EVIDENCE

Evidence: Admissibility

Fencher v. State,
931 So. 2d 184 (Fla. 5th Dist. App. 2006)

Admitting a rape kit into evidence, without the testimony of the nurse who collected the samples, does not violate a defendant's right to confront adverse witnesses when the prosecution establishes an evidentiary foundation for admitting the rape kit and the scientist who performed the laboratory tests on the kit is subject to cross-examination.

FACTS AND PROCEDURAL HISTORY

A 49-year-old woman was sexually assaulted by a male who approached her on her back porch and backed her into her apartment. Police took the victim to the Sexual Assault Treatment Center (Center), where a nurse on duty collected the necessary samples for the rape kit. The nurse sealed and signed the samples and gave them to a police detective. The detective delivered the samples to the Orlando Police Department for testing by the Florida Department of Law Enforcement laboratory.

The State charged Fencher with the crime. At trial, the nurse who collected the samples did not testify because she could not be located. Instead, an Advanced Registered Nurse Practitioner at the Center testified regarding the protocol for collecting and preserving samples, as well as recordkeeping procedures. This nurse also identified the collecting nurse's signature on the rape kit, and stated that the kit "did not appear to have been tampered with." *Fencher*, 931 So. 2d at 186. The Florida Department of Law Enforcement forensic scientist who performed the laboratory testing and DNA analysis on the rape kit also testified at trial, and Fencher's attorney cross-examined him.

Fencher was convicted of sexual battery with a deadly weapon, burglary with an assault or battery with a firearm, and kidnapping with intent to commit a felony. He appealed, arguing that the trial court erred when it allowed the prosecution to admit the rape kit into evidence without the testimony of the nurse who collected the rape-kit samples, because the nurse was not subject

to cross-examination. The Fifth District Court of Appeal affirmed the trial court.

ANALYSIS

Using out-of-court testimonial witness statements against a defendant in a criminal case violates the Confrontation Clause of the Sixth Amendment, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine that witness. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). Lab reports prepared pursuant to police investigations are testimonial hearsay subject to the Confrontation Clause, even if the reports and results are admitted under a hearsay exception. *Johnson v. State*, 929 So. 2d 4, 8 (2005).

In this case, the rape kit was not testimonial hearsay subject to the Confrontation Clause because it merely contained DNA evidence gathered so that police could generate lab results. Because the nurse who took the rape kit merely procured the samples and did not test the DNA material, the rape kit was not testimonial in nature and the *Crawford* analysis was not applicable. *Fencher*, 931 So. 2d at 187. Accordingly, the rape kit was properly admitted under the business-record exception to the hearsay rule. To establish the admission of a rape kit under the business-record exception, either the person collecting the samples or the custodian of the record must be present at trial. In this case, the Advanced Registered Nurse Practitioner from the Center met this requirement by identifying the rape kit and testifying that no one tampered with it. The forensic scientist who actually performed the tests on the rape kit samples testified at trial and was subject to cross-examination, thereby satisfying the defendant's right to confrontation under the Sixth Amendment.

SIGNIFICANCE

In *Fencher*, the Fifth District distinguished between evidence gathered pursuant to police investigations and laboratory results based on the gathered evidence. The Fifth District clarified that admitting the evidence gathered pursuant to police investigations, without the testimony of the person who gathered that evidence, does not violate a defendant's right to confrontation. Such evidence can be admitted as long as the prosecution establishes a foundation for the admission of the evidence under the business-

record exception to the hearsay rule, and the person who actually performed the laboratory tests on the evidence is subject to cross-examination.

RESEARCH REFERENCE

- 14B Fla. Jur. 2d *Criminal Law* § 1650 (Westlaw database updated Feb. 2007).

Anesha Worthy

Evidence: Hearsay

Martin v. State,
936 So. 2d 1190 (Fla. 1st Dist. App. 2006)

A Florida Department of Law Enforcement (FDLE) report is testimonial hearsay, even if admitted as a business record, when prepared in connection with a police investigation for use at trial. The admission of such a report violates the Confrontation Clause unless the author of the report is unavailable to testify at trial and the defendant had a meaningful prior opportunity to examine the author.

FACTS AND PROCEDURAL HISTORY

Jermaine Lamar Martin was convicted for possession of illegal substances. At trial, the state offered as evidence a FDLE report revealing the results of tests performed on the substances. The trial court admitted the report into evidence, in place of the live testimony of the person who performed the tests, under the business-records exception to the hearsay rule. On appeal, Martin contended that the admission of the report without the testimony of its author deprived Martin of his constitutional right to confront a witness against him under both the federal and state Confrontation Clauses. The First District Court of Appeal agreed with Martin, holding that the admission of the report without providing Martin an opportunity to cross-examine the report's author was reversible error. The court reversed the lower court and remanded for a new trial.

ANALYSIS

To determine whether the admission of the report violated the Confrontation Clause, the court first looked to the Supreme Court's opinion in *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* set forth a test to determine when admitting hearsay evidence violates the federal Confrontation Clause. *Crawford* stated that the Confrontation Clause is violated by the admission of testimonial hearsay evidence unless the witness is unavailable and the defendant had a meaningful prior opportunity to cross-examine that witness. While the *Crawford* court did not comprehensively define testimonial, it did opine that business records were not testimonial by nature. The Court further explained that statements were testimonial when an objective witness would reasonably believe, under the circumstances in which the statements were made, that the statements would be available for use by the prosecution at trial.

The court then addressed the FDLE report at issue. The court acknowledged that the report met Florida's definition of a business record but emphasized that the report was prepared for use in litigation. The court noted that the testing illustrated by the report was conducted by law enforcement upon Martin's arrest and that the state offered the report to further its criminal prosecution of Martin. The court indicated that other Florida courts applying *Crawford* have consistently determined similar records to be testimonial hearsay. Most notably, the court pointed to the Second District Court of Appeal's opinion in *Johnson v. State*, 929 So. 2d 4 (Fla. 2d Dist. App. 2005). *Johnson* held that an FDLE report is testimonial hearsay, even if admitted under the business records exception, if it is created in connection with a police investigation and admitted to establish an element of the charged crime. The court concluded that, in this case, the FDLE report was testimonial hearsay.

Returning to the *Crawford* test, the court noted that the State made no claim that the author of the FDLE report was unavailable to testify or that Martin was given any meaningful opportunity to cross-examine the author. The court concluded that under the *Crawford* test the admission of the report violated Martin's right under the Confrontation Clause to confront a witness against him.

The dissent argued that the FDLE report was not testimonial hearsay under *Crawford*. The dissent noted that the majority of jurisdictions outside of Florida have held that laboratory reports are nontestimonial business records and may be admitted under *Crawford*. The dissent also referenced the statement in *Crawford* that business records were likely not testimonial. The dissent disagreed with the Second District's reasoning in *Johnson*, arguing that FDLE reports are not always used against the defendant and should be admissible as business records.

SIGNIFICANCE

Martin is significant because it clarifies the application of the *Crawford* test to FDLE reports in Florida. The case signifies agreement between the First and Second Districts that FDLE reports can be testimonial hearsay even if admitted as business records.

RESEARCH REFERENCE

- 14B Fla. Jur. 2d *Criminal Law* §§ 1661, 1661.5 (Westlaw database updated Aug. 2007).

Courtney Lynne Fish

Evidence: Hearsay

***State v. Pinault*,**
933 So. 2d 1287 (Fla. 4th Dist. App. 2006)

The Confrontation Clause of the Sixth Amendment does not prohibit the admission of testimonial hearsay under Florida's child-victim hearsay exception when the declarant testifies at trial.

FACTS AND PROCEDURAL HISTORY

Facing charges of sexual battery of a person less than twelve years old, the defendant received notice pursuant to Florida's child-victim hearsay exception, Florida Statutes Section 90.803(23), that the State intended to offer into evidence the victim's videotaped deposition. Prior to trial, the defendant filed a motion in limine to exclude the evidence. While the State indi-

cated that the victim would testify at trial, the circuit court granted the motion to exclude, determining that admitting the videotape would violate the Confrontation Clause under the Fourth District Court of Appeal's decision in *Contreras v. State*, 910 So. 2d 901 (Fla. 4th Dist. App. 2005). The State filed a petition for a writ of certiorari, seeking to quash the circuit court's order. The Fourth District granted the petition and quashed the order.

ANALYSIS

In *Contreras*, the Fourth District held that a trial court's admission of child-victim hearsay evidence violates the Confrontation Clause of the Sixth Amendment. This holding was based on *Crawford v. Washington*, 541 U.S. 36 (2004), in which the United States Supreme Court held that the admission of hearsay violates the Confrontation Clause when the hearsay statement is testimonial, the declarant is unavailable at trial, and the defendant lacked a prior opportunity for cross-examination. However, the Fourth District ruled that *Contreras* was inapplicable in this case because *Contreras* "does not apply to a situation in which the declarant testifies at trial, giving the defendant an opportunity to confront and cross-examine the declarant about the hearsay statement." *Pinault*, 933 So. 2d at 1288.

The defendant argued that the circuit court's order nevertheless should be affirmed because the child victim had withdrawn her statements since the order was issued, and the State was prohibited from calling her to testify solely for the purpose of impeaching her with her videotaped deposition. The Fourth District agreed that the State cannot call a victim to testify solely to introduce her prior inconsistent statements. However, the Fourth District determined that whether to forbid admission of the videotaped deposition on the grounds that the State was trying to introduce it as the sole substantive evidence of the defendant's guilt was an issue that should be decided at trial. More importantly, when the circuit court issued its order, it was unaware that the child victim would recant and that consequently the State might not call her to testify. Therefore the circuit court's ruling that admission of the evidence was prohibited under the Confrontation Clause constituted a departure from the essential requirements of the law.

SIGNIFICANCE

Florida criminal law practitioners need to be aware that while prosecutors may not introduce testimonial hearsay under the Florida child-victim hearsay exception when the declarant does not testify at trial and the defendant had no previous meaningful opportunity to cross-examine the declarant, the hearsay statements are admissible if the declarant testifies at trial. When it is unclear whether the declarant will testify at trial, the trial judge should refrain from a pretrial determination of the admissibility of the hearsay, and instead should decide the issue at the time of the trial.

RESEARCH REFERENCE

- 16 Fla. Jur. 2d *Criminal Law* § 3819 (Westlaw database updated July 2006).

Paul O'Neil

Evidence: Impeachment

FedEx Ground Package System v. Futch,
944 So. 2d 469 (Fla. 3d Dist. App. 2006)

Evidence of convictions for willful failure to file federal income tax returns is not admissible to impeach a witness because such crime does not involve dishonesty or a false statement.

FACTS AND PROCEDURAL HISTORY

Vantoria Futch's vehicle collided with a FedEx van. Futch called Dr. Gelbard, who treated Futch for injuries after the accident, to testify that the car accident caused the injuries. To impeach Dr. Gelbard, FedEx sought to admit evidence of the doctor's five prior convictions for willful failure to file federal income tax returns. Because the trial court found that willful failure to file federal income tax returns does not involve a false statement or dishonesty, it did not allow the evidence. Following a jury verdict for Futch, FedEx appealed. The Third District Court of Appeal affirmed the trial court.

ANALYSIS

FedEx argued that willful failure to file federal income tax returns is a crime involving dishonesty or a false statement and, therefore, may be used for impeachment purposes under Section 90.610(1), Florida Statutes. To buttress its argument, FedEx cited decisions of the United States Courts of Appeals for the Fourth, Eleventh, and Ninth Circuits. Each of these decisions relied on *United States v. Klein*, 438 F. Supp. 485 (S.D.N.Y. 1977), with which the Third District disagreed.

The *Klein* court relied on *United States v. Hayes,* 553 F.2d 824 (2d Cir. 1977), in holding that the willful failure to file federal income tax returns involves dishonesty or a false statement. In *Hayes*, the United States Court of Appeals for the Second Circuit held that evidence of a conviction for importing cocaine could be used for impeachment because the evidentiary value outweighed any possible prejudice. Only in dicta did *Hayes* opine that importing cocaine involves a false statement or dishonesty when a false statement is made to customs officers. Nonetheless, the court in *Klein* analogized importing cocaine to willful failure to file federal income tax returns. The Third District rejected the *Klein* court's application of *Hayes*, stating that "the *Klein* court seized upon the reasoning in *Hayes* to make a wholly illogical leap." *FedEx Ground Package Sys.*, 944 So. 2d at 471. The Third District further reasoned that willful failure to file federal income tax returns "involves [only] a failure to fulfill a legal duty," which is distinguishable from making a false statement. *Id.* at 472. Accordingly, the Third District rejected *Klein* and refused to follow the Fourth, Eleventh, and Ninth Circuit decisions.

The court agreed with the United States Court of Appeals for the Third Circuit's decision in *Cree v. Hatcher*, 969 F.2d 34 (3d Cir. 1992). In *Cree*, the court held that convictions for willful failure to file federal income tax returns could not be used for impeachment. While the Third Circuit recognized that a person committing such a crime might have a motive to conceal tax liability from the government, the court reasoned that motive is irrelevant in determining dishonesty for purposes of impeachment. Rather, the dishonesty must appear on the face of the conviction itself. The Third District agreed, noting that under *State v. Page*, 449 So. 2d 813 (Fla. 1984), courts may not "look beyond the face of a conviction to determine whether the conviction is for a

crime involving dishonesty." *FedEx Ground Package Sys.*, 944 So. 2d at 473. Because the Third District determined that convictions for the willful failure to file federal income tax returns do not, on their face, involve dishonesty or false statements, the court affirmed the trial court's decision to exclude the evidence.

SIGNIFICANCE

Prior to this case, Florida state courts had never addressed whether the crime of willful failure to file federal income tax returns involves a false statement or dishonesty. *FedEx* establishes that evidence of such a crime is inadmissible for purposes of impeachment. Because the Eleventh Circuit has decided the other way, the rule on this issue in Florida's state courts is different than the rule in Florida's federal courts.

RESEARCH REFERENCE

- Charles W. Ehrhardt, *Florida Evidence* vol. 1, § 610.3 (West 2007).

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