IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

STATE OF MARYLAND

vs. Case Number: 115141035

BRIAN RICE,

DEFENDANT.
_____/

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Trial on the Merits - Verdict)

Baltimore, Maryland

Monday, July 18, 2016

BEFORE:

HONORABLE BARRY G. WILLIAMS, Associate Judge

APPEARANCES:

For the State:

JANICE BLEDSOE, ESQUIRE
MICHAEL SCHATZOW, ESQUIRE
JOHN BUTLER, ESQUIRE
SARAH AKHTAR, ESQUIRE

For the Defendant:

MICHAEL BELKSY, ESQUIRE
CHAZ BALL, ESQUIRE
MICHAEL DAVEY, ESQUIRE

* Proceedings Digitally Recorded *

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T A B L E O F C O N T E N T S

P R O C E E D I N G S

(10:06:00 a.m.)

THE CLERK: All rise. The Circuit Court for Baltimore City, Part 31, will start the morning session. The Honorable Barry G. Williams presiding.

THE COURT: Good morning. Everyone, please be seated. Call the case.

MR. SCHATZOW: Good morning, Your Honor. This is the case of the State of Maryland versus Brian Rice. Number 115141035. Mike Schatzow on behalf of the State together with Deputy State's Attorney, Janice Bledsoe and Assistant State's Attorneys, John Butler and Sarah Akhtar and our law clerk, Michael Fiarenso, Your Honor.

THE COURT: Good morning.

MR. SCHATZOW: Good morning, Your Honor.

MR. BELSKY: Good morning, Your Honor. Michael Belsky on behalf of Lieutenant Rice, who is present standing to my left. Also, on behalf of the defendant is Chaz Ball, Mike Davey and behind us are our law clerks Marty Spirlene, Adam Davey. Good morning, Your Honor.

THE COURT: Good morning. All right. The court will issue it's ruling.

The State has charged the defendant with Involuntary Manslaughter, Reckless Endangerment and Misconduct in Office. As the finder of fact, and in determining the

outcome of the charges, the court must be guided by the law that pertains to the pending charges.

In order to convict the defendant of involuntary manslaughter, the State must prove that the defendant acted in a grossly negligent manner and that this grossly negligent conduct caused the death of Freddie Gray.

In order to convict the defendant of reckless endangerment, the State must prove that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; that a reasonable person would not have engaged in that conduct and that the defendant acted recklessly.

Finally, in order to convict the defendant of misconduct in office the State must prove that the defendant was a public officer, that the defendant acted in his official capacity and that the defendant corruptly failed to do an act required by the duties of his office. The State has the burden of proving, beyond a reasonable doubt, each and every element of the crimes charged. If the State fails to meet that burden for any element of any of the charged offenses, this court is constitutionally required to find the defendant not guilty of that crime.

As would be the case if this matter was tried before a jury, as trial judge and the finder of fact, this court

has, and I am paraphrasing Maryland Pattern Jury Instruction 2:04, an obligation "to consider and decide this case fairly and impartially." The court must "perform this duty without bias or prejudice as to any party." This court cannot "be swayed by sympathy, prejudice or public opinion."

At this time, and all times, it is critical for this court not to base any decision on public opinion or emotion.

In order to assess this case the court finds it helpful to discuss some of the facts presented at trial. All times mentioned occurred on the morning of April 12, 2015. Based on a call placed over KGA by the defendant, Mr. Gray was stopped by police officers in the area of Presbury and Mount. Throughout trial, the area was referred to as stop 1. A review of the Kevin Moore video (State's exhibit 51), the KGA transcript (State's exhibit 56), the CCTV video of the area around stop 1 (exhibit 57), and a still shot of the CCTV video (exhibit 58C) shows that Officer Garrett Miller twice called for a wagon over KGA at approximately 8:43a.m.

At the same time he noted that Gilmor Homes was starting to empty out. The defendant was on KGA both before and after Miller's transmissions. The wagon arrived and the defendant was on the scene within

minutes. Mr. Moore and Mr. Brandon Ross were within 5 to 10 feet of Miller, Officers Edward Nero, Zachary Novak and Caesar Goodson when Mr. Gray was placed into the wagon at stop 1. As the officers attempted to place Mr. Gray in the wagon he was yelling and complaining about his handcuffs being too tight. Mr. Gray did not complain about any back or neck pain.

At stop 1 the defendant was not involved in placing Mr. Gray into the wagon but interacted with citizens, including Mr. Ross, by telling them to clear the area. At last 11 citizens were in the area at the time Mr. Gray was on the ground, picked up, walked to and placed into the wagon. Some citizens were yelling, some were not. Mr. Ross stated that at stop 1, the defendant threatened him and told him to leave the area. Mr. Ross left and called 911. At some point he heard screaming through the Gilmore Homes and went to Mount and Baker, which has been identified as stop 2.

It is there that he saw Mr. Gray out of the wagon, on the ground and on his knees. The defendant, along with other officers, picked up Mr. Gray and placed him on the floor of the wagon. Mr. Ross testified that he could hear Mr. Gray inside the vehicle and he believed that Mr. Gray was kicking while inside the vehicle. He was angry because he believed that Mr. Gray had been tased by

officers.

Officer Novak testified that he responded to Stop 1 and helped Officer Nero pick up Mr. Gray and take him to the wagon. Mr. Gray did not assist them in placing him in the wagon. Novak stated that Mr. Gray was not seat-belted at stop 1 because there was a crowd and for officer safety they wanted to get out of the area. He heard Mr. Gray yelling and rocking the wagon.

According to Officer Nero he, Miller and the defendant met after Mr. Gray was placed in the wagon at stop 1. This meeting is corroborated by exhibit 69A which shows the three of them on a CCTV still photo at 8:45:50. According to Nero, it was at this meeting that the defendant stated shackles should be placed on Mr. Gray and that the wagon should go to the Western District instead of Central Booking. He was not asked, and did not say, why the decision was made. The three proceeded to meet the wagon at Mount Street. When the wagon driver opened the door, Mr. Gray was seated. Nero testified that Mr. Gray was flailing, screaming and either actively or passively resisting when he came out of the wagon. People were screaming that the officers had injured Mr. Gray. The defendant and Miller took Mr. Gray out of the wagon. Miller retrieved his cuffs, replaced them with flex cuffs and placed shackles on Mr. Gray. At this

point, Mr. Gray had gone limp so, to get him back into the wagon, the defendant got into the wagon and pulled Mr. Gray by the shoulders while Nero had his hands on Mr. Gray's legs.

Officer William Porter testified under immunity granted by the State. Because the State chose not to ask questions concerning stops 1 and 2, the defense requested permission to present evidence of Porter's testimony from his trial in December of 2015 pursuant to MD. Rule 5-804 (b)(1). After a hearing this court ruled that under the circumstances presented, it would be appropriate to allow the defendant's request and allowed into evidence defense exhibit 18. The State sought to present other portions of Porter's testimony from that trial. The defense did not object and without the necessity of a ruling from this court, the court received State's exhibit 91.

At his trial, Porter stated that at stop 2 he was there when Mr. Gray was placed into the wagon but did not assist because, either he was not looking or there were enough officers on the scene. He then proceeded to assist with crowd control and approached Mr. Ross who was seeking to talk to a supervisor because of what was happening to Mr. Gray. He informed Mr. Ross if the defendant was a supervisor. Porter said that he walked back to the van where he heard bumping and noted that the

wagon was shaking side to side.

Mr. Ross is responsible for State's exhibit 53, which has been referred to as the Ross video, which shows Mr. Gray being placed into the wagon and some of the other activity at stop 2. At the beginning of the video, Mr. Ross is cursing and loudly voicing his displeasure that Mr. Gray had been arrested. The court notes that there were other individuals in the area when this occurred. At 7 seconds of the video, Mr. Gray is on the ground. At 10 seconds, Porter arrives and at 13 seconds, Nero kneels down and grabs Mr. Gray's legs. At 22 seconds, the defendant steps out of the van after having grabbed Mr. Gray under the arms and placing him on the floor of the wagon.

Simultaneously an unknown female voice asks "is he alright?" Mr. Ross says "No." At 34 seconds, Mr. Ross asks Porter for a supervisor and when told that the defendant was a supervisor, wanted someone else. At 1 minute and 01 second, Mr. Ross says to Porter, in a loud voice, that the officers had taken Mr. Gray out of the wagon, took off his handcuffs and tased him. Ross stated that he had it on camera and again expressed his displeasure with the actions of the officers. At 1 minute and 10 seconds, he advised Porter that the officers would get no respect if they "do that." At 1:39

there are a number of unknown voices, some telling Mr. Ross to walk. At 1 minute and 45 seconds, a female voice says "you can hear him banging in the police car. You can hear him kicking." At 2 minutes, an unknown male voice says what sounds like "jail, jail, jail." At 2 minutes and 18 seconds, an unknown male voice says what sounds like "smoke this dumbass" and at 2 minutes and 21 second, a different male voice states "I'll bust all three of them" At 3 minutes and 11 seconds, an unknown female voice states " you could hear him kicking the cruiser. You could hear him screaming."

Mr. Ross acknowledged that no one used a taser on Mr. Gray. This court is satisfied that in the circumstance of the moment Mr. Ross actually believed, based on a sound or sounds that he heard, Mr. Gray had been tased by police officers although now it is clear that it did not happen.

After reviewing the video evidence solely from that perspective, the court noted that between 8:47, when the defendant comes in view of the van, and 8:53, there were, at various times, anywhere from 0 to 9 citizens on the street in range of the officers at stop 2.

Nero and Porter called it a crowd of people at stop 2. The State showed snippets of time when no one was at the scene and others that showed people in the area.

There is no finite definition of crowd. To one officer, 3 people may be a crowd; to 3 other officers, 9 may not be a crowd. It is a matter of perspective. As this court has noted its willingness to acknowledge that in the circumstances of the moment, Mr. Ross' perception that Mr. Gray was tased was believable for him, this court is equally willing to acknowledge from the viewpoint of Nero and Porter that there may have been issues with what they called the crowd. This is especially true given the concern being voiced by Mr. Ross, and others, which was projected in a loud and animated manner.

Based on the evidence presented, it is clear to this court that emotions and tensions ran high on April 12, 2015 at Mount and Baker. It is clear that law enforcement and citizens alike were yelling and upset. It is clear that information did not flow efficiently between law enforcement and citizens. While there are different views as to what happened, and a clear disagreement on the number of people at any given time, none of individuals who testified indicated that it was a quiet time at Mount and Baker while Mr. Gray was being placed into the wagon.

During closing arguments, this court noted that the parties would like this court's assessment of the scene

at Mount and Baker to be made in a vacuum based solely on their view of the evidence. The reality of what was going on at Mount and Baker is not particularly clear cut or one-sided. The defendant's decision to place Mr. Gray inside the van without seat-belting him must be viewed from that perspective.

The question then is, did the defendant have a duty to seatbelt Mr. Gray after he placed him in the wagon? If not, then the analysis must end. This court does find, that as a police officer with a number of years of service, this defendant was required to follow the polices set forth by the Baltimore City Police Department and as the officer who pulled Mr. Gray into the van, may have a had a duty to seatbelt him at stop 2.

Of course the question then becomes, did the defendant have any discretion to not seatbelt Mr. Gray. If K14 was in effect, he may have. If he was aware of Policy 1114, he likely lacked discretion.

Through exhibit 11, the State was able to prove that on April 9, 2015 the defendant did in fact receive the email that included the change in policy from K-14 to 1114. Through Exhibit 8, which is Police Commissioner's memorandum 19-99, the State proved, as of 2014, officers had an obligation to ensure that prisoners transported in prisoner transportation vehicles were secured with a seat

belt.

What the State has not shown to this court is that the defendant actually read 1114 or for that matter 19-99. The State also failed to present to the court any evidence that the defendant knew about the change from K14 to 1114.

Finally, the State has failed to present any evidence whatsoever that 19-99 negated the discretion that the defendant had to not seatbelt under K14.

State's exhibit 5 is General Order A-2, which is titled "DEPARTMENTAL WRITTEN DIRECTIVES". Under the General Information section it states in part that "employees shall be responsible for complete familiarity with and adherence to written directives, general orders and Police Commissioner Memoranda. As directed, written directives shall be maintained by employees in their General Manuals." It goes on to say that "Digital versions of General Orders and Police Commissioner's Memoranda shall be distributed in a (PDF) file, via email. Simultaneously, hard copies of directives shall be printed and distributed to each member. New directives shall require all supervisors to communicate the content of the new directive to their subordinates at roll call."

According to Captain Martin Bartness, Chief of Staff to Commissioner Davis, A-2 was the procedure in place on

April 12, 2015, but he does not know whether A-2 was followed or whether 1114 was ever read at roll call and did not know whether the defendant was ever aware of it. Furthermore, he testified that there was no policy in place that required officers to open emails daily or weekly. In fact, at the time there was no requirement at all to open emails.

There was no evidence presented to this court that at any time prior to April 12, 2015, that the defendant's General Orders where ever updated pursuant to the policy presented in General Order A-2. There is no evidence that the defendant was ever given any information at roll call and there was no information presented that he ever gave information out at roll call on April 9, April 10, April 11 or April 12, 2015 concerning Policy 1114.

The State would have this court look at Policy 1114 and presume that in the short time after having been implemented, the defendant knew he no longer had any discretion concerning the seat-belting of a detainee. The State wants this court to presume and/or assume that the defendant was aware of the new policy, possibly because he was a supervisor. This court's findings and determinations cannot rest upon presumptions or assumptions. In this criminal proceeding, this court cannot apply strict liability standards in order to reach

the State's desired result. The State did not prove the defendant was on notice of the new policy.

Since this court has found that the State has not proven that the defendant was on notice of the new policy, it follows that on the date Mr. Gray was arrested, the defendant was governed by K14 which afforded him discretion when determining whether to seat belt Mr. Gray. Since the evidence shows that the defendant did not seatbelt Mr. Gray at stop 2, the next questions the court must consider are why not and whether the failure to do so was unreasonable? And finally, if the court finds the failure to seatbelt Mr. Gray was unreasonable, the court must consider whether the failure to seatbelt Mr. Gray at stop 2 rose to the level of criminal conduct.

The State alleges that the failure to seat belt Mr. Gray, combined with his injuries that he suffered while in the van resulting in his death, constitute Involuntary Manslaughter. In order to convict the defendant of involuntary manslaughter the State must prove that the defendant acted in a grossly negligent manner; and that this grossly negligent conduct caused the death of Mr. Gray.

The term "grossly negligent" means that the defendant, while aware of the risk, acted in a manner

that created a high risk to, and showed a reckless disregard for, human life. The evidence shows that Mr. Gray, while in the custody of the police at stop 1, was yelling as he entered the wagon. The evidence also shows that after Mr. Gray was place in the wagon at stop 1, the defendant had a meeting with Officers Miller and Nero who were on the scene at stop 1 and had the initial interaction with Mr. Gray.

The court was not provided any evidence concerning what, if anything the officers told the defendant about Mr. Gray's behavior and actions at stop 1. What is in evidence is that the defendant, during the discussion, made the decision to have Mr. Gray shackled and transported to the Western District instead of Central Booking. There are a number of possibilities the court could entertain, some that are innocent and some that are not. However, the burden of proof rests with the State, and the court's imaginings do not serve as a substitute for evidence.

At stop 2, Mr. Gray was removed from the wagon, recuffed, shackled and placed in the wagon without being seat-belted by the defendant. At the same time, various citizens arrived at stop 2 and the environment becomes tense, as evidenced by the Ross video which made it clear that based on their perception of how the officers were

treating Mr. Gray, some citizens were concerned.

With the individuals in the area, having ordered Mr. Gray to Mount and Baker to switch cuffs, a decision was made to place shackles on him. The court does not know why that decision was made. It could have been based on the conversation between Miller, Nero and the defendant. It could have been made independently. The State would have court to simply infer that it was for reasons that were criminal. In that vein, the State also seeks to have this court find that the failure to seatbelt, under the circumstances, was grossly negligent – not a mistake, not an error in judgment, but a grossly negligent act, that effectively, on its face should rise to the level of wanton and abandoned indifference to human life required to meet the standard of gross criminal negligence.

Based on the evidence presented, the court does not make that finding. Furthermore, this court does not find that the State has proven that the defendant was aware that the failure to seatbelt created a risk of death or serious physical injury to Mr. Gray under the facts presented. The State presented no evidence to this court concerning the defendant's training or knowledge concerning the issue of death or serious physical injury occurring in police transport vehicles.

Even had that information been available and presented,

this court would note that the State produced no evidence that the defendant, had he had been aware of the danger, consciously disregarded the risk when he did not seatbelt Mr. Gray.

Finally, even if the court found that the failure to seatbelt Mr. Gray was grossly negligent conduct, which again the court does not, the State failed to prove beyond a reasonable doubt that the failure of the defendant to seatbelt Mr. Gray at stop 2 was the conduct that caused the death of Mr. Gray. For those reasons the court finds the defendant not guilty on the charge of Involuntary Manslaughter.

The State alleges that the failure of the defendant to seat belt Mr. Gray once he was placed back in the wagon at stop 2 rises to the level of reckless endangerment. In order to convict the defendant of reckless endangerment, the State must prove that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another. That a reasonable person would not have engaged in that conduct and that the defendant acted recklessly.

The defendant acted recklessly if he was aware that his conduct created a risk of death or serious physical injury to another and then he consciously disregarded that risk.

Reckless endangerment focuses on the actions of the defendant and whether or not his conduct created a substantial risk of death or injury to another. The crime occurs when the actions are found to be unreasonable under the circumstances presented. It does not focus on the end result which can be, and in this case was, charged as a separate crime. That crime was Involuntary Manslaughter.

Since again the conduct is the failure to seatbelt Mr. Gray, the analysis is similar to the analysis for Involuntary Manslaughter except there is no need for the court to determine whether the failure to seatbelt led to the death of Mr. Gray.

Md. Code Crim. Law, Section 3-204(a)(1) states that a person may not recklessly engage in conduct that creates a substantial risk of death or serious physical injury to another. However, Section 3-204(c)(1) states that (a)(1) does not apply to conduct involving the use of a motor vehicle as defined in Section 11-135 of the Transportation Article. Section 11-135 defines a motor vehicle as a vehicle that is self-propelled.

This Court finds that a police wagon or van constitutes a motor vehicle and that the reckless endangerment statute would prohibit prosecution of

conduct arising from the use of a motor vehicle in this case, a police transport wagon. This court finds that the Reckless Endangerment charge should fail as a matter of law because the alleged reckless conduct is failing to seat belt Mr. Gray in a vehicle.

In order for the defendant's failure to seatbelt Mr. Gray to rise to the level of reckless conduct and create a risk of death or serious physical injury, there has to be some use and movement of the vehicle. The simple placement of a person in a vehicle that is not used, without seat-belting him, cannot and does not constitute a crime.

Therefore, the alleged misconduct on the defendant's part for failure to seatbelt would not fall within the conduct proscribed by this statute. Nevertheless, the court will review Reckless Endangerment solely in the context of the failure to seat belt.

Again, the State has failed to show that the defendant was aware, not that he should have been aware, but that he was aware that his conduct created a risk of death or serious physical injury. The State also failed to show that the defendant, even if he was aware of the risk, consciously disregarded that risk. So even looking at this charge solely on the issue of failing to seatbelt

Mr. Gray, this court finds that the State has failed to meet the burden required and the verdict on the charge of Reckless Endangerment is not guilty.

This court finds that the State has failed to prove that the defendant's failure to seat belt Mr. Gray, under the circumstances presented at stop 2, was unreasonable. Given that the State did not charge the defendant with failing to render medical aid, and the State's failure to show that the defendant's failure to seatbelt Mr. Gray was grossly negligent, there is no need the for this court to assess the medical evidence and testimony presented at trial in reference to the charges.

That said, while preparing this opinion the court did review all the medical evidence and testimony presented by the State and the Defense and agree with the parties that Mr. Gray was not injured while being taken into custody at Presbury and Mount. The evidence shows that he received his injuries at some point after he was placed in the van.

Finally, there is the misconduct charge stemming from the stop on Mount and Baker. The State alleges that the defendant failed to ensure Mr. Gray's safety when the defendant failed to secure him with a seatbelt during the process of Mr. Gray being transported in a police vehicle

while in police custody. In order to convict the defendant the State must prove that the defendant was a public officer, that he acted in his official capacity; and that he corruptly failed to do an act required by the duties of his office.

There is no question that elements one and two of the misconduct charge are met since the defendant was a public officer acting in his capacity as a law enforcement officer on the day of Mr. Gray's arrest. The State asserts the defendant failed to do an act required by his office, and that failure to act is corrupt behavior that warrants a conviction for misconduct.

While this court has already determined that the defendant is not guilty of reckless endangerment based on the facts presented, the court still must determine whether the State has provided sufficient evidence to prove beyond a reasonable doubt that the defendant corruptly failed to do an act that is required by the duties of his office. The comments to the Maryland Pattern Jury Instructions note that the committee chose not to define or explain "corrupt" or "corruptly" believing that the words communicate their meaning better than a definition would. A review of relevant case law

shows that a police officer corruptly fails to do an act required by the duties of his office if he willfully fails or willfully neglects to perform the duty. A willful failure or willful neglect is one that is intentional, knowing and deliberate. A mere error in judgment is not enough to constitute corruption, but corruption does not require that the public official acted for any personal gain or benefit.

The court is satisfied that pursuant to General Order K-14, the defendant had a duty to assess whether or not to seatbelt Mr. Gray in the back of the van. While this court notes there is a duty to assess, the State retains the burden to present evidence that the defendant corruptly failed to follow his duty, not that the defendant a mistake, and not that the defendant made an error in judgment. Rather, the State bears the burden to show that the defendant corruptly failed to follow his duty. The law is clear that the standard for the State to secure a criminal conviction is higher than mere civil negligence.

The State did not offer the defendant's academy records or training records into evidence. The court is mindful of the fact that as a discovery sanction, the State was precluded from presenting certain documents

into evidence and that those documents may or may not have been relevant to the defendant's training concerning seat-belting a prisoner in a transport wagon. But again, the inability to present that evidence was based on a discovery violation by the State and the State must bear responsibility for its failure to provide discovery. The State's choice not to, or inability to, produce such evidence would leave the court to merely assume facts, which of course, it cannot do.

In order for there to be a conviction the State must show not simply that the defendant failed to do an act required by the duties of his office but that the defendant corruptly failed to do an act required by the duties of his office. Here the duty stems from K-14, a Baltimore City Police Department General Order. The commission of a crime is not, and cannot be, simply equated to failure to follow a general order of the police department. The court notes that the duty does not stem from a federal, state or local statute or law. Case law makes it abundantly clear that a violation of a general order may be an indicator that there is a violation of criminal law, but failing to seatbelt a detainee in a transport wagon is not inherently criminal conduct. More must be proven for a conviction. As

stated at the outset, the burden is on the State to prove the elements of each charge. It is not the defendant's job to disprove the allegations.

Here, the failure to seatbelt may have been a mistake or it may have been bad judgement, but without showing more than has been presented to the court concerning the failure to seatbelt and the surrounding circumstances, the State has failed to meet its burden to show that the actions of the defendant rose above mere civil negligence. What the court cannot do, based on the evidence presented, is find that that the defendant's failure to seatbelt Mr. Gray, based on all that went on at Mount and Baker, rose to the level of corruptly failing to do an act required.

For all the reasons stated, this court finds that the State has failed to meet its burden of proving that the defendant is guilty beyond a reasonable doubt of misconduct in office. Therefore the verdict is not guilty on all counts. This court is in recess.

THE CLERK: All rise.

(The proceeding concluded at 10:34:45.)

REPORTER'S CERTIFICATE

I, Christopher W. Metcalf, Deputy Court Reporter of the Circuit Court for Baltimore City, do hereby certify that the proceedings in the matter of State of Maryland vs. Brian Rice, Case Number 115141035, on July 18, 2016, before the Honorable Barry G. Williams, Associate Judge, were duly recorded by means of digital recording.

I further certify that the page numbers 1 through 25 constitute the official transcript of the morning session of these proceedings as transcribed by me or under my direction from the digital recording to the within typewritten matter in a complete and accurate manner.

In Witness Whereof, I have affixed my signature this 18th day of July, 2016.

_____

Christopher W. Metcalf
Deputy Court Reporter