COURT OF APPEALS OF NEW YORK

People v. Nieves-Andino[1]
(decided June 28, 2007)

Juan Nieves-Andino was charged with second-degree murder in connection with the shooting death of Jose Millares.[2] At trial, the People offered evidence of statements made by Millares to a police officer at the scene of the shooting, which indicated that Millares was "shot by a man named Bori."[3] Other evidence supported the contention that Nieves-Andino was known as Bori. Nieves-Andino moved to exclude Millares's statement to the officer as hearsay on the grounds it violated the Confrontation Clause of the United States Constitution and the parallel provision of the New York State Constitution.[4] The defense argued Nieves-Andino did not have a prior opportunity for cross-examination because Millares died and therefore admission of Millares's statement violated the defendant's "Sixth Amendment right to confront a witness against him."[5] The People, in turn, argued Millares's statement to the police officer fell under the

[1] 872 N.E.2d 1188 (N.Y. 2007).

[2] *Id.* at 1189.

[3] *Id.*

[4] The evidence included testimony by Michael O'Carroll indicating that he knew Nieves-Andino and witnessed Nieves-Andino shoot Millares. *Id.* *See* U.S. CONST. amend. VI which states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." N.Y. CONST. art. I, § 6 states, in pertinent part: "In any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witness against him . . . ."

[5] *Nieves-Andino*, 872 N.E.2d at 1189.

"excited utterance" exception because Millares had just been shot.[6]

Nieves-Andino was convicted of second-degree murder and the Appellate Division, First Department, affirmed and held Nieves-Andino's right of confrontation was not violated.[7] On appeal, the New York Court of Appeals found the statement nontestimonial—Nieves-Andino's Sixth Amendment right of confrontation had not been violated.[8]

On November 28, 2000, at approximately 4:14 a.m., Police Officers Doyle and Riordan were dispatched to the scene of a shooting.[9] Michael O'Carroll, a witness to the shooting and an "associate" of the shooting victim, had called 911.[10] A small crowd had formed around Millares. At the scene, Officers Doyle and Riordan shoved through the crowd and found Millares sprawled on the ground with half of his body on the street and half on the sidewalk between two parked cars.[11] Millares was conscious but severely bleeding and "grimacing with pain."[12] Officer Riordan searched the location for shell casings and found four that had been discharged from a .380 handgun. While Officer Riordan was searching for shell casings, Officer Doyle called an ambulance and then began to question Millares, asking basic background information and attempting to find out what

[6] *Id.*

[7] People v. Nieves-Andino, 802 N.Y.S.2d 20 (Sup. Ct. Bronx County 2005), *aff'd*, 815 N.Y.S.2d 577 (App. Div. 1st Dep't 2006). The Supreme Court of New York and the Appellate Division, First Department, both held that there was no violation of the defendant's Sixth Amendment Rights.

[8] *Nieves-Andino*, 872 N.E.2d at 1189.

[9] *Id.* at 1191 (Jones, J., concurring).

[10] *Id.* The Court of Appeals does not define the nature of this association, but the facts of the case support the inference that O'Carroll and Millares were drug crime partners.

[11] *Id.* at 1188.

[12] *Id.* at 1189.

had occurred.[13] According to Officer Doyle's testimony, Millares said he had an argument with Bori, who then pulled a gun on him and shot him three times. Millares then told the officer where Nieves-Andino could be found.[14]

After Millares' death, O'Carroll told the police that he saw Nieves-Andino, known to him as "Bori," shoot Millares.[15] O'Carroll informed the officers that Nieves-Andino peddled drugs for Millares in 1999, but began selling drugs on his own, resulting in a quarrel between Millares and Nieves-Andino.[16] O'Carroll testified he witnessed Nieves-Andino pull out "a .380 caliber automatic pistol from his 'hoodie' pocket and fire three shots at Millares."[17] Millares fell to the ground, apparently wounded from the gun shots, but Nieves-Andino continued to fire with the semi-automatic until it jammed. Nieves-Andino unjammed the pistol, stood directly above Millares and fired the gun twice more.[18]

At Nieves-Andino's murder trial, the People were able to admit into evidence the statements made by Millares to Officer Doyle that identified Nieves-Andino as the shooter.[19] On appeal, Nieves-Andino argued the statements made by Millares to the officer were testimonial in nature and should not have been admitted into evi-

[13] *Nieves-Andino*, 872 N.E.2d at 1189.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 1194 (Jones, J., concurring). Interestingly, the majority opinion describes O'Carroll as testifying that he witnessed the defendant "pull a .380 pistol from the pouch of his 'hoodie,' and fire four or five shots at Millares." The unpublished reports of the lower courts do not resolve this apparent contradiction. *Id.* at 1189 (majority opinion).

[18] *Nieves-Andino*, 872 N.E.2d at 1189. Again, the majority opinion recounts this differently, stating Nieves-Andino fled immediately after shooting the victim. *Id.*

[19] *Id.*

dence.[20] Millares's untimely death deprived Nieves-Andino of the opportunity to cross examine a witness against him, and the defense claimed this was a violation of the Sixth Amendment,[21] which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."[22] The issue before the New York Court of Appeals was whether the statements made by Millares to Officer Doyle were testimonial in nature.[23] If the statements were testimonial, the Confrontation Clause protections attach and would preclude their admission.

In deciding Nieves-Andino, the Court of Appeals relied on the United States Supreme Court's decisions in *Davis v. Washington*[24] and *Crawford v. Washington*.[25] The Court of Appeals concluded the statements made by Millares were nontestimonial and their admission did not violate Nieves-Andino's Sixth Amendment rights.[26] Because of the "speed and sequence of events" surrounding the shooting of Millares and the arrival of the officers to the scene of the crime, the police could not be certain that there was no danger posed to onlookers or to Millares by the assailant.[27] The court held that officer Doyle's objectives in questioning Millares were twofold: (1) to determine the cause and extent of Millares's injuries; and (2) to determine whether there continued to be a threat of harm to the civilians in

[20] *Nieves-Andino*, 872 N.E.2d at 1190.
[21] *Id.* at 1189 (citing Crawford v. Washington, 541 U.S. 36 (2004)). *See* U.S. CONST. amend. VI.
[22] U.S. CONST. amend. VI.
[23] *Nieves-Andino*, 872 N.E.2d at 1192-93 (Jones, J., concurring).
[24] 126 S. Ct. 2266 (2006).
[25] 541 U.S. 36 (2004).
[26] *Nieves-Andino*, 872 N.E.2d at 1190.
[27] *Id.*

the crowd.[28] Officer Doyle sought the information to prevent an ongoing emergency, thus the Millares' utterances were not testimonial but informational.

Judge Theodore J. Jones authored a concurring opinion in *Nieves-Andino*, disagreeing with the majority's determination that Millares' statements were nontestimonial.[29] Judge Jones explained that the situation surrounding the statements made by Millares objectively indicate they were not elicited to meet an ongoing emergency, but rather to establish events that have already taken place and would have potential relevance to a future criminal prosecution.[30] Therefore, in Judge Jones' view, the defendant's rights were violated by the admission of these statements as evidence against him at trial, and the violation of the defendant's Sixth Amendment right to confrontation is a violation "subject to a constitutional harmless error analysis."[31]

In so concluding, Judge Jones relied upon three decisions: *People v. Douglas*,[32] *People v. Eastman*,[33] and *People v. Crimmins*.[34] Judge Jones stated that Nieves-Andino's conviction should be reversed unless admitting the evidence was harmless error.[35] A constitutional error is harmless when it does not affect the jury's verdict.[36]

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[28] *Id.*
[29] *Id.* at 1191 (Jones, J., concurring).
[30] *Id.*
[31] *Nieves-Andino*, 872 N.E.2d at 1191, 1193 (Jones, J., concurring).
[32] 826 N.E.2d 796 (N.Y. 2005).
[33] 648 N.E.2d 459 (N.Y. 1995).
[34] 326 N.E.2d 787 (N.Y. 1975).
[35] *Nieves-Andino*, 872 N.E.2d at 1193 (Jones, J., concurring) (citing *Eastman*, 648 N.E.2d at 465).
[36] *Id.* (quoting *Douglas*, 826 N.E.2d at 797).

To satisfy the harmless error burden, an appeals court must weigh the total strength of the People's case against the importance the evidence admitted in error has to the case.[37]

According to Judge Jones, even though one of Officer Riordan's first actions upon arriving at the crime scene was to call an ambulance for Millares, he could do nothing further except question Millares.[38] When Officer Doyle asked Millares what happened, it was objectively apparent that any threat or emergency had passed; Doyle was not questioning Millares to determine what was happening.[39] However, Judge Jones concluded that because Nieves-Andino's guilt was established by O'Carroll's testimony and corroborating evidence presented at trial (by the ballistics expert and medical examiner), there was no reasonable possibility the erroneous admission of Millares's statements to Officer Doyle had an impact on the jury's verdict.[40] As there was no reasonable possibility that the jury's verdict was influenced as a result of the statements being admitted, the People met their burden by establishing that the error was harmless "beyond a reasonable doubt" and the conviction was proper.[41]

Twenty-four years before *Crawford*, where the United States Supreme Court revamped the criminal hearsay exception, the Court established a reliability test for dealing with Confrontation Clause issues in *Ohio v. Roberts*.[42] In *Roberts*, the Court, basing held courts

[37] *Id.* at 1194 (quoting People v. Goldstein, 843 N.E.2d 727, 734 (N.Y. 2005)).
[38] *Nieves-Andino*, 872 N.E.2d at 1192.
[39] *Id.* at 1193.
[40] *Id.* at 1194 (Jones, J., concurring).
[41] *Id.*
[42] 448 U.S. 56 (1980).

can admit out-of-court statements by an unavailable witness provided the witness's prior testimony bears adequate "indicia of reliability."[43] If the testimony falls within a firmly rooted hearsay exception or bears "particularized guarantees of trustworthiness" it can be admitted into evidence against the defendant.[44]

In *Idaho v. Wright*,[45] the Court elaborated on *Roberts* when it stated that "particularized guarantees of trustworthiness must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief."[46] The Court explained the surrounding circumstances clearly indicate the defendant's statements were truthful, then cross-examination "would be of marginal utility" and the statement would be admissible.[47] The Court also explained the basis for the excited utterance exception, which is of particular importance in *Nieves-Andino*.[48] There are certain circumstances under which statements are made that minimize the possibility of a witness' untruthfulness, rendering those statements sufficiently trustworthy despite the unavailability of the declarant for cross-examination.[49]

The Court's focus on the reliability test changed drastically in *Crawford v. Washington*. *Crawford* held that the Confrontation

[43] *Roberts*, 448 U.S. at 66 (quoting California v. Green, 399 U.S. 149, 161 (1970)).
[44] *Davis*, 126 S. Ct. at 2275 n.4 (quoting *Crawford*, 541 U.S. at 60).
[45] 497 U.S. 805 (1990).
[46] *Wright*, 497 U.S. at 819 (internal quotations omitted).
[47] *Id.* at 820.
[48] *Id.* In *Nieves-Andino*, the People argued that Millares's statements to police were considered excited utterances. 872 N.E.2d. at 1189.
[49] *Wright*, 497 U.S. at 820.

Clause of the Sixth Amendment bars testimonial statements when the witness is unavailable to testify at trial, and the defendant had a prior opportunity to cross-examine that witness.[50] The Court went on to state that interrogations made by law enforcement constitute testimonial hearsay, thus admitting the statements is contrary to a defendant's right of confrontation.[51] *Crawford*, on the other hand, shifted the analysis so as to focus on the reliability of the hearsay statement.

The Court expanded on *Crawford* in *Davis* by addressing the specific issue of whether initial information given to law enforcement during a 911 call or immediately thereafter is testimonial.[52] *Davis* was a consolidation of two cases involving criminal convictions arising from domestic violence incidents, both predicated on statements made in 911 calls that were taped and admitted into evidence.[53] The Supreme Court in *Davis* qualified *Crawford*'s holding by limiting the scope of police interrogations falling within the hearsay exception to interrogations whose sole purpose was to establish facts of a crime with the purpose of identifying a perpetrator.[54] *Davis* elaborates on the difference between testimonial and nontestimonial statements when made in the course of a police interrogation. Nontestimonial statements are those made in response to a police interrogation, the main purpose of which is to enable law enforcement to deal with an

[50] *Crawford*, 541 U.S. at 53-54.

[51] *Id.* at 53, 61. The Court acknowledged its failure to provide meaningful guidance as to what is constitutes an interrogation by stating "one can imagine various definitions of 'interrogation,' and we need not select among them in this case." *Id.* at 53 n.4.

[52] *Davis*, 126 S. Ct. at 2270.

[53] State v. Mechling, 633 S.E.2d 311, 319 (W. Va. 2006) (citing *Davis*, 126 S. Ct. 2266).

[54] *Davis*, 126 S. Ct. at 2276.

ongoing emergency.[55] Statements are testimonial, by contrast, when elicited primarily for interrogation purposes, absent an ongoing emergency, to establish a timeline of events that are "potentially relevant to later criminal prosecution."[56] The *Davis* Court stated the initial interrogation of a law enforcement officer "conducted in connection with a 911 call, is ordinarily not designed primarily to 'establish or prove' some past fact, but to describe current circumstances requiring police assistance."[57]

In *Davis*, Michelle McCottry told a 911 operator she "was involved in a domestic disturbance with her former boyfriend Adrian Davis," the defendant. McCottry did not appear to testify at the trial.[58] The trial court admitted the 911 recording into evidence and the jury convicted the defendant.[59]

In the second consolidated case in *Davis*, police officers responded to a domestic disturbance at the home of Hershel and Amy Hammon. The officers separated the Hammons and questioned them individually.[60] After the police officer heard Amy Hammon's account of the events that occurred, he had her fill out a battery affidavit. The affidavit described Herhsel Hammon physically attacking Amy Hammon, who was subpoenaed but never appeared at the bench trial.[61] The affidavit was admitted into evidence and defendant Hershel Hammon, who was found guilty of domestic battery and with

[55] *Id.* at 2273.
[56] *Id.* at 2273-74.
[57] *Id.* at 2276 (quoting *Crawford*, 541 U.S. at 51).
[58] *Davis*, 126 S. Ct. at 2271.
[59] *Id.* at 2271-72.
[60] *Id.* at 2272.
[61] *Id.*

violating his probation.[62]

The Supreme Court applied the analysis it developed in *Crawford*, stating the Confrontation Clause bars testimonial statements of a witness to be admitted when that witness did not appear at trial unless that witness was not available to testify or the defendant had an opportunity for cross-examination.[63] The *Davis* Court held that only testimonial statements fall within the meaning of the Confrontation Clause.[64] It was the statement's testimonial character that distinguished it from other types of hearsay. If a statement is testimonial then it is subject to traditional limitations on hearsay evidence; if it is nontestimonial then it does not enjoy the protection of the Confrontation Clause.[65] The Court then defined both testimonial statements and nontestimonial statements. Nontestimonial statements are statements made in response to a police interrogation whose main purpose is to enable law enforcement to deal with an ongoing emergency. Testimonial statements are statements made when there is no ongoing emergency and the interrogation is designed to prove past facts for use in a criminal prosecution.[66] The Supreme Court defined testimony as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[67] The Court thus draws a distinction between solemn and meaningful statements to police, and offhand comments.

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[62] *Id.* at 2273-74.
[63] *Davis*, 126 S. Ct. at 2273 (quoting *Crawford*, 541 U.S. at 53-54).
[64] *Davis*, 126 S. Ct. at 2273. *See* U.S. CONST. amend. VI.
[65] *Davis*, 126 S. Ct. at 2273.
[66] *Id.* at 2273-74.
[67] *Id.* at 2274 (quoting *Crawford*, 541 U.S. at 51).

The New York Court of Appeals decision in *Nieves-Andino* draws heavily on the language of *People v. Bradley*,[68] where the court held the defendant's rights were not violated by admitted statements made by a witness in response to police questions because those questions were asked to aid the officer in dealing with an ongoing emergency.[69] The statement in question came from Debbie Dixon.[70] Police Officer Steven Mayfield went to Dixon's apartment in response to a 911 call and, noticing that Dixon was visibly injured, asked her what had occurred. Dixon told him she was thrown through a glass door by her boyfriend. Dixon was later unavailable at trial but her statements were allowed to be entered into evidence as an exited utterance.[71]

The New York Court of Appeals essentially adopted *Crawford* and *Davis* and used the analytical framework in *Nieves-Andino* as it pertained to the Confrontation Clause under both the United States Constitution and the New York State Constitution. The *Bradley* court agreed with the Supreme Court in *Crawford* and *Davis* that an out of court statement by a witness does not violate a defendant's rights under the Confrontation Clause unless that statement is testimonial.[72] Dixon was visibly upset and injured when Officer Mayfield arrived at her apartment; his primary concern was for her safety. The initial objective was to determine how she was injured so he could decide if she was still in any physical danger. These were ac-

[68] 862 N.E.2d 79 (N.Y. 2006).
[69] *Bradley*, 862 N.E.2d at 79.
[70] *Id.* at 80.
[71] *Id.*
[72] *Id.* at 80 (citing *Davis*, 126 S. Ct. at 2273).

tions one would clearly expect a police officer to take in such a situation.[73] The court concluded that attempting to secure the victims safety before beginning to investigate the crime was an appropriate and responsible pattern of police behavior. The statements made by Dixon were not testimonial under the holdings of *Crawford* and *Davis* because the officer reasonably assumed that there was an ongoing emergency requiring his attention.[74]

The *Nieves-Andino* court compared the situation involving Officer Doyle with the situation of the police officer in *Bradley*.[75] Both officers reasonably assumed that an emergency still existed and therefore Millares's answers to Officer Doyle's questions were non-testimonial, and did not violate Nieves-Andino's constitutional rights.[76]

The established precedent in federal and state court is both similar and dissimilar. The actual wording of the Confrontation Clause found in both the United States Constitution and the New York State Constitution are similar. In *Nieves-Andino*, the New York Court of Appeals adopted the analysis developed in *Davis* and *Crawford*. First, testimonial statements will be bared if the witness did not appear at trial unless the witness was unavailable and the defendant had a prior opportunity to cross-examine the witness.[77] Second, the court defines statements as testimonial when those statements are made when there is no ongoing emergency and the interrogation is

[73] *Bradley*, 862 N.E.2d at 81.
[74] *Id.*
[75] *Nieves-Andino*, 872 N.E.2d at 1190. *See Bradley*, 862 N.E.2d at 81.
[76] *Nieves-Andino*, 872 N.E.2d at 1190.
[77] *Id.* at 1189 (quoting *Davis*, 126 S. Ct. at 2273). *See Crawford*, 541 U.S. at 53-54.

designed to prove past facts that can be used in a criminal prosecution.[78] Third, the court defines statements as nontestimonial when made in response to a police interrogation whose main purpose is to enable law enforcement to deal with an ongoing emergency.[79]

The Supreme Court has yet to make a decision on whether or not an interrogation made by a law enforcement officer after an initial 911 call would be nontestimonial. However, the two New York decisions show this is a reasonable interpretation of the decisions in *Crawford* and *Davis*. The Supreme Court's holdings and dicta in those two cases have not given clear guidance for lower courts (and state courts) to determine if statements made to law enforcement in different situations are testimonial in nature or nontestimonial. It does appear that the New York interpretation of the holdings in *Davis* and *Crawford* are reasonable, but courts in states other than New York could, and have, come to different conclusions.

The Supreme Court of Connecticut took a different approach in *State v. Greene*[80] when it held the statements given by a victim who is questioned after she initially contacts police, and answers to make sure proper medical attention is given and the crime scene is secured, are nontestimonial because they were not part of the crime itself.[81] An example of the ambiguity found in the Supreme Court holdings is the meaning of the term "ongoing emergency" used to describe nontestimonial statements made during a police interroga-

[78] *Bradley*, 862 N.E.2d at 81 (quoting *Davis*, 126 S. Ct. at 2273-74).
[79] *Nieves-Andino*, 872 N.E.2d at 1189 (quoting *Davis*, 126 S. Ct. at 2273).
[80] 874 A.2d 750 (Conn. 2005).
[81] *Id.* at 775.

tion.[82] This ambiguity leaves individual state courts to determine what circumstances represent an "ongoing emergency," because the Supreme Court never set forth concise guidelines to determine which situations constitute an ongoing emergency as opposed to past events—distinguishing statements made when there is no ongoing emergency (testimonial) from statements made in response to questioning with the main purpose of gathering information for a criminal prosecutions (nontestimonial).[83]

The *Nieves-Andino* court takes a broad interpretation of the *Davis* holding and states that regardless of whether the perpetrator fled the scene, the police officer's questioning of Millares objectively indicates that the officer was reasonable in assuming that there was an ongoing emergency and the police officers primary purpose in the questioning was to prevent the further harm.[84]

Because of this broad interpretation of *Davis* by the *Nieves-Andino* and *Bradley* courts, when police arrive at a crime scene where the victim(s) are present, the immediate questions asked can always be considered as taking place during an ongoing emergency. Therefore, if within the initial encounter the victim indicates the identity of the alleged perpetrator then such a statement would be admissible because it took place during an ongoing emergency and occurred while the police officer was assessing the dangerousness of the situation. The court determined the circumstances constituted an ongoing

[82] *Davis*, 126 S. Ct. 2273 (defining statements as nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency").

[83] *Id.* at 2273-74.

[84] *Nieves-Andino*, 872 N.E.2d at 1190.

emergency because under the "speed and sequence of events" the police officer could reasonably have believed that victim was still in danger.[85] However, the Supreme Court in *Davis* does state that an initial interrogation made during a 911 call is not one designed to establish facts that would be used in a future criminal prosecution but rather are designed to aid police in providing emergency assistance.[86]

Clearly the New York Court of Appeals broadly interprets *Davis* and *Crawford* and thus far, *Nieves-Andino* and *Bradley* indicate parallel interpretations of the Federal and State Confrontation Clauses.[87]

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[85] *Id.*
[86] *Davis*, 126 S. Ct. at 2276.
[87] *Bradley*, 862 N.E.2d at 80.