



IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

FILED

2008 MAY 28 A 11: 59

STATE OF OHIO,

Plaintiff(s),

- vs -

ANTHONY PRATT  
KATHLEEN STEELE,

Defendant(s).

Case No. CR-470846  
WILD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY  
Judge Joan Synenberg

Opinion and Journal Entry Re: Defendants'  
Motion in Limine to Exclude Questions Posed  
to Virginia Austin

**STATEMENT OF CLAIM AND FACTS**

**Trial Court**

Defendants filed a motion in limine to exclude statements made by the victim, Virginia Austin, before she died. The court conducted a hearing on the motion and, after hearing testimony from the State's first witness, Officer Dorothy Anderson, terminated the hearing and denied the motion in limine. A week later, the court reversed its ruling and granted the motion in limine.

**Appeal**

State appealed pursuant to Crim.R. 12(K). State argued that the trial court erred in granting the motion in limine because the "statements" made by Austin (victim) to the police qualified as excited utterances and were thus admissible under Evid.R. 803(2).

The court of appeals did not determine whether Austin's statements qualified as excited utterances. ¶ 4. The court found "that the trial court erred in granting the motion in limine *without*

stating its essential findings as required by Crim.R. 12(F).”<sup>1</sup> ¶ 4. The court stated that “[o]ur decision is made in light of the fact that the court reversed its prior ruling one week later without any further evidence or discussion on the record concerning the motion in limine.” ¶ 11.

### **Scope of Remand**

The court found that “the trial court’s decision to terminate the hearing without allowing the State to fully present its evidence, rendered the hearing procedurally deficient; therefore, we remand the case for a full hearing as well as factual findings.” ¶ 12.

According to the court of appeals, “the trial court needed to make several factual conclusions in order to grant the motion in limine. For example, no finding was made on the question of whether Austin [victim] was attacked before she made her statements to police.” ¶ 10.

### **THE ISSUE**

Defendants argue that the victim’s verbal and nonverbal responses to Officer Anderson’s questions constitute “testimonial” hearsay statements and are inadmissible under the Confrontation Clause of the 6<sup>th</sup> Amendment to the United States Constitution and pursuant to *Crawford v. Washington* (2004), 541 U.S. 36. The State argues that the victim’s “statements” qualify as excited utterances under the hearsay exception contained in Evid.R. 803(2), and that these statements are not testimonial.

The threshold issue is whether the victim’s statements are “testimonial.”

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<sup>1/</sup> Crim.R. 12(F) states that “[t]he court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means. \* \* \* *Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.*”

If the statements are found to be testimonial, then regardless of whether the statements were excited utterances, they will not be admissible because the defendants did not have “a prior opportunity to cross examine the victim.”

If, on the other hand, the statements are found not to be testimonial, then the court should proceed to the second tier of the analysis: do the victim’s statements qualify as excited utterances under the Evid.R. 803(2) exception to hearsay.

### LAW AND DISCUSSION

#### The 6<sup>th</sup> Amendment Confrontation Clause

The Sixth Amendment to the United States Constitution provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .” This portion of the Amendment, known as the Confrontation Clause, “bars ‘admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” *State v. Hunneman*, 2006-Ohio-7023 (12<sup>th</sup> Dist.), ¶ 11; *accord*, *Davis v. Washington* (2006), 126 S.Ct. 2266. 2273, *quoting Crawford v. Washington* (2004), 541 U.S. 36.

“The Sixth Amendment demands what the common law required: [i] unavailability and [ii] a prior opportunity for cross-examination.” *Crawford* at 68; *reaffirmed*, *Davis v. Washington* (2006), 126 S.Ct. 2266. 2275, fn4.

“A confrontation clause analysis cannot be avoided in instances where a testimonial statement falls within a firmly-rooted hearsay exception.” *Cleveland v. Colon*, 2007-Ohio-269, ¶ 13; *accord*, *Crawford* at 68-69. In other words, that a statement constitutes an excited utterance exception to hearsay is irrelevant where the statement is testimonial. A testimonial statement

“includes one made “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”” *State v. Hunneman*, 2006-Ohio-7023 ¶ 13.

### **The “Primary Purpose” Test**

To determine whether a declarant’s statement is testimonial or nontestimonial, the court is required to apply the “primary purpose” test. Under the primary purpose test:

Statements are *nontestimonial when* made in the course of police interrogation under circumstances objectively indicating that *the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency*. They are *testimonial when* the circumstances objectively indicate that *there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution*.

*State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, ¶ 1 Syllabus (*Davis v. Washington* (2006), \_\_\_ U.S. \_\_\_, 126 S.Ct. 2266, 2273-2274, followed.) [*emphasis added*]

In the case *sub judice*, the deceased witness is obviously unavailable, and there is no reasonable dispute as to defendant’s inability to cross-examine the decedent. Therefore, the threshold issue is whether the primary purpose of Officer Anderson’s questioning was to meet an ongoing emergency or to prove past events potentially relevant to later criminal prosecution.

### **TESTIMONY AT HEARING**

#### **Questioning At the Scene: Officer Dorothy Anderson**

When she entered the apartment, Officer Anderson checked to determine whether Ms. Austin was conscious; knelt down to talk to her to see if she was breathing and if she could respond to Officer Anderson. “I tried to ask her what had happened.” [66] She was breathing heavily, her eyes were open, and she was conscious.

Officer Anderson asked Ms. Austin "a number of questions . . . I asked if she could hear me, if she could understand me." [70] "She nodded her head; she didn't verbally say anything at that time."

Officer Anderson asked if someone had broken into the house (verbalized yes).

Officer Anderson did not notice any physical injuries at that time.

Officer Anderson next asked if Ms. Austin had been sexually assaulted (verbalized no); if someone had hurt her (verbalized yes). "I attempted to ask her more questions, but she was unresponsive and that is when fire had arrived on the scene." [72]

Fire rescue arrived 3-5 minutes after this series of questions. [74] EMS arrived one to two minutes after fire rescue had arrived. [74] Officer Anderson ceased questioning Ms. Austin upon arrival of fire fighters. [162] Officer Anderson stood in the hallway as emergency services transported Ms. Austin out of the apartment. [74] While she was in the house, Officer Anderson did not give any further information to anyone else making inquiry of her. [76]

Once Ms. Austin was placed in the EMS ambulance, Officer Anderson "went outside to try and gather as much information before she left to try and talk to her, again." [79] "My purpose [in going inside the EMS] is to try and get as much information as quickly as possible before they went to the hospital while she was still there on the scene and they were administering aid to her there." [80] Officer Anderson asked Ms. Austin if she knew who had done this to her (Ms. Austin nodded and verbalized yes). [81-2]

Officer Anderson next asked if it was a man that had done that to her (verbalized yes). [83] Officer Anderson asked Ms. Austin if the man who had been standing in the apartment when police had arrived had done this (verbalized yes). [83] Officer Anderson did not ask any more questions

in the ambulance because EMS was getting ready to transport Ms. Austin. [84] After that, Officer Anderson went back to the apartment and conversed with relatives. [84] “[W]e didn’t know if anything was taken.” [85]

Ms. Austin was in the ambulance “maybe 10 minutes.” [84] Officer Anderson’s “questions and answers in the EMS truck” took “maybe three or four minutes.” [164] Officer Anderson went into the EMS truck “to follow up on [her] criminal investigation.” [164] She had “specific questions [she] wanted to ask Virginia.” [165]

**Purpose of Officer Anderson’s Interview with Virginia Austin**

Officer Anderson testified (on direct examination – T.113-115):

Q. Now when you got the [dispatch] call, what is your initial purpose in talking to her? . . . When you first went in and saw her and started talking to her what was that purpose?

A. It was, first of all, to assess her injuries and then to find out what had happened to her.

Q. *To see if a crime had happened?*

A. *Yes.*

Q. And when you were talking with her in the ambulance was that the same purpose?

A. Yes, it was.

Q. And what about at the hospital what was your purpose in talking to her there?

A. *To have out what crime had occurred.*

\* \* \*

Q. Now when you were writing this down did you read it back to Virginia Austin what you had written down?

A. No.

Q. Did you ask her to sign it?

A. No.

Q. Why not?

A. *I was just gathering information for the report in connection with the crime.*

Officer Anderson testified that the fire department’s and EMS’s purpose upon arrival was to provide potential medical treatment [140]; that she is not a medical professional trained in

administering medical help other than CPR. [141] Officer Anderson testified further (beginning at T. 147):

- Q. [T]he reason you were asking questions is to develop information to investigate a crime, right?
- A. That's correct.
- Q. You were trying to develop information on suspects, correct?
- A. That's correct.
- Q. Information that you would later use obviously in a criminal prosecution, correct?
- A. That's correct.
- Q. And in Virginia Austin's answering your questions you have no idea what her expectations would have been as far as what your questions were meant for, would you?
- A. No.

Officer Anderson testified further (beginning at T.170):

- Q. Now, the three sets of questions you asked Virginia Austin were at the apartment, the EMS truck and the hospital, correct?
- A. That's correct.
- Q. They were specific questions, correct?
- A. That's correct.
- Q. The purpose of you asking these questions was to investigate a crime, correct?
- A. That's correct.
- Q. For later use in a criminal trial, correct?
- A. I guess it would be, yeah.

When Officer Anderson was asked on cross-examination what other questions she had asked Ms. Austin at her apartment, she replied: "[T]he same questions trying to investigate the crime. I was trying to investigate the crime." [202]

**EMT James Earl Taylor**

At the evidentiary hearing held on January 25, 2008, the State called James Earl Taylor ("Taylor"). Mr. Taylor, an emergency medical technician employed by EMS, and his partner,

paramedic Marybeth Klonowski, responded to a 9-1-1 emergency dispatch at 2:04 a.m. on September 12, 2005.

Mr. Taylor testified:

From the time EMS arrived until Ms. Austin was placed in the wagon, 7-10 minutes had elapsed;

Once Ms. Austin was inside the wagon, Mr. Taylor asked her questions; he asked, "what happened inside, was there anybody inside the apartment who did that to her," to which Ms. Austin responded: "got these injuries from the two people inside the apartment." Mr. Taylor asked how Ms. Austin got her injuries, and she said the two people inside the apartment caused the injuries to her. Mr. Taylor "recorded this "nonmedical" information and called the officer." Ms. Austin did not blurt out what happened at any time.

Mr. Taylor "asked questions because answers could be used in the courtroom, and [he] wanted to relay that information to Cleveland Police if not medical." This information from the victim was not medical.

In the apartment, Ms. Austin was not responding to questions; she was conscious but not AOx3 (Alert and Oriented Times 3). She was not AOx3 until she was placed in the wagon.

EMS was done with the medical portion of treatment by 2:20 a.m. Between 2:20 and 2:49 a.m., police were questioning the victim. Mr. Taylor was present at that time. The officer asked all yes/no questions. There was no narrative – only yes/no answers.

#### **Questioning At the Hospital: Officer Dorothy Anderson**

By the time Officer Anderson left the scene to go to the hospital, the ambulance had been gone "maybe ten or 15 minutes." [91] Officer Anderson went with Sergeant Patton into the Huron Hospital emergency room, spoke to Dr. Haynesworth, learned that Ms. Austin had two black eyes and a busted lip. [92]



Ms. Austin was in the trauma room. She was being attended by two nurses. [92] She was awake. Officer Anderson asked Ms. Austin if she "could answer some questions for me." [94] Ms. Austin verbalized "yes." This was Officer Anderson's third set of questions to Ms. Austin. [214]

Officer Anderson asked Ms. Austin "if she knew who had done this to her and who had broke in [sic] her house" (verbalized yes). [94] This question already had been asked two times. [211]

"I asked her if the people from apartment number four had been the ones who had done this to her. (verbalized yes). [95] (Ms. Austin did not tell Officer Anderson who was in apartment four; when Officer Anderson asked Ms. Austin who was in apartment four, Officer Anderson did not even know if Ms. Austin knew who lived there; Officer Anderson learned from the family the names of the people who lived in apartment four) [212]

"I asked her if it was Anthony Pratt who had done that" (she said yes). [96] (Ms. Austin never told Officer Anderson that Ms. Austin knew who Anthony Pratt was; Ms. Austin did not tell Officer Anderson that she knew who Kathleen Steele was; Ms. Austin did not indicate that she knew Kathleen's mom). [213]

"I asked her if *his girlfriend*, Kathleen Steele, did this, too" (she said yes). [97]

"I had asked her if *Kathleen's mom* knew that they had done that" ("She said I think she knew.") [97]

Officer Anderson did not ask her any other questions "at this time." [98] Of these questions, only two were different from those that already had been asked by Officer Anderson. [214]

Ms. Austin never told Officer Anderson she knew who Anthony Pratt was. [214] Ms. Austin never indicated she knew who Kathleen Steele was. [215] Ms. Austin did not tell Officer Anderson that she knew who Kathleen's mom was, and Ms. Austin did not tell Officer Anderson that she knew who lived in apartment four. [215]

Officer Anderson asked Ms. Austin at least two times if she knew if someone had broken in, and Ms. Austin did not answer. [217] Officer Anderson did not have any social history of Ms.

Austin to determine whether or not Ms. Austin was capable of answering Officer Anderson's questions. [218] At the apartment, Officer Anderson did not see any injuries to Ms. Austin to discern whether Ms. Austin was capable of answering Officer Anderson's questions. [218] Officer Anderson had no idea of Ms. Austin's educational background. When Officer Anderson arrived initially at the apartment, Officer Anderson did not know if somebody had done something to Ms. Austin. [219]

### FINDINGS

The court's findings are consistent with the undisputed testimony elicited by the State and the defendants. Officer Anderson testified unequivocally that the purpose of her questioning to Ms. Austin was "[t]o see if a crime had happened" and "to develop information to investigate a crime . . . [and] to develop information on suspects . . . information that [Officer Anderson] would later use obviously in a criminal prosecution." *Transcript, p.147.*

The court specifically finds that the purpose of Officer Anderson's questions to the victim, Ms. Austin, was to investigate a crime for later use in a criminal trial. The court finds further that Ms. Austin is unavailable, but that the defendants had no opportunity to cross-examine her before she died.

### CONCLUSION

The facts elicited at the two hearings lead to only one conclusion: Ms. Austin's responses to questioning by Officer Anderson and EMT James Earl Taylor constituted testimonial hearsay statements. As such, those statements are inadmissible, regardless of whether they may constitute excited utterances. Officer Anderson testified that the purpose of her questions to the victim, Ms. Austin, was to investigate a crime for later use in a criminal trial. Mr. Taylor testified that he "asked

questions because answers could be used in the courtroom, and [he] wanted to relay that information to Cleveland Police if not medical,” and that this information “was not medical.”

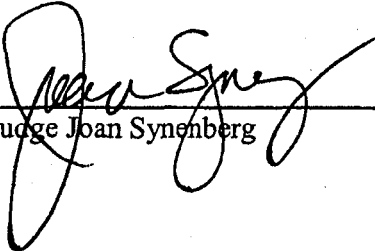
The Confrontation Clause bars admission of testimonial statements of a witness who did not or cannot appear at trial unless the witness is unavailable to testify, and the defendant has had a prior opportunity for cross-examination. Although, sadly, Ms. Austin died shortly after being injured and obviously is unavailable to testify at trial, the defendants in this case have had no prior opportunity to cross-examine her.

While there is no doubt that a “startling event” occurred, and that, as she answered Officer Anderson’s and EMT Taylor’s questions, Ms. Austin remained under the stress of the events which ultimately led to her death, the court need not address the excited utterance exception to hearsay rule under Evid.R. 803(2). A confrontation clause analysis cannot be avoided in instances where a testimonial statement falls within a firmly-rooted hearsay exception.

The court is compelled to grant the defendants’ motion in limine.

DEFENDANTS’ MOTION IN LIMINE IS GRANTED.

IT IS SO ORDERED.

  
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Judge Joan Synenberg