

Review of Recent Juvenile Cases (2011)

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

Confrontation rights are implicated only when an out-of-court statement is made by an absent witness.[In the Matter of J.A.G.](11-3-8)

On June 16, 2011 the Waco Court of Appeals held that when the declarant of an out of court statement appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.

¶ 11-3-8. In the Matter of J.A.G., No. 02-10-00235-CV, --- S.W.3d ----, 2011 WL 2436756 (Tex.App.-Waco, 6/16/11).

Facts: Rebecca's mother "Jenny" had been a Big Sister to Joseph's older sister "Samantha" through the Big Brothers and Big Sisters program, and had considered Samantha and Joseph to be a part of her family. Jenny began taking Samantha and Joseph to church with her family in 2004.

In May 2009, Jenny was chaperoning a field trip for Rebecca's kindergarten class. While sitting on a train, Rebecca mentioned to Jenny that when Rebecca had been in the bathroom at church, Joseph followed Rebecca into the bathroom, pulled down his pants, and rubbed his penis against her vagina.

Jenny and her husband filed a report with the Fort Worth police department. They took Rebecca to Cook Children's Medical Center where Araceli Desmaris, a sexual assault nurse examiner, conducted a sexual abuse examination. Desmaris did not find any physical signs of injury, but Rebecca told Desmaris that when she was sitting on the toilet, Joseph had "pulled his wiener out of his pants and he touched her vagina." Rebecca described Joseph's penis as being "tannish and kind of soft." Rebecca said that Joseph had touched her in this way "a lot."

In November 2009, the State filed a petition alleging that Joseph had engaged in indecency with a child and aggravated sexual assault of a child. After a bench trial, the trial court found beyond a reasonable doubt that Joseph had engaged in aggravated sexual assault of a child and adjudicated Joseph delinquent. The trial court placed Joseph on probation until his eighteenth birthday, ordered him to complete sex offender counseling, and deferred his mandatory sex offender registration. Joseph filed this appeal.

Held: Affirmed

Opinion: Joseph complains that his right to confrontation was violated when the trial court allowed Desmaris, the sexual assault nurse examiner, and Rebecca's mother Jenny to testify as to what Rebecca told them. His only contention at trial and on appeal is that these statements violated his right to confrontation because he lacked an opportunity for cross-examination. The United States Constitution guarantees an accused the right "to be confronted with the witnesses against him." U.S. Const. amends. VI, XIV; Crawford v. Washington, 541

U.S. 36, 42, 124 S.Ct. 1354, 1359 (2004); *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 1069 (1965) (applying the Sixth Amendment to the states); see *In re M.H.V.-P.*, No. 08-09-00291-CV, 2011 WL 1663154, at *3 (Tex.App.--El Paso May 4, 2011, no pet. h.) (holding that Crawford applies to juvenile delinquency adjudication hearings); see also *In re Gault*, 387 U.S. 1, 56- 57, 87 S.Ct. 1428, 1459 (1967) (holding that juveniles are entitled to the right to cross-examine witnesses). Confrontation rights are implicated when an out-of-court statement is made by an absent witness and that statement is testimonial in nature. *Crawford*, 541 U.S. at 50-52, 124 S.Ct. at 1364. Once implicated, such testimonial hearsay is admissible only if (1) the declarant is unavailable, and (2) the defendant had a prior opportunity to cross-examine the declarant. *Id.* at 53-54, 124 S.Ct. at 1365. A juvenile is guaranteed the same constitutional rights in the adjudicatory phase of a juvenile proceeding as an adult in a criminal proceeding. *In re Winship*, 397 U.S. 358, 359, 90 S.Ct. 1068, 1070 (1970) ("[T]he Due Process Clause does require application during the adjudicatory hearing of 'the essentials of due process and fair treatment.' "). However, confrontation rights are implicated only when an out-of-court statement is made by an absent witness; "[w]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 59, n.9, 124 S.Ct. 1354, 1369. The only statements of which Joseph complains were made by Rebecca, who testified at trial. Contrary to Joseph's position, he had the opportunity to cross-examine Rebecca at trial regarding the statements she made to Desmaris and her mother. He chose not to exercise his right to confrontation.

Conclusion: Failure to exercise a right does not mean that that right was violated.