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Panel Permits Hearsay Response to ‘Preliminary’ Police Inquiry

By Tom Perrotta

PROSECUTORS in Manhattan yesterday won a significant appellate ruling on the issue of hearsay exceptions, which have been the subject of great debate since the U.S. Supreme Court last year overruled a 24-year-old precedent that had governed the Confrontation Clause.

In *Crawford v. Washington*, 541 U.S. 36, the Supreme Court placed limits on exceptions to the rule excluding hearsay testimony. It ruled that testimonial statements made by a witness to a crime could not be admitted at trial unless the defendant had an opportunity to cross-examine the witness.

But the Court did not offer specifics on which statements would count as testimonial and which would not, leaving it to lower courts to determine.

In New York, The Appellate Division, First Department, ruled in March that statements made to 911 emergency operators almost invariably should not be viewed as testimonial, and therefore would be admissible at trial.

The court went further yesterday, saying that statements made to an officer who asks, “What happened?” when responding to a crime scene are more like excited utterances than testimonial statements.

Mark R. Dwyer, chief of the appeals bureau at the Manhattan District Attorney’s Office, said the ruling is particularly important for domestic violence cases in which victims were reluctant to testify.

In this case, *People v. Bradley*, 4971, the victim, a Bronx woman, told an officer responding to a call that her boyfriend had thrown her through a glass door. She later submitted a recantation letter in which she said she had punched her hand through the glass after she and her boyfriend had a fight. But the officer’s testimony about her original statement was used to convict the defendant, Norman Bradley, of criminal contempt and assault.

“We are delighted that the Appellate Division agrees with us that excited utterances of the sort delivered in this case do not constitute ‘testimonial’ hearsay,” Mr. Dwyer said.

Andrew C. Fine, director of Court of Appeals litigation at the Legal Aid Society, said the agency is disappointed in the ruling and would seek leave to appeal.

“We believe it presents a much too constricted view of *Crawford* and disfavors the right of cross examination,” Mr. Fine said.

In its 20-page ruling, written by Justice Peter Tom, the court stressed that the intentions of the officer asking the questions often were more important than the state of mind of the victim or witness answering them.

“It suffices to say that the answer by a victim of a crime asked ‘What happened?’ by a police officer responding to the scene does not take place in the context of structured interrogation and, thus, does not implicate the proscription against the use of a testimonial statement at trial on the ground that it violates a defendant’s right to confront the witness against him,” Justice Tom wrote.

He added: “Where the purpose of the inquiry is to gain general familiarity with the situation confronting a police officer to determine what happened, the officer is making only a preliminary investigatory inquiry.”

However, the judge cautioned that “where the purpose of the inquiry is to gather incriminating evidence against a particular individual, the officer is advancing a potential prosecution, and the response takes on a testimonial character.”

The court rejected an argument that the victim should have known that her statement would be used against him since she had a restraining order against the defendant.

The argument relied on *U.S. v. Saget*, 377 F3d 223 (2004), a U.S. Court of Appeals for the Second Circuit ruling that said testimonial statements would involve a declarant who would reasonably expect that responses might be used in future judicial proceedings.

“[Defendant] intimates that a declarant should reasonably anticipate that any statement made to an investigating officer is likely to be used as evidence at trial,” Justice Tom wrote. “Nothing in *Crawford* suggests that the Court intended to erect so formidable a barrier to the introduction of out-of-court statements.”

Justices Angela M. Mazzarelli, David B. Saxe, David Friedman, and Joseph Sullivan concurred on the ruling.

Assistant District Attorney Susan Axelrod handled the appeal for the prosecutor’s office. Robert Budner appeared for Legal Aid.

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