COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2220 **Cir. Ct. No. 1995CF954194A**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEREK MONROE WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Derek Monroe Williams appeals from the circuit court order denying his motion for postconviction relief under WIS. STAT.

§ 974.06 (2005-06).[1] He argues that he is entitled to retroactive application of the rule that testimonial statements from an unavailable witness are inadmissible unless the defendant has had a prior opportunity to cross-examine the declarant. *See* ***Crawford v. Washington***, 541 U.S. 36, 68 (2004). We disagree and affirm.

Background

¶2 In 1995, Williams was charged with multiple counts of armed robbery as party to a crime. James Evans, one of Williams's two co-defendants, gave a custodial statement implicating himself and Williams in the crime spree. The circuit court conducted a ***Miranda-Goodchild*** hearing to determine the admissibility of the statement.[2] Evans testified at the hearing, but the court did not offer Williams an opportunity for cross-examination. At the conclusion of the proceeding, the court ruled that Evans's statement was given freely and voluntarily after receipt of ***Miranda*** warnings and was, therefore, admissible in the State's case-in-chief against each defendant.

¶3 In 1997, the matter proceeded to a jury trial on twelve counts of armed robbery. Evans did not testify at trial, but two Milwaukee police detectives read Evans's statement to the jury. Other evidence against Williams included his confession and incriminating testimony from a third accomplice. The jury convicted Williams on every count.

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[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). "[A]t a ***Miranda-Goodchild*** hearing the issues to be decided are the voluntariness of the [custodial] statements, the proper giving of the ***Miranda*** warnings and the intelligent waiver of the ***Miranda*** rights." ***Norwood v. State***, 74 Wis. 2d 343, 362, 246 N.W.2d 801 (1976).

¶4 Williams appealed his convictions pursuant to the no-merit procedure of WIS. STAT. RULE 809.32 (1997-98), and ***Anders v. California***, 386 U.S. 738 (1967). This court agreed that the appeal presented no arguably meritorious issues and summarily affirmed the convictions. *See* ***State v. Williams***, No. 1998AP2076, unpublished slip op. (WI App June 24, 2000).

¶5 In 2004, the United States Supreme Court held that testimonial hearsay is inadmissible as violative of the Confrontation Clause, U.S. CONST. amend. VI, unless the declarant is unavailable and the defendant previously had a fair opportunity for cross-examination. ***Crawford***, 541 U.S. at 68. Williams then filed a postconviction motion for a new trial.[3] He contended that he had no opportunity to cross-examine Evans; therefore, the circuit court improperly admitted Evans's hearsay statement at trial. Further, Williams argued that his trial counsel was ineffective by failing to challenge the admission of Evans's statement on Confrontation Clause grounds.

¶6 The circuit court denied the motion, holding that Williams did not show prejudice from his trial counsel's failure to raise a Confrontation Clause challenge to Evans's statement. We affirm, but on different grounds.[4] *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (this court may affirm on grounds other than those relied upon by circuit court).

[3] The Honorable Diane S. Sykes presided over Williams's pretrial and trial proceedings. The Honorable William W. Brash, III presided over Williams's postconviction motion.

[4] On appeal, Williams does not contend that his trial counsel was ineffective. We deem the issue abandoned, and we do not address it. *See* ***Adler v. D&H Indus., Inc.***, 2005 WI App 43, ¶18, 279 Wis. 2d 472, 694 N.W.2d 480.

Discussion

¶7 "'The Confrontation Clause of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them.'" ***State v. Jensen***, 2007 WI 26, ¶13, 299 Wis. 2d 267, 727 N.W.2d 518 (citations omitted). Whether admission of evidence under these clauses violates a defendant's right to confrontation presents a question of law that we review *de novo*. *See* ***id.***, ¶12. We generally apply United States Supreme Court precedents when we engage in Confrontation Clause interpretation. *See* ***id.***, ¶13.

¶8 At the time of Williams's trial, Wisconsin courts determined the admissibility of out-of-court statements under the Confrontation Clause by applying the analysis of ***Ohio v. Roberts***, 448 U.S. 56 (1980), *overruled by* ***Crawford***, 541 U.S. 36. *See* ***State v. Hale***, 2005 WI 7, ¶¶44-52, 277 Wis. 2d 593, 691 N.W.2d 637 (discussing the framework for Confrontation Clause analysis since 1980). This entailed a two-prong test:

> First, the witness must be "unavailable" at trial. Second, the statement of the unavailable witness must bear adequate "indicia of reliability." This second prong could be inferred without more in a case where the evidence fell within a firmly rooted hearsay exception or upon a showing of "particularized guarantees of trustworthiness."

Id., 277 Wis. 2d 593, ¶45 (citations omitted).

¶9 In 2004, the United States Supreme Court changed Confrontation Clause analysis. *See* ***Jensen***, 299 Wis. 2d 267, ¶14 (discussing ***Crawford***). The Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." ***Crawford***, 541 U.S. at 68-69. Pursuant to ***Crawford***, out-of-court testimonial statements by an unavailable witness are

barred by the Confrontation Clause unless the defendant had a prior opportunity for cross-examination. *See* ***State v. Savanh***, 2005 WI App 245, ¶19, 287 Wis. 2d 876, 707 N.W.2d 549. Williams contends that ***Crawford*** applies retroactively and entitles him to a new trial without the admission of Evans's hearsay statements.

¶10 Williams raises his claim in a collateral attack on his conviction, not a direct appeal. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 648-49, 579 N.W.2d 698 (1998) (motion under WIS. STAT. § 974.06 is a collateral attack on a conviction). Wisconsin determines whether a new rule of criminal procedure should be applied retroactively on collateral review using the analysis developed in ***Teague v. Lane***, 489 U.S. 288 (1989). *See* ***State v. Lagundoye***, 2004 WI 4, ¶31, 268 Wis. 2d 77, 674 N.W.2d 526. Pursuant to the ***Teague*** analysis, a new rule will not be applied retroactively to cases on collateral review, subject to two exceptions. ***Lagundoye***, 268 Wis. 2d 77, ¶13. "Th[e] first exception applies to conduct that 'is classically substantive.'" ***Id.***, ¶32 (citation omitted). The second exception applies to "'watershed rules of criminal procedure.'" ***Id.***, ¶33 (citation omitted).

¶11 The ***Crawford*** rule does not fall within a ***Teague*** exception. *See* ***Whorton v. Bockting***, 549 U.S. ___, 127 S. Ct. 1173 (2007). First, the ***Crawford*** rule is indisputably procedural, not substantive. ***Whorton***, 127 S. Ct. at 1181. Second, ***Crawford*** does not declare a watershed rule. ***Id.*** at 1184. ***Crawford*** neither "remedie[s] '"an impermissibly large risk" of an inaccurate conviction' [nor] 'alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" ***Id.*** at 1182, 1183 (citations and emphasis omitted). Therefore, the Supreme Court held that ***Crawford*** does not satisfy the ***Teague*** criteria for retroactive application. *See* ***Whorton***, 127 S. Ct. at 1177.

¶12 Williams contends that we may apply the ***Crawford*** rule retroactively as a matter of Wisconsin's state constitutional jurisprudence even though the rule does not apply retroactively as a matter of federal law. We reject the contention. Our supreme court "has unequivocally decided" that Wisconsin follows the retroactivity analysis in ***Teague***. ***Lagundoye***, 268 Wis. 2d 77, ¶14 n.11. We are not free to reject that decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Accordingly, we hold that ***Crawford*** does not apply retroactively to Williams's collateral attack on his criminal convictions.

¶13 In his reply brief, Williams suggests for the first time on appeal that he should be granted a new trial in the interests of justice pursuant to WIS. STAT. § 752.35. We do not consider arguments raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.