Touro Law Review

Volume 23 | Number 2 Article 22

May 2014

Family Court, Queens County, In re German F. and Hector R.

Angelique Hermanowski

FAMILY COURT OF NEW YORK
QUEENS COUNTY

In re German F. and Hector R.[1]
(decided August 25, 2006)

During juvenile delinquency proceedings, German Flores and Hector Rodriguez claimed that the admission of a nontestifying victim's out-of-court statement violated their right to confrontation under the Sixth Amendment of the United States Constitution and article I, section 6 of the New York State Constitution.[2] Flores and Rodriguez argued that the alleged victim had not testified nor did it appear as though the alleged victim planned to testify.[3] The court acknowledged that even though both the United States Constitution and the New York Constitution allow the accused to confront and cross-examine a witness, this right is not absolute.[4] The court adhered to the United States Supreme Court's holdings in both *Crawford v. Washington*[5] and *Davis v. Washington*,[6] and precedent from New York courts, by holding that the right to confrontation was not violated.[7] After determining that the adverse victim's statement

---

[1] 2006 N.Y. Misc. LEXIS 2261, at *1 (N.Y. Fam. Ct. Aug. 25, 2006).

[2] *Id.*, at *1. U.S. CONST. amend. VI states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."; N.Y. CONST. art. I, § 6 states in pertinent part: "In any trial in any court whatever the party accused shall . . . be confronted with the witnesses against him or her."

[3] *Id.*, at *4.

[4] *Id.*, at **4-5.

[5] 541 U.S. 36 (2004).

[6] 126 S. Ct. 2266 (2006).

[7] *German F.*, 2006 N.Y. Misc. LEXIS 2261, at **12, 14, 15.

was non-testimonial, the court found an exception to the hearsay rule applied.[8]

The respondents, German Flores and Hector Rodriguez, were both charged with assault and attempted assault in the third degree.[9] At the hearing, Police Officer William Gschlecht was called as a witness for the Presentment Agency.[10] Officer Gschlecht testified that he was on foot patrol in Corona, Queens, when a person informed him that an individual was being stabbed on the street.[11] When he headed to the location of the incident, there was a crowd of people surrounding the fight.[12] One of the attackers grabbed the victim, while two other attackers stood next to the victim and yelled at him.[13] Subsequently, two of the attackers were identified as the respondents.[14]

Once the attackers were apprehended, Officer Gschlecht testified that he called for back-up because the crowd seemed "hostile" and there was screaming in a language the officer did not understand.[15] Officer Gschlecht then walked over to the victim.[16] The victim had blood on his pants and socks[17] and a large laceration on his leg.[18] Officer Gschlecht asked the victim how he sustained his

---

[8] *Id.*, at *15.
[9] *Id.*, at *1.
[10] *Id.*, at *2.
[11] *Id.*
[12] *German F.*, 2006 N.Y. Misc. LEXIS 2261, at *2.
[13] *Id.*
[14] *Id.*
[15] *Id.*, at *3.
[16] *Id.*
[17] *German F.*, 2006 N.Y. Misc. LEXIS 2261, at *3.
[18] *Id.*

injuries.[19] The victim pointed at the attackers that Officer Gschlecht had apprehended and stated, "They stabbed me, they fucking stabbed me!"[20] Officer Gschlecht then arrested the attackers.[21]

After Officer Gschlecht testified that the victim had made the abovementioned statement, respondents argued that the admission of such testimony was hearsay in violation of their Confrontation Clause rights because the alleged victim had not testified and did not seem to be available as a witness.[22] The question before the trial court was "whether the admission of the out-of-court statement of the non-testifying victim violate[d] respondents' rights under the Sixth Amendment of the United States Constitution and article I, section 6 of the New York State Constitution."[23]

The court determined that the victim's statement to Officer Gschlecht was a response to his questions.[24] Additionally, the court determined that Officer Gschlecht's questions were asked in order to "deal with an ongoing emergency"[25]—the victim was injured and there was a "hostile" crowd.[26] Accordingly, the court classified the victim's statement as non-testimonial in nature.[27] The court found the nontestimonial statement was admissible under "a recognized exception to the hearsay rule."[28] As a result, the court held that

---

[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *German F.*, 2006 N.Y. Misc. LEXIS 2261, at *4.
[23] *Id.*, at *1.
[24] *Id.*, at *11.
[25] *Id.*, at *12.
[26] *Id.*, at **11-12.
[27] *German F.*, 2006 N.Y. Misc. LEXIS, at *12.
[28] *Id.*, at **14-15 n.4 (stating that the victim's statement to Officer Gschlecht was an

German Flores's and Hector Rodriguez's right to confrontation was not violated.[29]

The Sixth Amendment of the United States Constitution states that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"[30] The Supreme Court, in *Crawford*, explained that the purpose of the Confrontation Clause was to prevent civil-law abuses of criminal procedure, particularly the "use of ex parte examinations as evidence against the accused."[31] The portion of the Sixth Amendment that reads "witnesses against him"[32] means those witnesses that bear testimony.[33] Testimony, in turn was defined by the Court as " 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' "[34] The Supreme Court suggested various examples of testimonial statements including:

> [*E*]*x parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, [or] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . .[35]

---

excited utterance which "is a statement made under the stress of an external event rather than the product of studied reflection.") (citations omitted).

[29] *Id.*, at *15.

[30] U.S. CONST. amend. VI.

[31] *Crawford*, 541 U.S. at 50.

[32] U.S. CONST. amend. VI.

[33] *Crawford*, 541 U.S. at 51.

[34] *Id.* (quoting WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

[35] *Id.* at 51-52.

However, the *Crawford* Court declined to articulate a precise definition of "testimonial."[36] Yet, the Court expressed that some statements are testimonial "under any definition."[37] For example, statements taken by police officers during an interrogation[38] are clearly testimonial.[39]

Further, the *Crawford* Court stated that the Sixth Amendment's Confrontation Clause refers to those rights given at common law.[40] Hence, testimonial statements made by an absent witness are inadmissible unless the common law articulates an exception to this rule.[41] Indeed, the Supreme Court examined the common law of 1791 and found it to be clear that the Framers "would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[42]

In articulating the two requirements that permit the introduction of testimonial statements into evidence, the Court rejected its general reliability exception set forth in *Ohio v. Roberts*[43]

---

[36] *Id.* at 68.

[37] *Id.* at 52.

[38] *Crawford*, 541 U.S. at 53 n.4. The Court stated that there could be many definitions of "interrogation" but that this Court did not have to explain what type of interrogation was involved in this case since the declarant's statement "knowingly given in response to structured police questioning, qualifies under any conceivable definition." *Id.*

[39] *Id.* at 52.

[40] *Id.* at 54.

[41] *Id.*

[42] *Id.* at 53-54.

[43] Ohio v. Roberts, 448 U.S. 56 (1980) (stating that an unavailable witness's statement is admissible if it "bears adequate indicia of reliability" which can be inferred if the statement "falls within a firmly rooted hearsay exception" or shows "particularized guarantees of trustworthiness").

which the lower courts had utilized.[44] As such, the *Crawford* Court held that the Sixth Amendment only permits testimonial statements of an absent witness if the witness was both unavailable and the defendant had "a prior opportunity for cross-examination."[45] When the issue involves nontestimonial hearsay, however, the state courts should be afforded flexibility in admitting evidence, since the criminal defendant has no right to confrontation when the statements are non-testimonial in nature.[46]

Two years later, the United States Supreme Court, in *Davis*, addressed the Confrontation Clause.[47] In *Davis*, the Court upheld *Crawford* but found that it was necessary to articulate what type of police interrogations produce testimonial statements.[48] The Court stated that nontestimonial statements are those made "in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[49] Conversely, testimonial statements are made "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events

---

[44] *Crawford*, 541 U.S. at 59-61, 65-66, 68. The Court rejected the *Roberts* test after finding it overly broad therefore making it unpredictable and inconsistent. Specifically, the court in *Crawford* only rejected the *Roberts* test when the statement is testimonial and implied that when the statement was nontestimonial, courts were free to apply the *Roberts* indicia of reliability test. *Id.*

[45] *Id.* at 68.

[46] *Id.* Therefore, if the statement is nontestimonial the Court may apply *Roberts* indicia of reliability test. *Id.*

[47] *Davis*, 126 S. Ct. at 2271.

[48] *Id.* at 2273.

[49] *Id.*

potentially relevant to later criminal prosecution."[50] The Court, however, did not attempt to articulate an exhaustive list of every possible statement made during a police interrogation or in other situations, as definitively testimonial or nontestimonial.[51] As a result, the Court's definition of testimonial and nontestimonial refers only to interrogations.[52] Importantly, the Court expressly stated that it did not intend to assert that statements not made during an interrogation are therefore automatically nontestimonial.[53]

Article I, section 6 of the New York State Constitution is similar to the Sixth Amendment of the Unites States Constitution.[54] New York courts, after *Crawford* and *Davis*, have adhered to the two-part testimonial test.[55] Like the United States Supreme Court, New York courts focus on the facts of the case at hand and closely examine the circumstances at the time the statement was made.[56] Since *Crawford*, New York courts have interpreted different types of hearsay as being testimonial and therefore inadmissible.[57]

---

[50] *Id.* at 2273-74.

[51] *Id.* at 2273.

[52] *Davis*, 126 S. Ct. at 2274 n.1.

[53] *Id.*

[54] N.Y. CONST. art. I, § 6 states in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear . . . and be confronted with the witnesses against him or her."

[55] *German F.*, 2006 N.Y. Misc. LEXIS 2261, at *9.

[56] People v. Diaz, 798 N.Y.S.2d 21, 26 (App. Div. 1st Dep't 2005).

[57] *German F.*, 2006 N.Y. Misc. LEXIS 2261, at *9. *See, e.g.*, People v. Hardy, 824 N.E.2d 953, 957 (N.Y. 2005) (stating that a plea allocution is testimonial); People v. Coleman, 791 N.Y.S.2d 112, 114 (App. Div. 1st Dep't 2005) (stating that a 911 caller asking for immediate police intervention and the 911 operator asking the victim to describe the attacker is classified as " 'questions delivered in emergency situations to help the police nab . . . assailants' " and therefore is not testimonial) (quoting Mungor v. Duncan, 393 F.3d 327, 336 n.9 (2d Cir. 2004)); People v. Bradley, 799 N.Y.S.2d 472, 479 (App. Div. 1st Dep't 2005) (stating that a police officer at the scene of the crime asking "what happened?" is not a structured interrogation and therefore is not a testimonial statement); People v. Newland, 775

In conclusion, both the United States Constitution and the New York Constitution provide that a defendant has the right to confront a witness.[58] The *Crawford* Court established that the Confrontation Clause was implemented when a testimonial statement by an unavailable witness was made against the accused.[59] Two requirements must be present in order for a testimonial statement by an unavailable witness to be admitted before the court.[60] First, the witness has to be unavailable; second, the defendant must have had a prior opportunity to cross-examine the witness.[61] In *Davis*, the Court reinforced *Crawford's* two requirements for testimonial statements but clarified what was meant by a "testimonial" statement.[62] Both *Crawford* and *Davis* make clear that when a statement is nontestimonial, states are afforded flexibility in admitting the evidence under a hearsay exception.[63] Since *Crawford* and *Davis*, New York courts have continued to adhere to the United States Supreme Court holdings.[64]

Notably, the respondents may have had a stronger Confrontation Clause argument if they had argued that the statements made to the police officer were testimonial. Pursuant to the decision

---

N.Y.S.2d 308, 309 (App. Div. 1st Dep't 2004) (stating that "a brief, informal remark to an officer conducting a field investigation, not made in response to 'structured police questioning' should not be considered testimonial, since it 'bears little resemblance to the civil-law abuses the Confrontation Clause targeted' ").

[58] *Id.*, at *4.

[59] *Crawford,* 541 U.S. at 53-54, 68.

[60] *Id.* at 68.

[61] *Id.*

[62] *Davis,* 126 S. Ct. at 2273-74.

[63] *Crawford*, 541 U.S. at 68; *see Davis*, 1265 S. Ct. at 2275.

[64] *German F.*, 2006 N.Y. Misc. LEXIS 2261, at *9.

in *Crawford* the respondents could have argued that the statements were testimonial since they were made to a police officer during an interrogation. However, the respondents would have had difficulty arguing that the statement was testimonial since the *Davis* Court clearly defined a testimonial statement as one occurring during a non-emergency situation. Yet, while the respondents would have encountered difficulties, because the Court did not establish an exhaustive list of testimonial and non-testimonial statements the respondents did have an opportunity to argue that the victim's statements were made during a non-emergency, and were thus, testimonial.

Angelique Hermanowski