

No. 33103 *State of West Virginia ex rel. Carroll Eugene Humphries v. Thomas McBride, Warden*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I agree with the majority's decision, and the reasoning behind that decision.

Numerous errors occurred in the appellant's trial, any one of which standing alone would have been sufficient to support setting aside the conviction. I am bothered, however, by the majority opinion's discussion of the Confrontation Clauses found in the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution*. The majority opinion's discussion relies upon cases that have been overruled at both the state and federal levels, and the discussion therefore might tend to confuse courts and practitioners facing Confrontation Clause questions.

This case centers on a murder that occurred in 1976, and the trial of that crime that occurred in 1999. At the trial, numerous witnesses discussed statements made by people who did not testify, statements that were incriminating to appellant Humphries. In other words, the out-of-court incriminating words of absent witnesses were offered against Humphries, without Humphries having an opportunity to confront and cross examine those absent witnesses.

The majority opinion analyzes the appellant's Confrontation Clause arguments in light of this Court's holdings in *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995), and *State v. Kennedy*, 205

W.Va. 224, 517 S.E.2d 457 (1999). These cases all permitted out-of-court statements of witnesses to be used against a criminal defendant if those statements were somehow shown to be “reliable.”

In the 2006 case of *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006), this Court plainly overruled *James Edward S.*, *Mason*, and *Kennedy*. As we said in Syllabus

Point 7 of *Mechling*:

To the extent that *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995), and *State v. Kennedy*, 205 W.Va. 224, 517 S.E.2d 457 (1999), rely upon *Ohio v. Roberts*, 448 U.S. 56 (1980) (overruled by *Crawford v. Washington*, 541 U.S. 36 (2004)) and permit the admission of a testimonial statement by a witness who does not appear at trial, regardless of the witness’s unavailability for trial and regardless of whether the accused had a prior opportunity to cross-examine the witness, those cases are overruled.

The reliability scheme of analysis in those three cases was replaced with a somewhat simpler rule, one that completely bars the admission of testimonial-type, out-of-court statements by a witness who does not appear at trial. As we said in Syllabus Point 6 of *Mechling*:

Pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.

The question of whether *Mechling* is retroactive has never been answered by this Court. However, by any system of analysis, the appellant in this case was deprived of

his constitutional right to confront witnesses making statements against him. Readers should simply keep in mind that the majority opinion expends five lengthy paragraphs analyzing the inadmissibility of the numerous out-of-court statements used against the appellant under an outdated, overruled analytical scheme.

Still, I concur.