

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LEVIE WILLIAMS,

Defendant-Appellee.

UNPUBLISHED

April 12, 2007

No. 265851

Wayne Circuit Court

LC No. 96-002162

ON REMAND

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

PER CURIAM.

Our Supreme Court has vacated our judgment affirming an order of the Wayne Circuit Court precluding the prosecution from introducing the testimony of a now-deceased witness from defendant's first trial at defendant's retrial, and has remanded this case for reconsideration in light of *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). On reconsideration, we conclude that the trial court erred by determining that the Confrontation Clause, US Const, Am VI; Const 1963, art 1, § 20, barred admission of the testimony at defendant's second trial, and abused its discretion by excluding that testimony. We reverse the trial court's decision and remand this case to the trial court with instructions that the prior testimony be admitted at defendant's second trial.

I. Underlying Facts and Proceedings

In 1996, defendant was convicted by a jury of two counts of first-degree felony murder, MCL 750.316(1)(b), two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of armed robbery, MCL 750.529, one count of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The convictions arose from the shooting deaths of Kevin Tate and Anthony Nathaniel and the shooting of Gail Thomas, the now-deceased witness, during the robbery of a drug house. The trial court sentenced defendant to concurrent terms of life in prison without parole for first-degree felony murder¹ and 20 to 30 years for assault with intent to commit murder, to be served

¹ Defendant's convictions of first-degree premeditated murder and armed robbery were merged into his convictions of first-degree felony murder.

consecutively to the mandatory two-year term for felony-firearm.

In *People v Williams*, unpublished per curiam opinion of the Court of Appeals, issued November 24, 1998 (Docket No. 200579), another panel of this Court affirmed defendant's convictions. Our Supreme Court denied leave to appeal. 460 Mich 874 (1999).

In 2000, defendant moved for relief from judgment on the basis of newly discovered evidence in the form of an alleged eyewitness, Santo Taylor, who stated in an affidavit that he had been at the drug house on the night of the incident, that defendant did not commit the killings, and that Thomas was involved in the incident. After several decisions in the trial court and this Court, our Supreme Court remanded the case for a new trial. See 471 Mich 928 (2004).

On July 28, 2003, Thomas died after being struck by a car. As a result of Thomas's unavailability, the prosecutor filed a notice of intent to use Thomas's sworn testimony from defendant's first trial at defendant's retrial. Defendant objected on the ground that the testimony was not admissible under MRE 804(b)(1) and the Confrontation Clause, US Const, Am VI; Const 1963, art 1, § 20, because at the first trial he did not have the opportunity to cross-examine Thomas regarding the newly discovered evidence, i.e., Taylor's allegations. The trial court accepted defendant's arguments, and precluded the prosecution from using Thomas's testimony at retrial. This Court granted the prosecutor's application for leave to appeal.

In *People v Williams*, unpublished per curiam opinion of the Court of Appeals, issued November 2, 2006 (Docket No. 265851), a majority of this Court (Cavanagh, P.J., and Markey, J.) affirmed the trial court's order precluding the prosecution from introducing Thomas's testimony at defendant's retrial. The *Williams* majority observed that at the first trial, defendant had no reason or opportunity to cross-examine Thomas regarding her involvement, if any, in the incident, because Taylor had not yet come forward to give evidence. Therefore, because the question "whether defendant had a similar motive to develop Thomas's testimony at the first trial as he would have in the second trial" was close, the trial court did not abuse its discretion in excluding Thomas's former testimony from the second trial pursuant to MRE 804(b)(1). *Id.* at 5. The *Williams* majority did not reach the issue whether admission of the testimony would violate the Confrontation Clause. *Id.*

Judge Meter, dissenting, would hold that Thomas's testimony from the first trial survived a Confrontation Clause challenge. While *Crawford, supra*, "required an adequate opportunity for cross-examination", *id.* at 1 (Meter, J., dissenting), the Confrontation Clause did not guarantee a defendant the right to cross-examination in whatever form and to whatever extent might be desired. Therefore, because "[d]efendant was given the opportunity at the earlier trial to cross-examine Thomas extensively regarding her credibility and her identification of [him] as the perpetrator of the charged crimes[.]" admission of Thomas's earlier testimony survived a Confrontation Clause challenge. *Id.* at 1-2.

Judge Meter would also hold that Thomas's earlier testimony was admissible under MRE 804(b)(1). The identity of the shooter was a material issue in the first trial, and would be again in the second trial. Thus, defendant would have a "similar motive to develop" Thomas's testimony in the second trial. *Id.* at 2.

Our Supreme Court, in lieu of granting the prosecutor's application for leave to appeal, issued the following order:

On order of the Court, the application for leave to appeal the November 2, 2006 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we REMAND this case to the Court of Appeals for consideration of whether *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), precludes admission of the deceased victim's prior testimony on retrial.

We do not retain jurisdiction.

II. Analysis

The decision to admit evidence is within the discretion of the trial court. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A preliminary issue of law regarding the admissibility of evidence based on the construction of a constitutional provision or a rule of evidence is subject to de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). No abuse of discretion occurs when the evidentiary question is a close one. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

A. MRE 804(b)(1)

MRE 804(b)(1) provides:

(b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Thomas is obviously unavailable as a witness. See MRE 804(a)(4). However, she testified against defendant at the first trial, and defendant cross-examined her regarding her identification of him as the shooter. Therefore, the question for resolution is whether defendant had a "similar motive to develop" Thomas's testimony in the first trial as he would in the second trial, given that Taylor had not come forward at the time of the first trial. *Williams, supra* at 3.

In determining whether former testimony is admissible under MRE 804(b)(1), whether a person had a similar motive to develop the testimony of a witness in a prior proceeding depends on the similarity of the issues for which the testimony was presented at each proceeding. A court should consider: (1) whether the party opposing the testimony had at the prior proceeding an interest of substantially similar intensity to prove or disprove the same side of a substantially similar issue; (2) the nature of the two proceedings, including both what is at stake and the applicable burden of proof; and (3) whether the party opposing the testimony cross-examined the witness. *People v Farquharson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 271783, issued

February 13, 2007), slip op at 5, citing *United States v DiNapoli*, 8 F3d 909, 914-915 (CA 2, 1993) (en banc).

The first trial was a criminal proceeding in which defendant's liberty was at stake, and the prosecution had the burden of proving the elements of the charged offenses beyond a reasonable doubt. The second trial would be the same type of proceeding. Defendant cross-examined Thomas at the first proceeding regarding her identification of him as the shooter, and would have the same interest at the second trial as he did at the first trial, i.e., attacking Thomas's credibility. Taylor's new evidence implicated Thomas in a conspiracy to frame defendant for the killings of Tate and Nathaniel, and the shooting of Thomas. Nevertheless, it is reasonable to assume that even if defendant had had the opportunity to cross-examine Thomas regarding Taylor's allegations, Thomas would have continued to assert that defendant was the shooter. Thus, the central thrust of defendant's cross-examination would have been the same had he had the opportunity to cross-examine Thomas regarding Taylor's evidence.

We conclude that defendant did have a "similar motive to develop" Thomas's testimony in the first trial as he would have in the second trial. Thomas's testimony satisfies the requirements of MRE 804(b)(1), and is admissible on remand.

B. Confrontation Clause

The Confrontation Clause guarantees an accused the right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. In *Crawford, supra*, the United States Supreme Court held that testimonial hearsay evidence is admissible only in circumstances where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine the declarant. The *Crawford* Court held that admitting a hearsay statement deemed reliable by a judge pursuant to various factors was at odds with the right of confrontation guaranteed by the Confrontation Clause, and reasoned that the Confrontation Clause demanded not only that evidence be reliable, but also that its reliability be assessed by testing it by cross-examination. *Crawford, supra* at 60-68.

The *Crawford* Court held that prior trial testimony clearly constituted testimonial hearsay. *Id.* at 51-52. *Crawford, supra*, does not address the precise situation present in this case, i.e., whether the subsequent revelation of evidence on which the declarant was not, and could not have been, cross-examined renders inadmissible the declarant's testimony in a subsequent proceeding. The Confrontation Clause requires that a defendant have an "adequate" opportunity to cross-examine a witness against him. *Id.* at 57. However, in *State v Estrella*, 277 Conn 458; 893 A2d 348 (2006), the Connecticut Supreme Court observed that the Confrontation Clause does not guarantee a defendant the opportunity to cross-examine a witness to whatever extent the defendant might wish. *Id.* at 473; quoted in *Williams, supra* at 1 (Meter, J., dissenting).

At the first trial, defendant did not have the opportunity to cross-examine Thomas regarding Taylor's accusations that Thomas conspired to frame defendant for the crimes because Taylor had not yet come forward at the time the first trial took place. Nevertheless, defendant cross-examined Thomas regarding her credibility and her identification of him as the shooter. Were Thomas available to testify at defendant's second trial, that cross-examination would certainly venture into the conspiracy allegedly entered into by Thomas and others. However, the

crux of the cross-examination would still concern whether defendant or some other person fired the shots that killed Tate and Nathaniel and wounded Thomas. This topic was covered extensively during Thomas's testimony at defendant's first trial; as noted above, it is hardly plausible to assume that Thomas's testimony would differ on this issue if she were asked about the alleged conspiracy.

The admission of Thomas's prior testimony at defendant's second trial would not violate the Confrontation Clause.

III. Conclusion

The trial court erred by determining that the Confrontation Clause barred admission of Thomas's prior testimony at defendant's second trial, and abused its discretion by excluding that testimony. We reverse the trial court's decision and remand this case with instructions that Thomas's prior testimony be admitted at defendant's second trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Patrick M. Meter