

Chicago Daily Law Bulletin

March 20, 2006

Justices Apparently Split Over 911 Calls

By Steve Lash

WASHINGTON – A seemingly divided Supreme Court on Monday considered whether the “excited utterances” of crime victims to 911 operators and police officers right after being victimized can be introduced as evidence at trial without the victims having to testify in person.

During a two-hour court session, Justice Antonin Scalia took the position that such statements, in which attackers are often named, must be testified to in court by the victim to satisfy the defendant’s constitutional right to confront and cross-examine his or her accuser.

But Justice Ruth Bader Ginsburg said often victims, particularly of domestic violence, are too scared to testify in court. Their recorded statements seeking emergency from 911 or a police officer might be a valid exception to the Constitution’s Confrontation Clause.

The justices’ comments came as the court heard appeals from two men convicted of domestic violence, one in Washington state and one in Indiana. The men argued through their attorneys that having these incriminating statements simply replayed or retold in court denied them their constitutional Sixth Amendment right to confront and cross-examine their accusers.

Attorneys for Washington, Indiana and the federal government countered that “excited utterances” of victims have long been allowed to be introduced at trial as an exception to the general bar on hearsay testimony, obviating the need for the utterer to testify.

But Stephen G. Breyer appeared to be the only justice on the nine-member court to accept the argument that an exception to the hearsay rule could also be an exception to the Confrontation Clause.

He said that a person reporting current criminal activity to a police officer is giving a “present-sense impression” of what he is seeing, Breyer said, citing another exception the hearsay rule. That person would not be required to testify in court so long as the officer were to testify, Breyer added.

Appearing before the justices, defense attorney Jeffrey L. Fisher pressed the appeal of Adrian Martell Davis, who was convicted based largely on the statement his girlfriend gave to a 911 operator during an attack. Fisher argued that any “out of court accusation” knowingly told to a 911 operator, an agent of law enforcement, triggers the confrontation clause, requiring the accuser to testify in court and be subject to cross examination.

Richard D. Friedman, another defense lawyer, argued on behalf of Hershel Hammon, who was found guilty of beating his wife based largely on a statement she gave a police officer who reported to her house. Any “accusation made to a known law enforcement officer,” even if uttered in the immediate aftermath of

an attack, is inadmissible at trial unless the accuser testifies in court and is subject to cross-examination, said Friedman, of Ann Arbor, Mich.

But Ginsburg, addressing Fisher, said statements to 911 and police officers amid the stress of an attack by an ex-boyfriend or husband are excited utterances and not accusations that require the victims presence when they are merely replayed or retold by an officer in court.

“This is not just a call” to law enforcement in which one person is accusing another of a crime, Ginsburg said “This is a cry for help.”

The justice added that often the best evidence a prosecutor can hope for in a domestic-abuse case is a hysterical 911 call or statement to police because the female victim is afraid she will be attacked again. “Many women in these situations are scared to death” and will not testify Ginsburg said.

The justice, who championed women’s rights in the 1970s, recalled a time when police were unwilling to investigate claims of domestic violence. Placing the burden on prosecutors to require women to testify against their male abusers, rather than allowing their statements to officers to be used as evidence, may once again discourage these cases from being brought, she added.

Fisher expressed sympathy with domestic-violence victims but said a statement made to a 911 officer, or other law-enforcement agent, accusing someone of a crime triggers the defendant’s constitutional right to confront his accuser in court for cross-examination. The Seattle defense lawyer added that the Sixth Amendment applies to all crimes and does not have an exception for domestic violence.

Representing Washington state, James M. Whisman argued that a crime victim’s emergency call to a 911 operator does not qualify as an accusation but a desperate call for assistance and may be played in court without the victim being present. “People don’t testify in an emergency,” said Whisman, a senior deputy prosecuting attorney from Seattle.

Indiana Solicitor General Thomas M. Fisher said in-court testimony need not be provided by victims whose sole statements to police occurred in an effort to get immediate help and not to accuse someone of a crime. But Scalia was not convinced.

When a person is speaking in person to a police officer, the immediate danger has passed because the officer is there to protect the individual, Scalia said. Thus, any information provided about the crime is not an excited utterance but an after-the-fact accusation that must be subjected to cross-examination in court, he added.

Justices David H. Souter and Anthony M. Kennedy were also skeptical. To allow accusatory statements to be introduced without cross-examination at trial, even if given excitedly during a violent attack, would reward alleged victims bent on seeing their alleged attackers put in prison, they said.

The Confrontation Clause is critical for “testing the truth” of an alleged victims statement by having him repeat it in court, Souter said. “Why should the [Confrontation] Clause stop short of the self-interested witness?” he added.

Kennedy said that the in-court replaying of a 911 call or a retelling by a police officer does not render the excited utterance truthful if the alleged victim was holding a grudge. “There are false charges made that the police [honestly] believe are true,” Kennedy said.

Deputy U.S. Solicitor General Michael R. Dreeben and Assistant Solicitor General Irving L. Gornstein appeared before the court to express the federal government's support for the prosecutors' position.

Dreeben said a crime victim's excited utterance to law enforcement officers is a plea for help and not a "form of bearing witness" that would trigger the Confrontation Clause, requiring his or her presence in court. Gornstein said the 911 operator and police officer were not seeking testimony from the victims but only enough information "reasonably necessary" to help them.

Gornstein gave the example of hearing a prowler at his house and calling 911. In such a case, Gornstein said he would be seeking help and not giving testimony for which he would have to be cross-examined in court.

But Chief Justice John G. Roberts Jr. said Gornstein's status would presumably change once the tape of his 911 call is played in court. "That strikes me that you are [then] a witness" who must testify, Roberts said.

The Supreme Court is expected to issue its decisions by July in the two cases, *Davis v. Washington*, No. 05-5224, and *Hammon v. Indiana*, No. 05-5705.

In the Washington case, Davis was convicted of domestic assault based largely on the statement his ex-girlfriend, Michelle McCottry, gave to a 911 operator after being attacked. In Indiana, Hammon was found guilty of domestic battery due in large part to his wife Amy's statement to police that he had struck her.

Neither woman was willing to testify at the respective trials, where a tape of McCottry's 911 call was played and a police officer recounted what Amy Hammon had told him.

A jury found Davis guilty of violating a domestic protective order, which is considered a felony in Washington when accompanied by physical violence. He was sentenced to 15 months in prison.

Hammon was convicted of domestic battery and violating his probation on an earlier battery conviction. He was sentenced to a year in prison, with all but 20 days suspended, and ordered to take drug and alcohol counseling.

After their convictions were upheld by the Washington and Indiana supreme courts, respectively, Davis and Hammon appealed to the U.S. Supreme Court.

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