Legally Speaking

The Right to Confront Witnesses

A recent case from the Ohio Supreme Court with simple facts shows how complex criminal law can. The case is State v. Pasqualone.

Thomas Pasqualone was stopped by a state trooper for a number of traffic violations. When asked for his driver's license, he admitted his was suspended. The officer confirmed this and placed Pasqualone under arrest, then searched him and found a "large white rock" wrapped in cellophane in his pocket, which field-tested positive for cocaine. The laboratory test later performed verified that the rock was 0.446 grams of cocaine. Later, the laboratory report was used at Pasqalone's trial for possession of cocaine. The person who did the testing and signed the report did not come to the trial to testify. Pasqualone was convicted by a jury on the drug charge.

The Sixth Amendment to the U.S. Constitution states that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted by witnesses against him."

On appeal Pasqualone argued that admission of the lab report violated his Sixth Amendment rights. A report cannot be cross-examined. A majority of judges on the 11th District Court of Appeals agreed with him. Justice Maureen O'Connor, writing for a unanimous court, disagreed, and reversed the court of appeals. Let's break this down into pieces.

In 2004, in a decision written by Justice Antonin Scalia, the U.S. Supreme Court drew a distinction between testimonial and nontestimonial evidence, and held that as far as testimonial evidence was concerned, the Sixth Amendment could only be satisfied by confrontation. Testimonial evidence from a witness who doesn't appear at trial is only admissible if the accused has had the opportunity to cross examine the witness. Since the Crawford decision came out, courts have been deciding what kind of evidence is "testimonial" and what kind isn't.

It is routine practice in most states to admit various kinds of scientific reports into evidence without the author of the report coming to court to testify. In 2007, the Ohio Supreme Court decided that records of scientific tests, and DNA test results in particular were not testimonial evidence and could be used against a defendant even though the DNA analyst who actually performed the test and signed the report did not appear in court to testify. But that decision may be called into question by a case pending before the U.S. Supreme Court this term. In Melendez-Diaz v. Massachusetts, the U.S. Supreme Court is going to decide whether crime laboratory reports can be brought into trial and used against the defendant without the testimony of the expert who prepared the report. If a crime lab report is "testimony" as that term was used in the Crawford case, a live witness will have to appear and be cross examined about it, or it will be kept out of evidence. If the U.S. Supreme Court decides that such reports are testimonial, the Ohio Supreme Court was probably wrong about the DNA reports. But all of that remains to be seen. And the Ohio Supreme Court found a way around this very difficult issue in the Pasqualone case.

There is an existing law in Ohio about the use of lab reports at trial, because they can be the most important evidence in a trial for drug possession. That law requires that lab reports must be served on the accused or his/her lawyer, and must contain notice of the accused's right to demand the in-court testimony of the signer of the report. If the accused doesn't insist, as is his or her right, that a person involved in the actual testing and preparation of the report appear in court to be questioned about the testing then what is in the report is deemed presumptively correct, and can be used to convict the defendant.

Pasqualone's lawyer received a copy of the lab report from his case before trial. The report complied with all the statutory requirements. Pasqalone did not demand the in-person testimony of the laboratory analyst, as he had the right to do under the statute. But he still objected to the report at trial. The trial court found Pasqalone had waived his right to cross examine the analyst. That raises the last of the complex issues in this case.

Everyone knows that lawyers represent clients. Technically, lawyers are agents. Typically, there is no question about a lawyer's authority to act for a client. A lawyer who negotiates a contract or files a lawsuit or accepts a settlement offer is doing so on behalf of the lawyer's client.

There are occasions when a lawyer cannot act on a client's behalf, when only the client must act or decide. Those areas typically involve the rights and other decisions of criminal defendants. Examples of rights that can only be waived personally by an accused are the right to a lawyer and the right to enter a not guilty plea. Other

decisions that can only be made by an accused are whether to plead guilty, whether to waive a jury trial, whether to testify on his or her on behalf, and whether to appeal a conviction.

The question in Pasqualone's case was whether confrontation of witnesses is a right that can be waived by the accused's lawyer, or can only be waived by the accused. The state high court held that a lawyer can waive a client's right to confrontation, and that Pasqualone's lawyer had done so. This decision on waiver avoided the difficult issue of whether the laboratory report was testimonial evidence. Pasqualone's conviction was upheld.