YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Neither Sixth Amendment or *Crawford* confrontation rights apply at the juvenile certification hearing.[Milligan v. State](06-2-1)

On February 16, 2006, the Austin Court of Appeals held that neither the Sixth Amendment nor the hearsay rule applies to a juvenile certification hearing.

¶ 06-2-1. **Milligan v. State**, MEMORANDUM, No. 03-04-00531-CR, 2006 Tex.App.Lexis 1356, (Tex.App.— Austin, 2/16/06).

Facts: On the night of February 8, 1997, armed and masked assailants burst into an apartment where five university students--two men and three women--were gathered for a party. The assailants physically assaulted the men and sexually assaulted the women. In April 2001, police received an anonymous tip identifying appellant as one of the perpetrators. Appellant's known fingerprints were compared with prints recovered from the apartment in 1997 and found to match. Police then obtained a search warrant to take samples of appellant's blood, saliva, and hair. Appellant's DNA was shown to match the DNA contained in semen left by one of the assailants. Appellant, who was fifteen years old in February 1997, admitted his guilt during his punishment stage testimony. n1

> n1 Appellant's appointed attorney on appeal initially concluded that there were no meritorious grounds for appeal because appellant's admission of guilt at the punishment stage waived any guilt-stage error under the "*DeGarmo* doctrine." *See DeGarmo v. State, 691 S.W.2d 657, 660-61 (Tex. Crim. App. 1985); and see Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493 (1967).* This Court abated the appeal and instructed counsel to file a new brief taking into account the opinion in *Leday v. State, 983 S.W.2d 713, 725-26 (Tex. Crim. App. 1998),* which significantly limited the application of this doctrine. *See also Gutierrez v. State, 8 S.W.3d 739, 744-45* (Tex. App.--Austin 1999, no pet.) (construing *Leday*). The State does not contend that any of the asserted errors was waived by appellant's admission of guilt.

A jury found appellant Robert Milligan guilty of five counts of aggravated sexual assault and one count of burglary of a habitation. *See Tex. Pen. Code Ann. § 22.021* (West Supp. 2005), § 30.02 (West 2003). The jury assessed punishment for each count at imprisonment for life. Appellant contends that victim-impact testimony was erroneously admitted at his trial and that his counsel rendered ineffective assistance. He also contends that the witness rule was violated and victim-impact and hearsay testimony was erroneously admitted at the juvenile court hearing at which he was certified to be tried as an adult.

Held: Affirmed

Memorandum Opinion: Pursuant to article 44.47, appellant brought forward the record from his juvenile court certification hearing and, with the Court's permission, filed a supplemental brief asserting error at the hearing. *See Tex. Code Crim. Proc. Ann. art. 44.47* (West Supp. 2005); *see also Tex. Fam. Code Ann. § 54.02* (West 2002). The certification hearing was conducted in the 98th District Court of Travis County in cause number J-16,014, the Honorable W. Jeanne Meurer presiding.

Appellant's first point of error regarding the certification hearing is that there was a violation of the witness exclusion rule. *Tex. R. Evid. 614*. After one of the sexual assault victims testified at the hearing, counsel for the State told the court that the witness "has requested that she be allowed to stay in the courtroom and not be subject to the Rule." Defense counsel responded, "I don't know if this witness is subject to recall. . . . I may take her testimony in the future as well. I'd like to guard against that if at all possible." The court asked to speak to both attorneys in chambers. When the hearing resumed, there was no further mention of the witness.

Because the record does not reflect that the witness was permitted to remain in the courtroom, nothing is presented for review. If the witness was allowed to remain, appellant offers no argument and cites no evidence to support a finding that her testimony would have been (or was, at trial) materially affected. *See Tex. R. Evid. 614(4)*. Point of error one is overruled.

In point two, appellant contends the juvenile court erred by allowing one of the male victims to testify regarding the emotional impact of the crime. The witness testified that he had been diagnosed with post-traumatic stress syndrome and had undergone several months of therapy. He added, "My life never will be the same." Appellant offers no argument and cites no authority to support his contention that this testimony was inadmissible at the certification hearing. Point of error two is overruled.

Appellant's remaining points of error complain of the admission of hearsay and of a violation of his Sixth Amendment confrontation right at the certification hearing. U.S. Const. amends. VI, XIV; *Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177 (2004)*. It has been held that neither the Sixth Amendment nor the hearsay rule applies to a juvenile certification hearing. *In re S.J.M., 922 S.W.2d 241, 242* (Tex. App.--Houston [14th Dist.] 1996, no writ); *Alford v. State, 806 S.W.2d 581, 582* (Tex. App.--Dallas 1991), *aff'd*, *866 S.W.2d 619, 625 (Tex. Crim. App. 1993)*. But even if they do, no error is presented.

In point of error three, appellant asserts that hearsay was admitted through the testimony of the nurse who conducted the sexual assault examinations. The record reflects, however, that the witness's testimony was based solely on her personal examination of the female victims. The point of error is overruled.

Point of error four concerns the testimony of one of the investigating officers. The officer testified that when he entered the apartment, he heard screams coming from the bedroom. He entered the room and found two of the female victims. Over objection, he testified that the first victim told him that they had been raped. The second victim, who "also was in a hysterical state," said "look what he did" and pointed to semen on her leg. Appellant argues that State failed to show the emotional state of the first victim, and thus the excited utterance exception was erroneously invoked with respect to her. Considering the circumstances, however, we conclude that the court did not abuse its discretion by finding that both victims were under the stress of excitement caused by the crime. Point of error four is overruled.

Points five and six relate to the testimony of the police officer who arrested appellant. The officer explained that one of the assailants, a known sex offender, had been identified and prosecuted soon after the crimes were committed. The police had no other suspects until April 2001, when an anonymous tip was received. Over appellant's objections, the officer testified that the anonymous caller "told us that he

knew that there was another young man involved, that his name was Robert Milligan. And that he had been bragging about this."

In overruling appellant's hearsay objection, the court stated, "The information is accepted as what the caller said, not what the truth of the matters asserted therein." The court repeated this in overruling appellant's confrontation objection: "I'm not, one, accepting any of the truth of the matters of anything asserted within the 911 call, but only that it occurred." The record thus demonstrates that the challenged testimony was not offered or received to prove the truth of the matter stated. *See Tex. R. Evid. 801(d)*. Points of error five and six are overruled.

Conclusion: The judgment of conviction is affirmed.