No. 26733 - State v. Harris

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DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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May 24, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
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Davis, Justice, concurring:[1]

I concur with the majority opinion in this case insofar as it affirms the conviction and sentence. The majority correctly held that the statement attributed to Ms. M. was properly admitted during the trial under the excited utterance exception to hearsay found in West Virginia Rules of Evidence, Rule 803(2). I also believe that the majority appropriately concluded that it was error to admit the hearsay statement of an unknown and anonymous declarant, but that such error was harmless. The issue which compels me to write separately involves the formulation of Syllabus point 2 of the majority opinion and the analysis that led to its creation. This new Syllabus point permits a statement attributed to an unknown and anonymous declarant to be admissible under the excited utterance rule. While I agree that such an extension of the excited utterance rule is warranted, I believe a more concise analysis of this issue is required in order to provide guidance to trial courts.

A. The Excited Utterance Exception

[1]I had initially intended to concur in part and dissent in part to the majority decision in this case. However, after careful reflection I have chosen simply to concur. Justice Potter Stewart once remarked that "[i]n these circumstances the temptation is strong to embark upon a lengthy personal *apologia*." *Boy's Mkts. Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 255, 90 S. Ct. 1583, 1595, 26 L. Ed. 2d 199, 213 (1970) (Stewart, J., concurring). Those remarks somewhat underscore my thoughts as I must confess at this time that initially I was in error in indicating I would issue a partial dissent in this case. However, like Justice Stewart, I take solace in an aphorism of Justice Felix Frankfurter: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Trust Co*., 335 U.S. 595, 600, 69 S. Ct. 290, 293, 93 L. Ed. 259, 264 (1949) (per curiam) (Frankfurter, J., dissenting).

Prior to this Court's adoption of the West Virginia Rules of Evidence, the test that was used for evaluating a statement as a "spontaneous declaration" was set out in Syllabus point 2 of *State v. Young*, 166 W. Va. 309, 273 S.E.2d 592 (l980), *modified on other grounds*, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d l (l991):

> An alleged spontaneous declaration must be evaluated in light of the following factors: (l) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation; and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

See Syl. pt. 2, *State v. Murray*, 180 W. Va. 41, 375 S.E.2d 405 (l988). Thereafter, this Court adopted the Rules of Evidence, incorporating the spontaneous declaration hearsay exception into Rule 803(2), the excited utterance exception:

> The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (2) Excited Utterance.--A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

W. Va. R. Evid. 803(2). *See also* Syl. pt. 1, in part, *State v. Smith*, 178 W. Va. 104, 358 S.E.2d 188

(l987) ("Rule 803(2) of the West Virginia Rules of Evidence correctly contains the heart of the hearsay exception that was formerly called a spontaneous declaration and which is now termed the excited utterance exception to the hearsay rule.").

Explaining the rationale underlying the rule version of this hearsay exception, this Court stated succinctly in *State v. Jones*, 178 W. Va. 519, 522, 362 S.E.2d 330, 333 (l987), that "[t]he excited utterance exception is predicated on the theory that a person stimulated by the excitement of an event and acting under the influence of that event will lack the reflective capacity essential for fabrication." Thus, "a guarantee of reliability surrounds statements made by one who participates in or observes a startling event, provided they are made while under the stress of excitement." *Smith*, 178 W. Va. at 109, 358 S.E.2d at 193.

In light of Rule 803(2)'s adoption, its employment of the new term "excited utterance," and our prior body of law concerning "spontaneous declarations," this Court recognized the need for a more concise test for this hearsay exception. Therefore, in Syllabus point 7 of *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (l995), we refined the test to be used in evaluating a statement as a spontaneous declaration or an excited utterance:

> In order to qualify as an excited utterance under W. Va. R. Evid. 803(2): (l) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication;[2] and (3)

[2]In determining the second prong of *Sutphin's* test, the Court held in Syllabus point 8 of (continued...)

the statement must relate to the startling event or condition.[3]

(Footnotes added). The *Sutphin* test for excited utterance did not mean a total rejection of the *Young* test. As was stated in *Sutphin:* "We are not rejecting the six-factor test recited in *Young*; however, we believe that the three-part analysis synthesizes these six factors and provides for a more efficient analysis of Rule 803(2)." *Sutphin*, 195 W. Va. at 564, 466 S.E.2d at 415.

B. Extending the Excited Utterance Exception

The case *sub judice* required the Court to decide for the first time whether a statement made by an unknown and anonymous declarant may be admitted into evidence under the excited utterance exception to hearsay contained in Rule 803(2). In determining the resolution of this issue, the majority

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[2](...continued)
the opinion:

> Within a W. Va. R. Evid. 803(2) analysis, to assist in answering whether a statement was made while under the stress of excitement of the event and not from reflection and fabrication, several factors must be considered, including: (1) the lapse of time between the event and the declaration; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements.

195 W. Va. 551, 466 S.E.2d 402.

[3]We borrowed the *Sutphin* test from principles that are used by some federal courts in analyzing a purported excited utterance under Rule 803(2) of the Federal Rules of Evidence. *See Morgan v. Foretich*, 846 F.2d 94l, 947 (4th Cir. 1988); *United States v. Moore*, 791 F.2d 566, 570 (7th Cir. 1986); *David v. Pueblo Supermarket*, 740 F.2d 230, 235 (3d Cir. 1984).

opinion relied upon guidance from the decisions in *People v. Alexander*, 173 A.D.2d 296, 569 N.Y.S.2d 689 (1991), and *Miller v. Keating*, 754 F.2d 507 (3d Cir. 1985).[4]

The decision in *Miller* was a civil action involving an automobile accident. During the trial, the district court admitted into evidence a statement made by an unidentified declarant at the scene of the accident, which amounted to an allegation that the plaintiff was at fault. On appeal the plaintiff assigned error to the admission of the statement as an excited utterance. The Third Circuit Court of Appeals rejected the contention "that statements by unidentified declarants are ipso facto inadmissible under Fed. R. Evid. 803(2)," finding that "[s]uch statements are admissible if they otherwise meet the criteria of 803(2)." *Miller*, 754 F.2d at 510.[5] In rendering this decision, the Third Circuit cited various criteria to be used in evaluating a statement as an excited utterance: "(l) a startling occasion, (2) a statement relating to the circumstances of the startling occasion, (3) a declarant who appears to have had opportunity to observe personally the events, and (4) a statement made before there has been time to reflect and

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[4]I find little use for the decision in *Alexander* as guidance for my determination to join the majority in carving out an extension to the excited utterance rule. *Alexander* was an important decision for the courts in New York, insofar as it abandoned a rule in that jurisdiction which had forbidden admission of a statement made by a bystander as a spontaneous declaration. Key to the adoption of the New York rule to allow a bystander's statement as a spontaneous declaration was "proof of the identity of the declarant[.]" *Alexander*, 173 A.D.2d at 298, 569 N.Y.S.2d at 691. The extension of the excited utterance rule approved by the Court in the instant proceeding, however, allows the admission of a statement made by an "unknown and anonymous" declarant.

[5]Not all federal courts interpret Rule 803(2) as admitting a statement by an unidentified declarant. *See Meder v. Everest & Jennings, Inc.*, 637 F.2d 1182, 1186 (8th Cir. 1981); *Miller v. Crown Amusements, Inc.*, 821 F. Supp. 703, 705 (S.D. Ga. 1993); *Cummiskey v. Chandris, S.A.*, 719 F. Supp. 1183, 1187-88 (S.D.N.Y. 1989) aff'd, 895 F.2d 107 (2d Cir. 1990). Furthermore, the United States Supreme Court has not yet resolved this conflict among the federal courts.

fabricate." *Id.* (citations omitted). In applying this test to the facts of the case, the *Miller* court found that there was no evidence to establish the third factor, personal knowledge, where the declarant's identity was unknown.

Deviating somewhat from the *Miller* holding, the majority herein has set out, in Syllabus point 2, the following standard regarding the admission of a statement by an unknown and anonymous declarant under W. Va. R. Evid. 803(2):

> When a court in a criminal case is evaluating whether to apply the "excited utterance" exception of W. Va. R. Evid. 803(2) to a hearsay statement offered against the defendant by an unknown, anonymous, declarant, the court should ordinarily conclude that the statement does not meet the criteria for the 803(2) exception, unless the statement is accompanied by exceptional indicia of reliability and the ends of justice and fairness require that the statement be admitted into evidence.

In light of the Third Circuit's limited decision in *Miller* and the majority's extension of the excited utterance rule in the instant appeal, I am concerned with the broad and imprecise formulation of our new holding. Accordingly, I believe it is necessary to clarify these inconsistencies to help trial courts apply this new rule.

The court in *Miller* used a four factor test in evaluating a statement by an unidentified declarant as an excited utterance. *See* 754 F.2d at 510. The general test for excited utterance used by this Court, as formulated in *Sutphin*, delineated only three factors. *See* Syl. pt. 7, 195 W. Va. 551, 466 S.E.2d 402. However, a careful reading of the *Sutphin* test reveals that it includes each of the four factors set out in *Miller*. The factor in *Miller* which at first blush seems to be absent from the *Sutphin* factors is *Miller's* third factor: "a declarant who appears to have had opportunity to observe personally the

events." *Miller's* third factor is actually a part of *Sutphin's* first factor: "the declarant must have experienced a startling event or condition." In other words, *Miller's* "opportunity to observe personally" factor is the same as *Sutphin's* "must have experienced" factor.

Although the majority opinion in this case is not clear on the issue, each of the *Sutphin* factors must be used in evaluating a statement by an unknown and anonymous declarant. Nevertheless, the majority has also required another factor: "the ends of justice and fairness require that the statement be admitted into evidence."[6] Therefore, as I interpret the majority opinion, even if the *Sutphin* factors are satisfied, a trial court may still exclude an unknown and anonymous statement if the ends of justice and fairness do not require that the statement be admitted into evidence.

With the foregoing comments in mind, I concur in the decision reached by the majority in this case.

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[6]The majority opinion also holds that such a statement must be "accompanied by exceptional indicia of reliability." I have no idea what this means, and the majority opinion does not explain the phrase. I believe the majority's use of "accompanied by exceptional indicia of reliability" will leave trial courts wandering in the dark in search of evidence of indicia more stringent than the *Sutphin* test itself. Consequently, I do not believe the "accompanied by exceptional indicia of reliability" is a practical part of the analysis because it is redundant of the *Sutphin* test.