated, *Nol Prossed* Case

The State's claim (at 19-25) that Vaides did not preserve his *Hicks* and speedy trial challenges for appellate review is belied by the record. With respect to *Hicks*, the State cannot dispute that, at trial, Vaides' counsel brought a "preliminary motion . . . to dismiss on the *Hicks* issue" (1T. 4-5), that he laid out for the court the full chronology of the State's pre-trial delay (1T. 5-7), that the State's *only* response was that Vaides could not benefit from *Hicks* because of his failure to appear at the June 28 arraignment (1T. 7),[4] and that the trial court—after considering the arguments of both counsel—concluded there had been no *Hicks* violation (1T. 8). Vaides was not required to do anything more. See Md. Rule 8-131(a) (appellate court may decide issues "raised in . . . trial court").

On the speedy trial issue, the State cannot deny that Vaides' counsel filed a speedy trial motion soon after entering his appearance (R. 60), that he repeatedly objected to postponement before the pre-trial courts (*e.g.*, T. 7 (Vol. IV)), that even those courts recognized that the State's delay was unacceptable (T. 5 (Vol. V)), and that, before the

[4] The State finally concedes that Vaides' failure to appear is irrelevant to the *Hicks* analysis. State Br. at 22 n.6. It is not the case, however, that the trial court did not improperly consider that factor in denying Vaides' motion to dismiss. The trial court concluded that Vaides' failure to appear "may" affect the *Hicks* starting date (1T. 8), which of course would impact the rest of its calculation. Moreover, the State does not dispute that the pre-trial courts operated under the misconception that Vaides' failure to appear had foreclosed any *Hicks* challenge. See T. 6 (Vol. I); T. 8 (Vol. IV); T. 4 (Vol. VIII); T. 9 (Vol. IX). Vaides' *Hicks* challenge is not "appellate afterthought" (State Br. at 24) merely because the lower courts accepted the State's erroneous position and refused even to consider the potential *Hicks* violation.

trial court, Vaides' counsel again pointed out that Vaides had "never waived . . . his speedy trial rights" (1T. 7). The trial court may not have articulated findings on all four *Barker* factors, but it did state that it was denying the motion to dismiss "for failure to allow a speedy trial" (1T. 8)—which, it is undisputed, is distinct from a violation of *Hicks*. In any event, the State concedes that this Court "may elect to make its own independent constitutional appraisal" of Vaides' speedy trial claim. See State Br. at 29 (citing *Fields v. State*, 172 Md. App. 496, 523 (2007)).

Notably, the State does *not* argue that it lacked notice of either the *Hicks* or speedy trial challenges, or that Vaides somehow secured an unfair tactical advantage. The State should not receive a windfall, and Vaides should not be punished, where the record demonstrates that the trial court was simply not amenable to hearing further argument from counsel on these two issues. (See 1T. 8 ("Today is the 15th of December, 2008, and we are ready for trial and ready to proceed.").)

On the merits, the State's nearly two-year delay in bringing Vaides to trial violated both *Hicks* and Vaides' constitutional rights to a speedy trial. The State concedes that Vaides' trial did not take place for almost an additional year beyond the mandatory *Hicks* deadline. State Br. at 26. And although it acknowledges that Vaides' counsel explicitly argued on November 5th—during the critical postponement—that Vaides "was 'not waiving *Hicks*,'" the State claims that this objection was somehow negated by Vaides' later failure to "voice[] an objection" when the administrative court noted that the postponement was to "'consolidate everything'" and that it would be regarded as

"'everybody's postponement.'" *Id.* at 27-28. That simply is not the case. Vaides' counsel made his position known, which was all that he was required to do. The State was the party driving the consolidation of this case with Vaides' unrelated case. This case is thus decidedly unlike *State v. Brown*, where the court held that the defendant had "'expressly consent[ed] to a trial date in violation' of the Rule" by executing a signed filing that included an explicit and unambiguous waiver of the 180-day requirement. See State Br. at 27-28 (citing *Brown*, 307 Md. 651, 659 (1986)).

The State makes no effort—nor did the trial court—to defend the November 5 postponement itself or the resulting delay. The administrative court clearly abused its discretion by postponing Vaides' trial in this matter and tying its resolution to an unrelated, multi-defendant case that the State then dropped. *Hicks* was also violated because the State waited an additional year after November 5th to bring Vaides to trial. See Vaides Br. at 28 (observing that trial court failed to analyze whether "the resulting length of delay" after November 5th "was supported by good cause.").

The State's analysis of Vaides' constitutional claim is similarly flawed. The State offers no explanation as to why a twenty-three month delay was necessary to decide this alleged "ordinary street crime." See Vaides Br. at 31. Nor can it deny that Maryland courts have found even shorter periods of delay to have created a speedy trial violation. See *Divver v. State*, 356 Md. 379, 389-90 (1999) and cases cited therein.

With respect to the second *Barker* factor—the reasons for delay—the State contends that "the bulk of the delay in bringing Vaides to trial should be afforded neutral

status." State Br. at 31. That argument rests on a selective (and misguided) reading of the record. The excessive pre-trial delay was overwhelmingly attributable to the State's unreasonable desire to consolidate this case with Vaides' unrelated case. In apparent contradiction to its position on the *Hicks* issue, the State contends here that the time attributable to Vaides' failure to appear "should weigh against dismissal." *Id.* But the State does not dispute that Vaides never received notice of his rescheduled arraignment. Vaides Br. at 4, 29. In addition, the State's argument that the delay stemming from the continued postponements "should be considered neutral" because those postponements were due, at least in part, to the fact that "some of Vaides' co-defendants had not obtained counsel" (State Br. at 32), fails to mention that ***those co-defendants were part of the other case***, and should never have impacted the scheduling of this case to begin with.

The State also errs by arguing that Vaides was required to make more aggressive demands for a speedy trial. The State concedes that defense counsel moved for a speedy trial soon after Vaides' arraignment, and repeated this demand after Vaides had been incarcerated for nine months. See State Br. at 33. And the State cannot deny that counsel's repeated refusal to waive *Hicks* also alerted it to Vaides' desire to proceed expeditiously. Moreover, the State bore the primary responsibility to bring Vaides to trial in a timely manner. *Barker v. Wingo*, 407 U.S. 514, 529 (1972) (primary burden is on courts and prosecutors to ensure that cases are timely brought to trial).

Finally, the State contends that Vaides' argument about the prejudice resulting from Giles' lack of recollection "defies common sense" because Giles' lack of

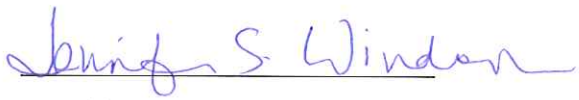
recollection "could have only benefitted Vaides." State Br. at 34-35. The State's argument is a complete non-sequitur. At trial, Vaides exposed at least one important inconsistency between Detective Cannida's and Giles' recollections of Giles' interactions with the suspected purchasers. See Vaides Br. at 33. Before this Court, Vaides identified another specific instance in which defense counsel might have impeached Giles on similar details, but was unable to do so because of Giles' failure of memory—a failure which Giles himself attributed to the two-year passage in time. (See 1T. 210 ("I don't remember none of that. It was two years ago.").) Thus, Vaides has established far more than a "bald allegation" of prejudice. State Br. at 35.

CONCLUSION

For the reasons explained here and in Vaides' opening brief, the Court should dismiss the entire case against Vaides or, in the alternative, vacate Vaides' conviction on Count III.

April 1, 2010.

Respectfully submitted,



Jennifer S. Windom
Assigned Public Defender
Robbins, Russell, Englert, Orseck,
Untereiner & Sauber LLP
1801 K Street, N.W. Suite 411L
Washington, DC 20006
Phone: (202) 775-4527
jwindom@robbinsrussell.com

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Md. Rule 8-112(c)(1), the foregoing Reply Brief for Appellant was prepared in Times New Roman proportionally spaced 13-point font.