

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Honorable Edgar Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

HENRY HAYGOOD,

APPELLANT.

Appellate Case No. 2012-211961

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES2

STATEMENT OF ISSUE ON APPEAL.....3

STATEMENT OF THE CASE.....4

ARGUMENT

The circuit court violated appellant's 6th amendment right to confrontation by admitting testimonial hearsay into the record under the excited utterance exception without an opportunity of cross-examination by the defense.....5

CONCLUSION.....9

TABLE OF AUTHORITIES

Cases

Crawford v. Washington, 541 U.S. 36 (2004).....5, 6
Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)6, 7

Other Authorities

U.S. Const. amend. VI.....5, 6, 7

STATEMENT OF ISSUE ON APPEAL

Did the circuit court violate appellant's 6th amendment right to confrontation by admitting testimonial hearsay into the record under the excited utterance exception without an opportunity of cross-examination by the defense?

STATEMENT OF THE CASE

This case was tried before the court on September 25, 2009. During the trial an objection was made by the defense to the state's introduction of verbal statements allegedly made by the alleged victim to the investigating officer. The objected to statements pertained to all allegations of what the defendant allegedly did on the date in question. The court overruled defendant's objections and admitted the statement under the "excited utterance" exception to the hearsay rule. It should be noted that (1) the alleged victim was not present for the trial of the state; (2) the alleged victim resides in Orangeburg County and was available for the trial; (3) the state did not subpoena the victim; (4) prior to the trial of the case, the alleged victim provided the defense with two written statements indicating (a) that she did not recall the events in question and (b) that she did not want the defendant to prosecuted; and (5) that these statements were shown to the state prior to the case being remanded to the Magistrate Court. An appeal was made on October 2nd, 2009 to overturn the conviction and remand the case for a new trial. The appeal was denied on May 4th 2012. This appeal follows.

ARGUMENT

The circuit court violated appellant's 6th amendment right to confrontation by admitting testimonial hearsay into the record under the excited utterance exception without an opportunity of cross-examination by the defense.

1. The Circuit Court erred in finding that the testimonial of the alleged victim did not violate the Confrontation Clause by finding the statement in this case to fall within an established exception to hearsay.

The Sixth Amendment Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him" In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court mandated that where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is confrontation. Further, the Court stated that testimony is typically "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony. . . ." Id. 541 U.S. 36 (2004).

In this case, the court admitted testimonial statements made by the alleged victim to the police into evidence. The statement was made by the alleged victim to the police at the scene of the incident after the police had responded to a 911 call. The alleged victim was not in attendance at court and there was no opportunity for cross-examination by the defense.

The court erroneously admitted the testimonial statement under the hearsay exception of excited utterance. In Crawford, the Court stated that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not

evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." Id. 541 U.S. at 56, 124 S.Ct. at 1367. In this case, the statements made by the alleged victim were arguably given in excited utterance when the police responded to the scene. However, the statements were also testimonial in nature, given that they were "...declarations or affirmations made for the purpose of establishing or proving some fact" and therefore require a sixth amendment confrontation by the defense. Id. As stated in Crawford, any testimonial statement made to a police officer is not admissible under the hearsay exceptions of the rules of evidence, if the Sixth Amendment right to confrontation is not met. Here, the testimony was erroneously admitted into evidence despite the precedent in Crawford.

2. The Circuit Court erred in distinguishing the facts of this case from Crawford by ruling that the statement made in Crawford was (a) taken in a custodial interrogation and (b) not an excited utterance.

(a) The Court of Appeals erred in distinguishing the present case from Crawford by exclaiming that the statements here were made at the scene of the alleged domestic disturbance to the responding police officers, while in Crawford the statements were made during a custodial interrogation.

However, the Crawford Court stated that "We use the term 'interrogation' in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island v. Innis*, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case." Crawford, 541 U.S. at 53, 124 S.Ct. at 1365. The above language indicates that the Supreme Court did not provide the foundation

relied upon in the order of denial of the court of appeals that Crawford distinguishes itself from the present case by only applying to testimonials made during custodial interrogations.

Not only does this theory go unsupported in Crawford but it is directly refuted in the case of Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L. Ed. 2d 224 (2006). In Davis, the alleged victim made a 911 call in response to ongoing domestic disturbance. Police responded to the scene and recorded the alleged victim's written testimony outside the residence with the suspect still inside the house. The Court ruled that the statements the alleged victim made during the 911 call fell under the excited utterance hearsay exception and were admissible. However, the written statement given to the responding police officers outside the residence was not admissible. In their reasoning, the Court stated that "[a]lleged domestic battery victim's written statements in affidavit given to police officer who responded to domestic disturbance call were 'testimonial' and, therefore, subject to Confrontation Clause; there was no emergency in progress when statements were given, as alleged battery had happened before police arrived, so that primary purpose of officer's interrogation was to investigate a possible past crime." U.S. Const. amend. VI; Davis, 547 U.S. 813, 126 S. Ct. 2266.

The Davis Court advocates a closer examination of statements made to the police to determine at what point testimonial statements require a sixth amendment confrontation. "A conversation which begins as an interrogation to determine the need for emergency assistance, and is not subject to the Confrontation Clause, may evolve into testimonial statements subject to the Confrontation Clause once that purpose has been achieved; trial courts should recognize the point at which, for Sixth Amendment

purposes, statements in response to interrogations become testimonial and, through in limine procedure, should redact or exclude the portions of any statement that have become testimonial." U.S. Const. amend. VI; Davis, 547 U.S. 813, 126 S. Ct. 2266.

(b) The Appellate Court states that the case applies only specifically to the type of hearsay exception present in Crawford, one that "bears indicia of reliability" and does not extend to excited utterance. This assumption is not supported by the Supreme Court's reasoning in the Crawford decision as the Court states that, "This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances."

In furtherance, the Crawford decision has been expressly extended to apply to the sort of statements made here by the alleged victim to the police during their response to the scene of the incident in the case of Davis, 547 U.S. 813, 126 S. Ct. 2266. "Alleged domestic battery victim's written statements in affidavit given to police officer who responded to domestic disturbance call were "testimonial" and, therefore, subject to Confrontation Clause; there was no emergency in progress when statements were given, as alleged battery had happened before police arrived, so that primary purpose of officer's interrogation was to investigate a possible past crime." U.S.C.A. Const. Amend. 6; Davis, 547 U.S. 813, 126 S. Ct. 2266.

As can be seen by Davis, the Court did not seek to establish a limited provision for the confrontation clause by challenging only statements that bore indicia of reliability, such as statements made to the police during a custodial interrogation, but that instead it sought to cover any statements made to the police that are testimonial in nature.

CONCLUSION

Based on the above reasons, the order of the appeals court should be reversed and the case be remanded accordingly.

October 16th, 2013

A handwritten signature in black ink, appearing to read "Breen R. Stevens, For". The signature is written in a cursive style with a large initial "B" and "S".

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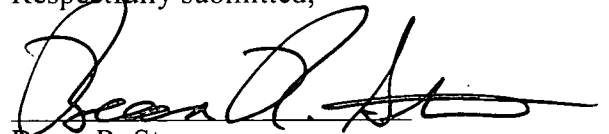
APPELLANT

APPELLATE CASE NO. 2012-211961

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, and the South Carolina Court of Appeals, this 16th day of October 2013.

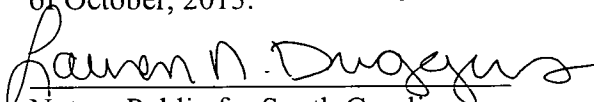
Respectfully submitted,



Breen R. Stevens
Public Defender
First Judicial District

Attorney for Appellant

SWORN TO BEFORE ME this 16th day
of October, 2013.


Notary Public for South Carolina

My Commission Expires: March 5, 2018

