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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002168-MR

CHARLES SAMUEL McDONALD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
INDICTMENT NO. 152496

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Charles Samuel McDonald, *pro se*, appeals from those portions of an Opinion and Order of the Jefferson Circuit Court entered on September 1, 2004, which denied his motion to vacate or set aside judgment pursuant to the provisions of CR[1] 60.02(e) and (f) -- as well as for his motion for appointment of counsel. We affirm.

[1] Kentucky Rules of Civil Procedure.

In 1978, a jury convicted McDonald of raping his stepdaughter, engaging in indecent and immoral practices, and committing assault and battery against his wife. He was sentenced to life imprisonment without parole on the rape charge; he received lesser concurrent sentences of five years and twelve months, respectively, on the other two charges. His conviction was affirmed by the Kentucky Supreme Court in a published opinion.[2]

The motion that is the subject of the present appeal was filed on August 9, 2004. McDonald also filed accompanying motions for appointment of counsel and for leave to proceed *in forma pauperis*. The circuit court granted the motion to proceed *in forma pauperis* and denied the other motions.

Although McDonald asserted three different grounds for relief in his CR 60.02 motion, he has raised only one issue on appeal. That issue concerns the introduction into evidence of a medical record made by Dr. B. Martin, who examined McDonald's stepdaughter at the hospital emergency room after the rape. Dr. Martin did not testify at the trial, nor did McDonald ever have an opportunity to cross-examine him.

McDonald argues that his life sentence without parole for rape should be vacated in light of the recent decision of

[2] See McDonald v. Commonwealth, 569 S.W.2d 134 (Ky. 1978)(reh'g denied 1978).

the United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct.1354, 158 L.Ed.2d 177 (2004), which held that:

> the Confrontation Clause of the Sixth Amendment forbids admission of all testimonial hearsay statements against a defendant at a criminal trial, unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination.

Bray v. Commonwealth, 177 S.W.3d 741, 744 (Ky. 2005) citing Crawford, 541 U.S. at 68, 124 S.Ct. at 1374. This holding superseded a prior rule holding that the admission of hearsay did not violate the Confrontation Clause if the declarant was unavailable and the statement fell under a "firmly rooted hearsay exception" or otherwise bore "particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980).

McDonald contends that under Crawford, the medical report constituted inadmissible hearsay. He seeks relief under CR 60.02(e), which allows a court to relieve a party from a final judgment if:

> the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]

CR 60.02(e). In his original CR 60.02 motion, McDonald also relied on CR 60.02(f), allowing relief on the basis of "any other reason of an extraordinary nature[.]" CR 60.02(f).

We must first consider whether this question may be addressed pursuant to CR 60.02 (e) or (f). In general, new rules pertaining to criminal prosecutions will apply retroactively **only** to cases that are pending on direct review or that are not yet final. Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987).

McDonald contends that Crawford did not establish a new rule and that it is merely a "clarification" of the meaning of the Confrontation Clause. We disagree. Crawford abandoned the Roberts test for admissibility of testimonial statements and represents a marked departure from Roberts, rendering inadmissible evidence that would have been permitted under Roberts if it is now determined to be "testimonial" in nature. Crawford strengthens and expands the scope of the Confrontation Clause far beyond Roberts by subjecting all testimonial hearsay to cross-examination. Thus, Crawford establishes a new rule of procedure as to admissibility of evidence, but

> [n]ew rules of procedure . . . generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated

> procedure might have been acquitted otherwise.

Schriro v. Summerlin, 542 U.S. 348, 352, 124 S.Ct. 2519, 2523, 159 L.Ed.2d 442 (2004)(citations and quotation marks omitted).

Additionally, the medical report in this case did not constitute the type of "testimonial" evidence that was the focus of concern in Crawford. In Crawford, the Supreme Court carefully distinguished between testimonial and non-testimonial evidence. When testimonial declarations are at issue, the Court concluded that judicial assessments of reliability are not sufficient to foreclose or to satisfy the Confrontation Clause. Crawford, 541 U.S. at 61, 124 S.Ct. at 1370.

> The text of the Confrontation Clause . . . applies to "witnesses" against the accused – in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

Bray, 177 S.W.3d at 745, quoting Crawford, 541 U.S. at 51, 124 S.Ct. at 1364 (internal citations omitted).

The Crawford court discussed three general categories of "testimonial" statements:

> [1] *ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial

> statements that declarants would reasonably expect to be used prosecutorially,
>
> . . .
>
> [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, [and]
>
> . . .
>
> [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]

Id., 541 U.S. at 51-52, 124 S.Ct. at 1364.

At McDonald's trial, the medical report was introduced into evidence through the testimony of Valerie Breunig, who was employed as the assistant director in the Medical Records Department at Louisville General Hospital. She testified that she maintained control and exercised supervision over such records and that the records were maintained as part of the routine business of the hospital. The Commonwealth then moved for the admission of the medical report into evidence.

Breunig read aloud the following excerpt from the report:

> Chief complaint at the time 6/7/74, 10:16 A.M. was alleged rape. History at that time was a 13 year old negro female . . . states at 0545 hours A.M. her step-father threatened to hurt her mother if she did not have sexual intercourse with him. He did not hit her but did penetrate her vagina and

> he ejaculated. Patient is on no birth control. She states that she has had sexual intercourse only once before, six months ago.
>
> . . .
>
> General appearance, 13 years old, negro in no acute distress, oriented times three, no external bruises or lacerations noted. Pelvic, BUS negative, [I'm not sure what that next word is], laceration and abrasion at 7:00 o'clock, cervix no discharge, uterus small anteverted, adenexa negative.
>
> Laboratory findings: Wet prep times 3 negative.
>
> Diagnosis: Alleged rape.
>
> Medication: Was stilbeateral 25 milligram BID times 5 days.
> Compasine five milligrams PO BID 30 minutes prior to stilbeateral.
>
> And she was to return to the G.Y.N. Clinic in two weeks.

While defense counsel did not object to the initial admission of the medical record, he did object later in the trial when the prosecutor asked McDonald on cross-examination: "And you're telling me that it's a figment of that doctor's imagination that [the alleged victim] had abrasions and lacerations?" Defense counsel objected on the grounds that the record was entered only as a shop book entry rather than as a business record. (The basis for the objection is less than clear.) Before the jurors retired to deliberate, they asked the

judge whether an interpretation of the medical records would be available. The judge informed them that it would not be.

The medical report in McDonald's case does not fit within any of the three categories of the testimonial statements outlined in Crawford as falling within the protection of the Confrontation Clause. The report is essentially a routine record containing the doctor's own medical observations and an account of what the alleged victim told him. It was made in the course of treatment. The doctor drew no conclusions as to whether the alleged victim had been raped, nor did he speculate as to the identity of the perpetrator. There is no indication that the doctor was acting as an agent of the police; the report was not prepared in response to police questioning but in the normal course of a medical examination.

The Supreme Court of Kansas recently applied Crawford to test whether an autopsy report was testimonial in nature. Its analysis is particularly pertinent to this case:

> factual, routine, descriptive, and nonanalytical findings made in an autopsy report **are nontestimonial and may be admitted without the testimony of the medical examiner**. In contrast, contested opinions, speculations, and conclusions drawn from the objective findings in the report are testimonial and are subject to the Sixth Amendment right of cross-examination set forth in *Crawford*. (Emphasis added.)

State v. Lackey, 120 P.3d 332, 351-52 (Kan. 2005).

The medical report in McDonald's case contained no opinions, speculations, or conclusions about the patient's condition. The report was routine, descriptive, and nonanalytical; *i.e.*, it was non-testimonial in nature and thus did not trigger the Crawford mandate for cross-examination pursuant to the Confrontation Clause. In his CR 60.02 motion, McDonald himself described the statements in the report as "not particularly incriminating to movant" and stated that the doctor's diagnosis of the victim "was not a find [*sic*] of rape."

Thus, Crawford is not available for retroactive application in collateral, post-conviction proceedings. Additionally, the medical report in this case was not testimonial evidence implicating the Sixth Amendment rights of the appellant.

Accordingly, we affirm the opinion and order of the Jefferson Circuit Court.

ALL CONCUR.

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