

Virginia State Crime Commission

Melendez-Diaz

2009

MELLENDEZ-DIAZ

Using the statutory authority granted by the General Assembly to the Crime Commission, and upon the request of its Executive Committee, staff reviewed the recent U. S. Supreme Court case of Melendez-Diaz v. Massachusetts, the legislation Virginia enacted in response to the case during the Special Session of 2009, and the possibility of using video-conferencing during criminal trials to help alleviate the burden of state lab analysts from having to testify in person multiple times each month in courts throughout the state.

CASE LAW

In 2004, in the case of Crawford v. Washington, the United States Supreme Court held that a testimonial statement may not be introduced into evidence against the accused in a criminal trial, unless the person who made the statement is unavailable for trial, and the defendant has had a prior opportunity to cross-examine the witness. In the opinion, which was authored by Justice Scalia, it was held that to allow testimonial hearsay statements into evidence against the accused would violate the confrontation clause of the Sixth Amendment. This was a new interpretation of the confrontation clause, or at least was a new emphasis on the importance of in-court testimony as required by the Sixth Amendment; previously the Supreme Court had allowed certain hearsay testimonial statements to be entered into evidence in criminal trials, provided they had an adequate indicia of reliability or trustworthiness, or the statement fell within a firmly recognized exception to the hearsay rule. Crawford, therefore, amounted to a reversal of the holding in Ohio v. Roberts and all cases which followed the Roberts line of reasoning.

Justice Scalia declined to give a comprehensive definition for “testimonial evidence” in Crawford, stating only that, “Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” However, he did give a strong hint of what was to come, by emphasizing in the opinion the injustice of Sir Walter Raleigh’s historic trial. Sir Walter Raleigh was convicted and sentenced to death on the basis of a confes-

sion, made by an alleged accomplice, which was read to the court. Although Sir Walter Raleigh repeatedly demanded that the author of the confession be brought to the court to testify in person, his requests were refused, and he was denied the right to cross-examine his accuser. This scenario, Justice Scalia emphasizes, is what the Sixth Amendment protects against—a defendant being convicted on the basis of a formal testimonial statement that is introduced into evidence without the defendant being able to cross-examine or confront the author of the statement. Justice Scalia also cautions, in footnote seven of the opinion:

Involvement of government officers in the production of testimony with an eye towards trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Therefore, the Crawford opinion clearly foreshadows the holding of Melendez-Diaz v. Massachusetts. In Melendez-Diaz, which was also authored by Justice Scalia, the Court held that certificates of analysis prepared by laboratories in drug cases are testimonial. Following the constitutional prohibition established in Crawford, such certificates cannot be admitted into evidence in criminal trials without the presence of the person who prepared or attested to the facts contained in the certificate. Justice Scalia notes that a defendant could waive his right to cross-examine the lab analyst who prepared the certificate. Otherwise, the certificate of analysis is not admissible into evidence. Justice Scalia also notes that for the state to provide a process by which the defendant on his own could subpoena the analyst does not satisfy the requirements of the Sixth Amendment; “the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”

There is a suggestion in Melendez-Diaz that certificates relating to the calibration of laboratory equipment would probably qualify as business records, and therefore would not be testimonial and subject to the requirements of Crawford and the Sixth Amendment. This does

not apply to certificates relating to chain of custody, though. Justice Scalia warns that while chain of custody issues may not be critical to the prosecution's case, if the prosecution wishes to produce evidence relating to the chain, it must do so with in-court testimony.

VIRGINIA'S LEGISLATION IN RESPONSE TO MELENDEZ-DIAZ

In Virginia, the greatest impact of the Melendez-Diaz case was on the prosecution of DUI and drug offenses, where certificates of analysis are almost always essential to the Commonwealth's case. To a lesser extent, prosecutions for failure to register or reregister as a sex offender were also affected, as prior to Melendez-Diaz, the Virginia State Police would supply the prosecuting attorney with an affidavit attesting to the fact that the offender was not registered as required. Now, in all of these cases, the live testimony of the relevant witness is required, unless the defendant waives his Sixth Amendment rights.

To comply with the new requirements of Melendez-Diaz, prosecutors must issue subpoenas for the witnesses who prepare certificates; the resulting delays in scheduling trials had the potential to lead to problems for prosecutors in meeting the deadlines established by Virginia's speedy trial statute. To attempt to address this problem, the Virginia General Assembly convened in a Special Session for one day on August 19, 2009. An enrolled bill, with an emergency clause, was sent to the Governor, and was signed into law on August 21, 2009.

Under this enacted legislation, prosecutors will notify a defendant or his attorney if they intend to introduce into evidence at trial a certificate of analysis, the results of a breathalyzer test, or an affidavit from the Virginia State Police concerning a registered sex offender's failure to properly register or reregister. The affidavit must be delivered to the defendant, or his attorney, no later than 28 days prior to trial. This deadline is more of a general goal than a strict requirement, as there is no penalty to the Commonwealth if it is missed; as long as the Commonwealth has used due diligence in attempting to secure the presence of the witness who prepared the affidavit or certificate, prosecutors are entitled to a continuance if the defendant insists the witness testify and the witness is unavailable on the day

of trial. Any objection the defendant has to the introduction of the certificate or affidavit without live testimony from the witness must be made within 14 days of the Commonwealth's delivery of the notice. If an objection is not made within that deadline, the defendant is deemed to have waived his objection. Any continuance granted to either the defendant or the Commonwealth because of an objection to the introduction of a certificate or affidavit does not count against the Commonwealth for purposes of the speedy trial statute. The continuance can only be for 90 days, though, if the defendant has been held continuously in custody, or 180 days if he has not been held continuously.

IMPACT ON THE DEPARTMENT OF FORENSIC SCIENCE

With Virginia's speedy trial requirements no longer applicable when the defendant makes a Melendez-Diaz objection, the procedural problems prosecutors faced prior to the enactment of the new legislation should now be alleviated, even if they are not completely dispelled. It still remains to be seen how much more frequently the lab analysts from the Virginia Department of Forensic Science now will be required to testify in court—if the amount of time analysts spend in court becomes too great, it will have an impact on the number of tests they are able to complete on a monthly basis. Therefore, the Melendez-Diaz case still has the potential to create enormous practical problems for Virginia's criminal justice system in the coming years, due to increased backlog of drug cases.

A review of the number of subpoenas the Department of Forensic Science has received since the Melendez-Diaz decision was handed down on June 25, 2009, does show an increase. While the Department received 487 subpoenas in April of 2009, 503 subpoenas in May, and 582 subpoenas in June, it received 1,884 subpoenas in July, 1,735 subpoenas in August, and 1,627 subpoenas in September. There does seem to be a slight downward trend: in October, there were 1,438 subpoenas, in November, there were 1,237 subpoenas and in December, there were 1,311 subpoenas.

The majority of all these subpoenas were for controlled substance examiners. The Department reports that the number of subpoenas for controlled substance cases was 136 in April, 142

in May, and 208 in June; after Melendez-Diaz, the numbers were 1,243 in July, 1,062 in August, 1,034 in September, 822 in October, 752 in November, and 758 in December. Most of these subpoenas were rescinded prior to trial. Only 10 examiners actually had to appear in court in April, 9 in May, and 11 in June. After Melendez-Diaz, the numbers were 123 appearances in July, 147 in August, 174 in September, 130 in October, 109 in November and 89 in December. Therefore, even though the numbers of subpoenas and court appearances is decreasing, the controlled substances examiners from the Department of Forensic Science are still making roughly ten times as many court appearances as they did before the Melendez-Diaz decision. This, in turn, has led these examiners to spend much more time out of the laboratory. While the total number of outside hours was 21 in April, 22 in May, and 19 in June, it was 324 in July, 374 in August, 539 in September, 361 in October, 332 in November, and 334 in December. (The seemingly disproportionate number of hours compared to the number of subpoenas is due to travel time and waiting in court).

Clearly, if this trend continues, it has the potential to increase the backlog of testing requests for suspected controlled substances. This in turn could lead to longer and longer delays for criminal trials. It will be imperative for the General Assembly to monitor this situation in the coming few years to ensure that the situation does not deteriorate to the point of causing irreparable strains on the criminal justice system.

THE USE OF VIDEO TESTIMONY

It has been suggested that one remedy for the increased workload placed upon the Department of Forensic Science due to the Melendez-Diaz decision is to statutorily allow lab examiners to testify at trial by two-way video conferencing. This would greatly reduce the number of hours that the examiners would have to spend out of the laboratory, and might save the Commonwealth money, as travel costs could be eliminated.

However, the constitutionality of allowing a prosecution witness to testify at a criminal trial via a closed circuit camera is unclear. The United States Supreme Court has

allowed the use of one-way video testimony in child abuse cases, when the attorneys for both sides are present with the child witness who is testifying outside of the direct presence of the defendant. In Maryland v. Craig, the United States Supreme Court held that the Sixth Amendment right of a defendant to confront his accusers in open court may be modified by allowing the use of video testimony, but only if this is necessary to further an important public policy, and there has been a specific determination by the judge, on a case by case basis, that in a particular trial it is not necessary for the defendant to face the witness directly in court. It must be noted that some of the reasoning in Maryland v. Craig was based on the reasoning of the earlier case of Ohio v. Roberts, which has essentially been overruled by the Crawford decision. Justice Scalia, who authored the Crawford and Melendez-Diaz opinions, dissented strongly in the earlier Maryland v. Craig case, writing "For good or bad, the Sixth Amendment requires confrontation, and we [the Court] are not at liberty to ignore it."

At first glance, the use of two-way video conferencing for witness testimony would seem to grant even stronger Sixth Amendment protections to a criminal defendant than the one-way closed circuit television broadcasts allowed in Maryland v. Craig and should therefore pass muster constitutionally. However, when confronted with the issue of whether or not the use of two-way video testimony in criminal trials is permissible, most of the federal circuit courts have relied upon the reasoning of Maryland v. Craig, holding that there must be an important public policy that requires the use of video testimony in such cases, and an individualized showing in a particular case that there is some necessity that the witness not be forced to testify in court in front of the defendant. All of the cases where the use of video testimony has been allowed have involved child witnesses, after a determination by the trial judge that the child would not be able to testify competently in front of his or her attacker due to the stress of the situation, or, in one instance, involved a witness in the witness protection program, who was terminally ill with cancer and physically unable to leave the hospital. In all of the cases, the witness' testimony probably would not have been available at all, at any time, if the use of two-way video conferencing had not been permitted. It is doubtful that the federal courts will equate mere scheduling delays, or

transportation costs to the Commonwealth, as manifesting the same need of requirement such that video testimony will be permitted over a defendant's Sixth Amendment objections.

Additionally, the Commonwealth must consider the financial costs involved in such a proposal. Not all courtrooms in the Commonwealth currently have the capability to send and receive two-way video testimony. The Office of the Executive Secretary of the Supreme Court of Virginia has been looking at this issue; although they have not completed a formal study, information they have gathered suggests that the costs to install suitable equipment in all of the courts throughout the Commonwealth would be considerable. Rough estimates indicate that the price would be 4 to 6 million dollars for initial installation, with costs of two to three million dollars annually thereafter for maintenance, staff support, and related expenses. And, as with most technology, the equipment would probably have to be replaced or updated every four to six years.

CONCLUSION

At its December 15 meeting, the Crime Commission considered the subject of allowing two-way video testimony for lab analysts in criminal cases to help alleviate the burden on the Virginia Department of Forensic Science created by the Melendez-Diaz decision. Due to the potential costs involved and the uncertainty as to whether or not such video testimony would be constitutional, the Crime Commission made no formal recommendations on this issue.