
YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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Drug test lab reports considered non-testimonial evidence in motion to modify.[In the Matter of J.R.L.G.](06-2-18)

On April 27, 2006, the Eastland Court of Appeals held that lab reports from drug tests were non-testimonial evidence and did not implicate the *Sixth Amendment Confrontation Clause*.

¶ 06-2-18. **In the Matter of J.R.L.G.**, MEMORANDUM, No. 11-05-00002-CV, 2006 Tex.App.Lexis 3344 (Tex.App.— Eastland, 4/27/06).

Facts: On July 16, 2004, the trial court placed appellant on probation for a period of one year for the offenses of evading arrest/detention with a vehicle, possession of marihuana less than two ounces in a drug-free zone, possession of marihuana less than two ounces, and escape from custody. The conditions of his probation included submitting to electronic monitoring; avoiding the use of alcohol, drugs, marihuana, or inhalants; reporting to the juvenile probation officer at least twice a week; abiding by a curfew; submitting to periodic urinalysis screening; and not operating a motor vehicle. On October 19, 2004, the State moved to modify appellant's disposition, alleging that appellant had engaged in conduct that violated his conditions of probation by testing positive for T.H.C., twice testing positive for cocaine, twice failing to report to the probation officer, failing to follow curfew regulations, and operating a motor vehicle. Appellant pled not true. After hearing the evidence, the court found all the allegations to be true except for one of the curfew violations. After a separate disposition hearing, the court sentenced appellant to the Texas Youth Commission. This appeal followed.

Held: Affirmed

Memorandum Opinion: The United States Constitution provides a right in both federal and state prosecutions to confront and cross-examine adverse witnesses. *U.S. CONST. amend. VI; Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The *Sixth Amendment* provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. The United States Supreme Court has held that out-of-court testimonial evidence is barred under the *Confrontation Clause* unless the witness is unavailable and the accused had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The threshold question is whether the evidence is testimonial or non-testimonial. We review this question of law de novo. *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006).

In the case before us, State's Exhibit Nos. 3 and 4 were the positive lab results from appellant's urinalysis screening. Dennis Shaughnessy testified that he is a medical review officer with Drug Screen Compliance. Through his testimony, the State established the chain of custody of appellant's lab results and that the results were prepared and kept in the regular course of business. When the State sought to

introduce the records, appellant objected on the grounds that the records were inadmissible hearsay and that admitting them would violate appellant's Right of Confrontation. The State argued that the records were admissible under the business records exception to the hearsay rule. The court denied appellant's objections. On appeal, appellant does not complain of the trial court's ruling on his hearsay objection. Therefore, we only address appellant's *Confrontation Clause* claim.

In *Crawford*, the Supreme Court did not provide a comprehensive definition of testimonial evidence. However, the Court stated that the term "testimonial" "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68. The Court also stated that the traditional hearsay exceptions, such as business records, were non-testimonial in nature. *Id.* at 56.

Texas courts have addressed what is testimonial and what is non-testimonial. Where records are involved, courts have distinguished between objective or historical information and subjective observations germane to the accused. In *Mitchell v. State*, No. 04-04-00885-CR, 2005 WL 3477857 (Tex. App.--San Antonio Dec. 21, 2005, pet. ref'd), and *Moreno Denoso v. State*, 156 S.W.3d 166, 182 (Tex. App.--Corpus Christi 2005, pet. ref'd), the courts held that autopsy reports were non-testimonial in nature and, therefore, that the rules promulgated in *Crawford* did not apply.

In *Rousseau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005), the Texas Court of Criminal Appeals found that discipline reports and incident reports from a prisoner's file containing written statements made by correctional officers of their own observations were testimonial and subject to the *Sixth Amendment* Right of Confrontation. The Fourteenth Court of Appeals, distinguishing *Rousseau*, held that jail records not containing statements or observations made by correctional officers were non-testimonial. *Ford v. State*, 179 S.W.3d 203 (Tex. App.--Houston [14th Dist.] 2005, pet. filed). The records admitted in *Ford* only recited the prisoner's offenses and the punishments he received for the offenses. The records did not contain statements that were testimonial in nature. *Id.* at 209.

The case before us is similar to *Ford*. The lab reports do not contain out-of-court statements providing observations of a declarant. The lab reports merely contain the results of the tests. The reports are not testimony given at a preliminary hearing, before a grand jury, or at a former trial. The reports are not statements given in response to a police interrogation. The reports are more akin to general business records, which the Supreme Court has characterized as non-testimonial. *Crawford*, 541 U.S. at 56. Moreover, we note that the United States Supreme Court has held that blood tests and the results of those tests are not testimonial for purposes of the *Fifth Amendment*. *Schmerber v. California*, 384 U.S. 757, 765, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). We hold, therefore, that the lab reports are non-testimonial evidence. The *Sixth Amendment Confrontation Clause* is not implicated, and the trial court did not err in admitting the reports. We overrule appellant's first and second issues.

Conclusion: The trial court did not err in admitting appellant's lab results. The trial court did not abuse its discretion by sentencing appellant to the Texas Youth Commission. The trial court's judgment is affirmed.