
CRIMINAL LAW UPDATE

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cases

C*rawford v. Washington*, the United States Supreme Court decision which reaffirmed the right to cross-examination, continues to wreak its vengeance on existing case law, cutting a large swathe through the dense jungle of the hearsay exceptions which formerly denied defendants their constitutional right to face their accusers. The latest *Crawford* progeny is *State v. Berezansky*, 386 N.J.Super. 84 (App.Div. 2006). Defendant was involved in the *never suspicious* one-car accident. He admitted to the always popular "two beers." The police at this point, of course, likely found him to be highly credible. The blood-alcohol analysis revealed a .33% BAC. The reading corroborated the defendant's version of his drinking, so long as each of his two beers was a quarter-keg. At trial, over defendant's objection, the laboratory report was admitted into evidence under the business records exception to the hearsay rule, N.J.R.E. 803(c)(6). Parenthetically, the defense attorney cunningly also demanded, in a letter to the prosecutor, that any unused portions of defendant's blood sample should be saved and turned over to defendant for independent testing. (Practice note: it is the policy of the state police laboratory to save all such samples for 90 days. If you have an independent laboratory to test the samples, and a client with the money, you now have one more defense strategem). The Appellate Division here analogized this issue to the one presented by *N.J.S.A. 2C:35-19*, the statute permitting the State to present the lab report of a drug analysis as evidence. In *State v. Simbara*, 175

N.J. 37, 48,(2002), the Supreme Court addressed that statute, specifically, upholding the defendant's right to require the preparer's testimony and availability for cross-examination as a precondition for admitting the certificate. The court found the same rationale applied to a blood alcohol analysis. To hold to the contrary would be to abandon the adversarial trial process in favor of blind reliance on the skill and good intentions of prosecuting agencies. This report as to the results of the lab blood analysis was prepared specifically to prove an element of the crime and offered in lieu of producing the qualified individual who actually performed the test. (Second practice note: I recently observed a trial judge in another county berate a defense attorney who, rather than stipulating to the admission of the laboratory drug analysis certificate, required the chemist to testify. The judge made demeaning comments about the attorney's spirited defense of the client in this regard. The attorney did not relent, and the cross-examination of the chemist revealed, among other favorable facts, that some of the seized drugs were mysteriously missing. Standing your ground on constitutional issues is not a vice; it is in the highest traditions of the profession, and no amount of pressure for a "quick trial and early lunch" should deter the vigorous defense counsel from, as Spike Lee would say, "doing the right thing.")

D*avis v. Washington*, 126 S.Ct. 2266, (6/19/06) begins to flesh out the great unanswered question in *Crawford*: just what is this "testimonial hearsay" that is prohibited by the Sixth

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Amendment? And just what is “non-testimonial,” and thus allowed into evidence under evidence rules allowing certain hearsay exceptions? Statements are non-testimonial, for instance, when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is, for instance, to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation or report is to establish or prove events potentially relevant to later criminal prosecution. Can you say “lab report” (803(c)(6), 803(c)(8), or “statements by a child relating to a sexual offense,” 803(c)(27)? Like Godzilla, mighty *Crawford* tramples all foolish rules which stand in its path.

Run of the mill DWI cases are relatively easy to prove: show that the defendant smelled of alcohol, demonstrated slurred speech and the instability indicative of intoxication, and get an opinion from just about anyone, police officer or ordinary citizen, that defendant appeared drunk. But what about the charge of driving while under the influence of *drugs*? It is a question that often befuddles many prosecutors, confounds judges and confuses defense attorneys. In *State v. Bealor* (July 20, 2006) the New Jersey Supreme Court laid out a roadmap as to how to prove such a charge. First the Court noted that although alcohol intoxication is common enough that most adults will recognize the signs and are qualified to offer an opinion, the same is not true with respect to being under the influence of drugs, because “no such general awareness exists as yet with regard to the signs and symptoms of the condition described as being ‘high’ on marijuana” (quoting from a 1971 case which was written before the children of the 60's reached adulthood...). In order to successfully prosecute such a case, “competent lay observations of the fact of intoxication, coupled with additional independent proofs tending to demonstrate defendant's consumption of narcotic, hallucinogenic or habit-producing drugs as of the time of the defendant's arrest, are required”. How does the State do that? Two ways come to mind: one, show that the defendant exhibited the classic

signs of intoxication, qualify a witness (most likely a police officer) by virtue of his training and experience as being a lay expert (*N.J.R.E.* 701) skilled at recognizing the signs of drug intoxication, and have him opine that defendant was under the influence of a drug (although not necessarily *which* specific drug); or two, have a witness testify that the defendant exhibited signs of intoxication, and then present competent evidence of a urine test showing the presence of drugs. Remember that forensic laboratory lab reports are arguably not admissible without the testimony of the chemist who performed the analysis (see pesky *Crawford* and *Berezansky* cases).

Beer or Breasts? (The “or” just kills the question, doesn't it? When you see the word “or” between those other words, you just know the rest ain't gonna be good. And you'd be right.) The killjoy Third Circuit Court of Appeals says you can pick one (or is it two?) or the other, but you can't have both. The Court just upheld the constitutionality of *N.J.A.C.* 13:2-23, prohibiting “any lewdness or immoral activity” on liquor-licensed premises. It found that the regulation does not prohibit the freedom of expression, but only prohibits serving alcohol where such expression takes place, to reduce the “unacceptable social behavior” that often arises from the combination of erotic entertainment and alcohol. The Court employed a four-prong test: (1) is the regulation within the constitutional power of the government; (2) does it further an important or substantial governmental interest; (3) is the governmental interest unrelated to the suppression of free expression; and (4) is the incidental First Amendment restriction no greater than is essential to furtherance of that interest. *South Inc. v. Fischer*, 454 F.3d 228 (3rd Cir. 2006). But in a criminal context see *State v. Capetta*, 180 N.J.Super. 300 (Law Div. 1981) holding that lewd behavior in a strip bar is non-criminal because patrons will not be alarmed or affronted (*especially* after a few beers). Cole Porter's 1934 song lyrics, “In olden times a glimpse of stocking was looked on as something shocking, but now heaven knows, anything goes” still rings true.

An attorney from my office was seated in a criminal court in Hudson County one row in front of our defendant client and his father. He turned around to speak with them, and as he did, he saw the father look down and spy his son's wallet lying on the bench next to him. He smacked his son in the back of the head, looked around the courtroom and said, "Don't leave your wallet out in the courtroom.....there are attorneys in here!"

***T**he price of success is hard work, dedication to the job at hand, and the determination that whether we win or lose, we have applied the best of ourselves to the task at hand. Vince Lombardi, legendary Green Bay Packers coach.*