IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant

v.

BRUNEL HOSTY,

Appellee.

CASE NOS.: SC03-511 & SC03-512 (CONSOLIDATED)

L.T. NO.: 4D02-3457

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ON DIRECT APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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APPELLANT'S SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

Appellant, the State of Florida, is the prosecution in the trial court and was the petitioner in the Fourth District Court of Appeal. Appellant will be referred to herein as "appellant" or "the State." Appellee, Brunel Hosty, is the defendant in the trial court and was the respondent in the Fourth District Court of Appeal. Appellee will be referred to as "appellee."

The record in this case consisted of the exhibits attached to the State's petition for writ of certiorari. In this brief, the exhibits attached to the State's petition for writ of certiorari will be cited as "Pet. Ex."

SUMMARY ARGUMENT

Point I The decision in Crawford has no impact on the first issue raised in this case because Crawford does not address the well-settled principle of Florida law that courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds.

Point II The Crawford decision has a negligible impact on the analysis of the second issue raised in this case because it does not undermine the general rule that for a facial challenge to a legislative enactment to succeed, the challenger must establish that no set of circumstances exists under which the Act would be valid. In addition, the Crawford decision could actually bolster the State's argument because the victim in this case may testify at trial and obviate any Confrontation Clause concerns expressed in Crawford.

ARGUMENT

THE UNITED STATES SUPREME COURT'S DECISION IN CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004) HAS A NEGLIBLE IMPACT ON THIS ISSUES RAISED IN THIS CASE

POINT I

In its Initial Brief, the State argued the trial court improperly (1) precluded the State from presenting evidence to establish that the victim's statements were admissible under the disabled adult hearsay exception,[1] and (2) violated the fundamental maxim of judicial restraint that courts should not decide constitutional issues unnecessarily. (IB. 6-12). The United States Supreme Court's decision in Crawford has no impact on the well-settled principle of Florida law that "courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds." Singletary v. State, 322 So. 2d 551, 552 (Fla. 1975)(Court failed to pass on constitutionality of law involving a defendant's speedy trial rights because the matter was disposed of on other grounds); State v. Covington, 392 So. 2d 1321 (Fla. 1981)(Court refused to pass on constitutionality of substantive criminal statute because the trial court should have granted the defendant's motion to dismiss the charges); State v. Boyd, 846 So. 2d 458, 459-460 (Fla. 2003)(refusing to entertain

[1] § 90.803(24), Fla. Stat.

constitutional due process argument involving the right to a hearing because case could be disposed of on other grounds); State v. Efthimiadis, 690 So. 2d 1320, 1322 (Fla. 4th DCA 1997)("'courts should not decide constitutional issues unnecessarily'").

The State contends that if the trial court applied the provisions of section 90.803(24) to the facts of this case and determined whether the victim's statements satisfied the applicable indicia of reliability,[3] it could have refrained from passing on the constitutional issue. Under Florida law it is clear that the trial court should have addressed the constitutionality of section 90.803(24) of the Florida Statutes if, and only if, it conducted a proper analysis and found that the victim's statements satisfied the applicable indicia of reliability and other requirements under section 90.803(24). Since the first issue in this case addresses the lower courts' failure to follow the fundamental maxim of judicial restraint that "'courts should not decide constitutional issues unnecessarily,'" the Crawford decision has little, if any, impact on this argument.

[3] If the trial court conducted a proper analysis and found that the victim's statements did not satisfy the applicable indicia of reliability and other requirements under section 90.803(24), then the trial court did not have to entertain the constitutional issue in this case.

POINT II

The State also contends that the lower courts erred by finding the disabled adult hearsay exception in section 90.803(24) of the Florida Statutes facially unconstitutional. The decision in Crawford has little impact on the analysis of this issue because nothing in Crawford affects the general rule that for a facial challenge to a legislative enactment to succeed, "the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). "The fact that [a legislative act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid...." Salerno, 481 U.S. at 745. This heavy burden makes such an attack "the most difficult challenge to mount successfully against an enactment." Id.; State v. Barnes, 686 So. 2d 633, 639 (Fla. 2d DCA 1996).

The Fourth District's decision in State v. Hosty, 835 So. 2d 1202 (Fla. 4th DCA 2003) should be reversed because appellee has not, and cannot, demonstrate that the disabled adult hearsay exception is facially unconstitutional because "circumstances exist[] under which [section 90.803(24)] would be valid." Salerno, 481 U.S. at 745; Dickerson v. State, 783 So. 2d 1144, 1146 (Fla. 4th DCA 2001)(courts are "obligated to interpret

statutes in such a manner as to uphold their constitutionality if it is reasonably possible to do so."). The law is crystal clear that no Confrontation Clause violation occurs if a hearsay declarant testifies at trial. Idaho v. Wright, 497 U.S. 805, 814 (1990); see also California v. Green, 399 U.S. 149, 162 (1970)(there is no Confrontation Clause issue if a hearsay declarant testifies at trial and is subject to cross-examination); Perez v. State, 536 So. 2d 206, 209 (Fla. 1988)(if hearsay declarant testifies, the defendant has been afforded the opportunity to cross-examine the hearsay declarant). The victim in this case is alive, and the trial court found her competent to testify. (Pet. Ex. 5, p.14). Since the victim in this case can testify at trial and obviate any Confrontation Clause concerns expressed in Crawford, it is impossible for appellee to demonstrate that the disabled adult hearsay exception is facially unconstitutional. See Salerno; Perez; United States v. Wipf, 397 F.3d 677, 682 n.2 (8th Cir. 2005)(Crawford decision inapplicable when a hearsay declarant testifies at trial and is available for cross-examination).

Furthermore, the disabled adult hearsay exception in section 90.803(24) is not facially unconstitutional because it is applicable in civil proceedings. § 90.803(24), Fla. Stat. (expressly stating the disabled adult hearsay exception is

applicable in civil proceedings). Nothing in Crawford changes the well-settled principle that the Confrontation Clause is not applicable in civil cases. See U.S. CONST. amend. VI (in all criminal prosecutions, the accused shall enjoy the right . . .to be confronted with the witnesses against him); Austin v. United States, 509 U.S. 602, 608 n.4 (1993)(Confrontation Clause inapplicable in civil forfeiture proceedings); United States v. Zucker, 161 U.S. 475, 480-482 (1896)(Confrontation Clause not applicable in civil cases); United States v. Williams, 447 F.2d 1285 (5th Cir. 1972)("the confrontation clause has applicability only in criminal cases"); Art. I, § 16, Fla. Const. ("[i]n all criminal prosecutions . . . [the accused has the right] to confront at trial adverse witnesses"). The rulings of the lower courts in this case, however, fail to realize there are no Confrontation Clause implications in civil cases, or in criminal cases where the hearsay declarant testifies at trial. Accordingly, the decision in Crawford has little impact on the analysis of this issue.

Even if Crawford were applicable in this case, which it is not, it would not change the resolution of this case. In Crawford, the defendant (Crawford) was charged with assault and attempted murder for stabbing a man who allegedly attempted to rape Crawford's wife (Sylvia). Law enforcement interrogated

Crawford and Sylvia about the incident and obtained statements from both of them. Crawford's account of the attack varied from the description given by Sylvia. At trial, Crawford claimed he acted in self-defense, and Sylvia did not testify because of the state marital privilege.[3] The prosecution introduced Sylvia's tape-recorded statement into evidence under the hearsay exception for statements against one's penal interest. Crawford claimed the admission of Sylvia's statement violated his rights under the Confrontation Clause of the United States Constitution.

The trial court admitted Sylvia's statement into evidence because it bore "adequate indicia of reliability" under the United States Supreme Court's decision in Ohio v. Roberts, 448 U.S. 56 (1980). The jury convicted Crawford of assault. The Washington Supreme Court ultimately upheld Crawford's conviction, and the United States Supreme Court granted certiorari to determine whether the prosecution's use of Sylvia's statement violated the Confrontation Clause. Crawford. The Supreme Court held that the admission of Sylvia's "testimonial" hearsay statements pursuant to the "adequate

[3] Washington's marital privilege generally bars a spouse from testifying without the other spouse's consent.

indicia of reliability" test espoused in Roberts violated the Confrontation Clause.

In Crawford, the Supreme Court differentiated between non-testimonial and testimonial hearsay and stated:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law - as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Id. at 68. The Supreme Court expressly chose not to comprehensively define testimonial hearsay finding only that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Id. However, a multitude of post-Crawford decisions have held hearsay statements remain admissible in the wake of Crawford if the declarant testifies at trial.[2] Somervell v. State, 883 So. 2d 836, 837 (Fla. 5th DCA 2004)(admission of child victim's videotaped statement to police

[2] The Fifth District has held, post-Crawford, that certain statements remain admissible under the child victim hearsay exception (which is virtually identical to the disabled adult hearsay exception). Herrera-Vega v. State, 888 So. 2d 66 (Fla. 5th DCA 2004); see also Towbridge v. State, 898 So. 2d 1205 (Fla. 3d DCA 2005)(agreeing with analysis in Herrera-Vega); People v. Geno, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004)(child victim's statement to interviewer at Child Assessment Center "did not constitute testimonial evidence under Crawford, and therefore was not barred by the Confrontation Clause.").

did not violate confrontation clause because the victim testified at trial); Wipf, 397 F.3d at 682; State v. Price, 110 P.3d 1171, 1175 (Wash. Ct. App. 2005)("Crawford has no bearing on this case as the confrontation clause is not implicated by the use of out-of-court statements when the declarant appears for cross-examination at a trial."); Clark v. State, 808 N.E.2d 1183, 1189 n.2 (Ind. 2004)(Crawford inapplicable where hearsay declarant testifies at trial); State v. Plantin, 682 N.W.2d 653, 660 n.2 (Minn. App. 2004)(holding Crawford inapplicable because declarant testified at trial); State v. Zanghi, 2005 Wash. App. LEXIS 656 (Wash. Ct. App. 2005)(Crawford was inapplicable because the challenged hearsay statements came from witnesses who testified at trial and were available for Zanghi's cross-examination).

The Crawford decision expressly states "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." Crawford, 541 U.S. at 59 n.9. Thus, if the victim in this case testifies at trial, her statements under the disabled adult hearsay exception are clearly admissible and would not run afoul of the Confrontation Clause. Id. Since the victim in this case may appear for cross-examination at trial, the disabled adult hearsay exception cannot be facially

unconstitutional because "circumstances exist[] under which [section 90.803(24)] would be valid." Salerno, 481 U.S. at 745. Accordingly, the Fourth District's decision in Hosty must be reversed.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of appeal and hold that the disabled adult hearsay exception in Section 90.803(24) of the Florida Statutes is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. mail to: Donald J. Cannarozzi, Assistant Public Defender, Broward County Courthouse, Suite 3872, 3rd Floor, North Wing, Fort Lauderdale, FL 33301 on June __, 2005.

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RICHARD VALUNTAS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point type and complies with the font requirements of Rule 9.210.

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