

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LEVIE WILLIAMS,

Defendant-Appellee.

UNPUBLISHED
November 2, 2006

No. 265851
Wayne Circuit Court
LC No. 96-002162

Before: Cavanagh, P.J., and Markey and Meter, JJ.

METER, J. (*dissenting*).

I respectfully dissent. I would allow the testimony of the now-deceased witness, Gail Thomas, from defendant's first trial to be introduced at defendant's retrial. The testimony survives a Confrontation Clause challenge and also falls within Michigan's prior testimony exception to the hearsay rule.

I. The Confrontation Clause

In criminal prosecutions, the accused persons have the right to confront the witnesses against them. US Const, Am VI. In *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the Supreme Court revised its analysis of the admissibility of prior testimony of an unavailable witness. The Court held that the testimonial statement of a witness absent from trial is not admissible for its truth unless the declarant is unavailable and there has been a prior opportunity for cross-examination. *Id.* at 68.

Defendant relies on the notion that *Crawford* requires an adequate opportunity for cross-examination and that he did not have an opportunity to cross-examine Thomas adequately at the first trial, given that he could not cross-examine her regarding the new evidence that arose after the first trial. However, as noted in *State v Estrella*, 277 Conn 458, 473; 893 A2d 348 (2006), "[t]he [C]onfrontation [C]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" (citations and quotation marks omitted). The *Estrella* court acknowledged that the *Crawford* Court did "not address whether evidence that did not exist at the time of the prior opportunity for cross-examination can somehow render that opportunity inadequate and therefore render the prior testimony inadmissible." *Id.* Under the specific circumstances of this case, I conclude that allowing Thomas's testimony at the retrial would not violate defendant's right to

confront the witnesses against him. Defendant was given the opportunity at the earlier trial to cross-examine Thomas extensively regarding her credibility and her identification of defendant as the perpetrator of the charged crimes. Despite the surfacing of the new evidence, I believe that the earlier testimony survives a Confrontation Clause analysis.

II. MRE 804(b)(1)

I would further hold that Thomas's testimony properly falls within the prior testimony exception to Michigan's hearsay rule, found in MRE 804(b)(1).

I agree with the majority that the primary question with regard to the admissibility of Thomas's testimony under MRE 804(b)(1) is whether defendant had a "similar motive to develop" Thomas's testimony in the earlier trial as he would have on retrial. The identification of the shooter was a material issue in the first trial, and Thomas was cross-examined fully on that issue. This, again, would be the focus of the second trial. Thus, I conclude that defendant did indeed have a "similar motive to develop" Thomas's testimony in the earlier trial as he would have on retrial. I believe that Thomas's prior testimony satisfies the requirements of MRE 804(b)(1) and should be admitted at the retrial.

The testimony survives a Confrontation Clause challenge and also falls within Michigan's prior testimony exception to the hearsay rule.

I would reverse.

/s/ Patrick M. Meter