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24, 28, 29A, 29B, 30

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Exceptions to the Confrontation Clause

By Amber Lueken Barwick

It has been four years since the U.S. Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), and our courts and others across the country continue to shape and define the law on the right of confrontation. This summer, the Supreme Court addressed exceptions to the Confrontation Clause. Below is a summary of the Court's decision, which will have a significant impact on the prosecution of domestic violence crimes.

Giles v. California, 554 U.S. ____ , No. 07-6053 (June 25, 2008)

The Supreme Court mentioned the doctrine of forfeiture by wrongdoing in both *Crawford* and *Davis v. Washington*, 547 U.S. 813 (2007), but not until now have they attempted to define the scope of conduct to which it refers. The doctrine of forfeiture by wrongdoing is an equitable principle which stands for the proposition that the defendant should not benefit from his own wrongdoing in procuring the absence of a witness against him. If the witness for the State is unavailable due to some wrongdoing of the defendant, then he cannot complain that he has no opportunity to cross-examine that witness, thereby forfeiting his right of confrontation. As such, those statements from the unavailable witness, though testimonial in nature, would not be rendered inadmissible under the Confrontation Clause.

The question for the Court in *Giles* was whether the California courts had properly admitted statements from a murder victim at the murder trial of the defendant, her boyfriend. At trial, the defendant claimed that he had acted in self-defense when he shot the victim. The State sought to rebut those assertions by introducing statements made by the victim to a police officer responding to a domestic call about three weeks prior to the murder. The victim told police that the defendant had physically assaulted her and threatened to kill her while holding a knife to her. The trial court admitted this testimony under a state law hearsay exception, and the defendant was found guilty of the murder. While the case was on appeal, the Court handed down its *Crawford* decision. Subsequently, the California appellate courts ruled that the admission of the victim's statements did not violate the Confrontation Clause because the defendant had forfeited his right to confront the witness because it was his intentional wrongful act that had made her unavailable for trial. The Court ultimately concluded that the California courts erred in the application of the forfeiture by wrongdoing doctrine.

The Court recognized two forms of testimonial statements that were admitted at common law despite the fact that the statements were previously unconfuted. The first was a dying declaration, where the declarant was "both on the brink of death and aware that he was dying." If these two elements were met at common law, the statements of the deceased declarant were admissible at trial. In this case, the statements at issue were not made while the victim was dying, but three weeks prior to her murder.

The second exception, forfeiture by wrongdoing, admitted "statements of a witness who was 'detained' or 'kept away' by the 'means of procurement' of the defendant". The Court, after much discussion of common law cases, concluded that this exception to the Confrontation Clause only applied when the defendant "engaged in conduct *designed* to prevent the witness from testifying." The State must prove that the defendant intended to prevent the witness from testifying, not just that the defendant had, in fact, caused the absence of the witness, in order for the witness's statements to be admissible.

The majority does, however, recognize that "acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions." It goes on to suggest that "the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution – rendering her prior statements admissible under the forfeiture doctrine." The abusive behavior that isolates a victim of domestic violence and prevents her from getting outside help may be, in and of itself, evidence of the defendant's intention to prevent the victim from testifying. The case was remanded and the California courts are now free to decide whether the defendant possessed the requisite intent.

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NC Courts Discuss Exceptions

The North Carolina Court of Appeals has recently decided two cases regarding the dying declaration exception to the Confrontation Clause. Below are summaries of these cases.

State v. Calhoun, No. COA07-580 (March 4, 2008)

The defendant and a co-defendant were charged with and found guilty of first-degree murder. Shortly after the shooting, a witness, Ms. Williams, returned home and found the victim on the floor of her home. The responding officer arrived at the same time and entered the home with Ms. Williams. Ms. Williams asked the victim who had shot him, and the victim responded that it was defendant and co-defendant. The responding officer was present for this statement.

The Court concluded that these statements were admissible because they were non-testimonial. The statements were made to a civilian, not a law enforcement officer during the course of interrogation. Therefore, the statements were non-testimonial, and the Sixth Amendment right of confrontation did not apply. In addition, the Court concluded that even if the statements had been made to a law enforcement officer, it was clear that any interrogation at that time had the primary purpose of meeting an ongoing emergency. An acceptable, non-testimonial purpose of interrogation is determining the identity of the perpetrator so that officers are prepared to encounter dangerous suspects.

The Court ruled that these statements were admissible under another theory as well. The Court looked to the Supreme Court's discussion in *Crawford v. Washington*, 541 U.S. 36 (2004), which concluded that there are still some "special exceptions" to the right of confrontation rooted in common law. The Supreme Court noted that dying declarations are among those possible exceptions. After reviewing the decisions of other jurisdictions, the Court ruled that dying declarations are indeed "special exceptions" to the right of confrontation.

State v. Bodden, No. COA07-719 (May 20, 2008)

The defendant and a co-defendant were charged with first and second-degree murder, aiding and abetting, and acting in concert. The victim was shot several times but was able to give statements to law enforcement both at the scene and at the hospital before he died. The Court ruled that those statements qualified as dying declarations under N.C. Gen. State. 8C-1, Rule 804(b)(2). The Court further ruled that the admission of these statements did not violate the Confrontation Clause of the Sixth Amendment. The Court agreed with the trial court in determining that dying declarations do not violate the right of confrontation. The Court looked to its holding in *State v. Calhoun*, and to other jurisdictions in concluding that the Confrontation Clause allows an exception for testimonial dying declarations.

The Court also discussed the equitable principle of forfeiture by wrongdoing, which prevents a defendant from asserting his right to confront a witness who has been made unavailable because of the defendant's wrongdoing. Again, the Court looked to other jurisdictions to determine how this exception to the Confrontation Clause has been applied. The Court reached no conclusion on whether the principle applied in this particular case, however, since they had already concluded that the statements were admissible as dying declarations.

DV Regionals

We will continue to discuss *Crawford* and other Confrontation Clause issues at the remaining Domestic Violence Regionals. Please take a look at the remainder of the dates for the regional trainings and encourage your law enforcement to attend with you. If we have already been to your area, please contact us for more information on other trainings to attend.

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