ABA Commission on Domestic Violence
Justice and Safety for Victims of Domestic Violence

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Case Summaries

The following are summaries of cases involving domestic violence that we hope will be useful to practitioners. If you know of recent cases that you would like to be included in future newsletters please send them to Robin Runge at runger@staff.abanet.org.

Davis v. Washington *together with* Hammon v. Indiana, Nos. 05-5224 and 05-5705, 2006 U.S. Lexis 4886 (U.S. June 19, 2006)

Holding: A victim's statements to a 911 operator identifying Davis as her attacker *were not* testimonial and therefore admissible at trial under the Confrontation Clause.

A victim's affidavit signed at the request of police identifying Hammon as her attacker *was* testimonial and therefore inadmissible under the Confrontation Clause.

Summary: In *Davis v. Washington*, Michelle McCottry called 911 in the middle of a domestic violence incident with her former boyfriend, Adrian Davis. The operator questioned McCottry on the events surrounding the incident and the attacker's identity. During the call, McCottry stated that Davis had come to the house to collect his things, attacked her with his fists, then left the house. When the police arrived several minutes later, McCottry was in a frantic state, with obvious fresh injuries on her arm and face. Davis was arrested and charged with felony violation of a domestic no-contact order.

McCottry did not appear in court to testify. The trial court admitted the record of the 911 call, over Davis's objection that it violated his Sixth Amendment Confrontation Clause right, and Davis was convicted. The Washington Court of Appeals and the Supreme Court of Washington both affirmed the conviction, concluding that the conversation with the 911 operator was not testimonial and therefore its admission did not violate the Confrontation Clause.

On certiorari, the U.S. Supreme Court affirmed the conviction the Washington Supreme Court had upheld against petitioner Davis for violating a no-contact order, holding that the victim's statements to a 911 operator identifying Davis as her attacker were not

testimonial and therefore admissible under the Confrontation Clause in court in the victim's absence.

In *Hammon v. Indiana*, police responded to a report of a domestic disturbance in the home of Amy and Hershel Hammon. Amy was sitting on the porch when the officers arrived, looking "somewhat frightened" but told police that "nothing was the matter." She allowed the police to enter the home, where they found broken glass from a gas heating unit in the living room, and Hershel in the kitchen, who told them that he and his wife had been arguing. Police questioned both Hershel and Amy as to what happened, and had Amy fill out an affidavit stating that her husband had attacked her and broken several items in their home.

Amy Hammon refused to testify at the trial, where testimony as to her statements at the scene by the officer who questioned her was admitted as an excited utterance and her affidavit admitted as a present sense impression. Hershel was found guilty of domestic battery and violating his probation. The Indiana Court of Appeals and the Indiana Supreme Court affirmed, with the latter finding that although the affidavit was testimonial and therefore wrongly admitted, it was harmless error.

On certiorari, the Supreme Court reversed the Indiana Supreme Court's conviction of Hammon for domestic battery, and remanded the case for further proceedings consistent with its conclusion that admitting the absent victim's affidavit in court violated Hammon's rights under the Confrontation Clause.

The U.S. Supreme Court concluded in these two cases that statements are nontestimonial, and therefore potentially admissible, when made in the course of a police interrogation under circumstances which objectively indicate that the primary purpose of the questioning is to enable police assistance to meet the ongoing emergency, such as in the case of a 911 call. Statements are testimonial, and therefore inadmissible, when the circumstances objectively indicate that there is no longer an ongoing emergency and when the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution resulting from the incident at hand.

In dicta, the Court acknowledged the particular difficulties of obtaining victim testimony in a domestic violence situation, and emphasized that that attempts by the defendant to silence a witness or victim will result in the forfeiture of his Sixth Amendment right to confrontation.

Clark v. Arizona, No. 05-5966, 2006 U.S. Lexis 5184 (U.S. June 29, 2006)

Holding: The Supreme Court held that due process does not prohibit Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong.

Summary: Petitioner Eric Clark shot and killed a police officer and was charged with first degree murder. At his bench trial, he sought to introduce evidence of his paranoid schizophrenia to support his insanity defense and to show that he lacked the requisite *mens rea* of the crime with which he was charged. The judge found that Clark did not establish that his schizophrenia so distorted his perception of reality that he did not know right from wrong, and convicted him.

In 1993, the Arizona legislature eliminated the first two parts of the traditional *M'Naghten* insanity test (inquiring into the cognitive and moral capacities of the defendant at the time of the alleged crime), which was followed in 1997 by the Arizona Supreme Court's decision in *State v. Mott*, 931 P. 2d 1046, to disallow psychiatric testimony to negate specific intent and holding that Arizona does not allow evidence of a mental disorder short of insanity to negate the *mens rea* element of a crime. The resulting insanity test used by courts in Arizona is whether the defendant had the capacity to tell whether his act was right or wrong. Clark appealed on grounds that Arizona's limited insanity test violates due process, arguing that the *M'Naghten* test represents a minimum that the government must provide. The Supreme Court ruled against Clark, concluding that the *M'Naghten* test is not a fundamental principle and that states are substantially free to choose their particular formulation of an insanity test and the evidence which may be admitted accordingly.

The implication of this decision is that it allows states to legislatively limit the admission of battered women's syndrome testimony to show diminished *mens rea* in cases in which abused women may have killed their batterers. While *Clark v. Arizona* concerns the insanity defense, it also discusses the use of proof of a mental disease or defect defense to show diminished *mens rea*, specifically referring to Arizona's preclusion of use of the battered women's syndrome defense for this purpose. Further, the Supreme Court held that it is not a violation of due process to restrict proof of mental disease or defect defenses to insanity cases, which could severely hamper available defenses for battered women charged with crimes against their abusers.

Moore v. Green, 848 N.E.2d 1015 (Ill. 2006)

Holding: The Supreme Court of Illinois affirmed the court of appeal's decision to allow a suit for civil liability to proceed under the state's Domestic Violence Act against two police officers who failed to respond to a domestic violence victim's request for law enforcement assistance, resulting in her death at the hands of her estranged husband.

Summary: Ronyale White obtained an emergency order of protection against her husband, Louis Drexel, in April 2002. In early May, Drexel came to White's home, at which time she called 911 to report that he was violating the order of protection and that he owned a gun. The 911 operator told White that the police were on their way. Officers Green and Cornelius arrived at White's address and paused outside of the residence for a few moments, then left without pursuing White's distress call. Drexel shot and killed her five minutes later.

White's sister, Melissa Moore, sued the City of Chicago and Officers Green and Cornelius under the Wrongful Death Act, contending that the officers could be held liable pursuant to Illinois's Domestic Violence Act, which permits limited liability for law enforcement in the case of "willful or wanton misconduct." She argued that the officers had a duty under the statute to use all reasonable means to prevent further abuse by intervening to remove either party from the situation, and that their willful and wonton conduct in failing to investigate White's call was a breach of duty and proximate cause of her death. The defense argued that the Tort Immunity Act provides absolute immunity to the officers for failing to provide police protection, thereby barring Moore's claims.

The Court considered whether the Tort Immunity Act immunity or the Domestic Violence Act applied to this situation, and concluded that the legislature specifically intended to confer liability for such failure on the part of police officers to assist victims of domestic violence, overcoming the general absolute immunity standard. In analyzing the legislature's intent, the Court took note of two primary purposes of the Domestic Violence Act: for law enforcement to help victims of domestic violence avoid further abuse by promptly and diligently enforcing orders of protection, and to expand the civil and criminal remedies for victims. In light of this clear intent, the Court found that the officers breached their statutory duty to White, and therefore can be subject to liability through a private civil claim.

Ohio v. McKinley, 2006 Ohio 2507; 2006 Ohio App. LEXIS 2379 (Ohio Ct. of App. May 22, 2006).

Holding: In light of Ohio's recently-passed Defense of Marriage Amendment, which prohibits recognizing a legal status for relationships of unmarried couples, the Court reasoned that the state's domestic violence statute was unconstitutional as applied, in this case, to heterosexual couples who cohabit and have not parented any children together. Therefore McKinley's conviction for domestic violence was vacated.

Summary: Dallas McKinley was arrested in December of 2004 after a physical altercation with his live-in girlfriend, to which he admitted hitting her and throwing objects at her while intoxicated. McKinley was indicted on one count of domestic violence, in violation of an Ohio statute making his offense a third degree felony where he had three prior convictions for domestic violence. The domestic violence statute criminalizes physical harm between a family or household member, and defines "family or household member" as someone who lives with or has lived with the offender, a spouse or person living as a spouse of the offender, and clarifies "living as a spouse" to include co-habiting person. After pleading no contest and receiving his sentence, McKinley appealed on grounds that the domestic violence statute itself is unconstitutional under Ohio's 2004 Defense of Marriage Amendment to the state constitution. The Amendment states that marriage is a union between one man and one woman and the state shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the effect of marriage. McKinley's argument was that the domestic violence statute creates a legal relationship between

unmarried, cohabiting individuals that confers a legal status approximating marriage, and therefore violates the Defense of Marriage Amendment.

The Ohio Court of Appeals agreed with McKinley and voided his conviction. The Court found that the Ohio legislature and the domestic violence statute recognized cohabitation of unmarried couples as a legal status, and therefore the statute was unconstitutional as applied, in this case, to heterosexual couples who cohabit and have not parented any children together.

In making its determination, the Ohio court emphasized that the issue in the case at hand did not require the court to interpret the Defense of Marriage Amendment by analyzing the intent behind it, but rather they were charged with interpreting the domestic violence statute, requiring merely an analysis of the amendment's effect on the statute.

Several other Ohio Courts of Appeals have ruled on this issue, reaching differing conclusions. This decision is in accord with *Ohio v. Logsdon*, No. 13-05-29, 2006 Ohio App. LEXIS 2813 (3rd Dist. June 12, 2006). These decisions conflict with six others that held the domestic violence statute to be constitutional: *Ohio v. Newell*, No. 2004CA00264, 2005 Ohio App. LEXIS 2658 (5th Dist. May 31, 2005); *Ohio v. Carswell*, No. CA2005-04-047, 2005 Ohio App. LEXIS 5903 (12th Dist. Dec. 12, 2005); *Ohio v. Burk*, No. 86162, 2005 Ohio App. LEXIS 6078 (8th Dist. Dec. 20, 2005); *Ohio v. Rexroad*, Nos. 05-CO-36, 05-CO-52, 2005 Ohio App. LEXIS 6114 (7th Dist. Dec. 13, 2005); *Ohio v. Nixon*, No. 22667, 2006 Ohio App. LEXIS 55 (9th Dist. Jan. 11, 2006); and *Ohio v. Rodgers*, No. 05P446, 2006 Ohio App. LEXIS 1391 (10th Dist. Mar. 30, 2006). Because of the conflicts between the Ohio courts, the court in *Logsdon* certified the record of that case to the Ohio Supreme Court for review and a final determination of the question: Does the legislature's use of the term "living as a spouse" to define a family or household member under the domestic violence statute "create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage" in violation of the Defense of Marriage Amendment of the Ohio Constitution?

Wilmore v. Gonzales, **No. 05-60467, 2006 U.S. App. LEXIS 16827 (5th Cir. July 5, 2006).**

Holding: Courts do not have jurisdiction in immigration cases to review the Attorney General's discretionary decisions regarding eligibility for cancellation of removal under the battered spouse provision of the removal exception for "extremely unusual hardship."

Summary: Kathleen Wilmore entered the United States from her native Jamaica in 1981 as a non-immigrant temporary visitor. She has remained in the United States ever since. Wilmore married a U.S. citizen, David Wilmore, in 1996, at which time he petitioned to allow his wife to apply to remain in the country as a lawful permanent resident. Shortly thereafter, David withdrew the application and filed for divorce. In 2003, Kathleen was charged as an illegal alien subject to removal by the INS and assigned a removal hearing.

Still married, David again filed and withdrew a petition on behalf of his wife shortly before the hearing. At the initial hearing, the immigration judge found her subject to removal and advised her to pursue her options for cancellation of the order pursuant to the "extremely unusual hardship" exception of 8 U.S.C. section 1229b(b)(1)(D).

Wilmore ultimately applied for cancellation of removal pursuant to 8 U.S.C. section 1229b(b)(2), which permits cancellation if the alien proves that she was "battered or subjected to extreme cruelty by a spouse… who is or was a U.S. citizen." The immigration judge at that hearing found that she did not meet the eligibility requirements for the "extreme cruelty" provision. Wilmore then appealed to the Board of Immigration Appeals (BIA), who dismissed the appeal on the same grounds. She then submitted a petition for review to the Fifth Circuit Court of Appeals.

The Court dismissed Wilmore's petition for review of the BIA ruling to deny her to cancellation of removal from the United States. The court concluded that it did not have jurisdiction to review the Attorney General's discretionary decisions regarding eligibility for cancellation of removal under the battered spouse provision of the removal exception for "extremely unusual hardship."

The Court based its dismissal of her petition on the fact that Congress explicitly denied courts the jurisdiction to review discretionary decisions by the Attorney General, and the court found that determining if an applicant has been subjected to "extreme cruelty" is a discretionary decision.

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