[Cite as *State v. Smith*, 2010-Ohio-745.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 22926
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2007-CR-4895
v.	:	
	:	(Criminal Appeal from
THEODORE W. SMITH, III	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 26th day of February, 2010.

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BROGAN, J.

{¶ 1} Theodore Smith appeals from his conviction of two counts of kidnaping and one count of unlawful restraint after a jury trial. Smith was sentenced to fifteen (15) years to life on the kidnaping charges and twenty (20) days for the unlawful restraint charge.

{¶ 2} Smith was convicted upon the testimony of Cassie Davis which was given at a parole revocation conducted before the trial began. In that testimony, Davis testified that Smith came to her apartment on November 28, 2007, and demanded at knife point that she give him "his money." She testified that Smith released her to go to her sister's apartment in the same building to get the money, and told her if she was not back in ten minutes with his money he would hurt her small son. Davis testified she went to her sister's apartment where she called the police who arrived shortly thereafter and arrested Smith.

{¶ 3} In his first assignment of error, Smith contends the trial court erred in admitting Cassie Davis' testimony over his objection because it violated his right to confrontation guaranteed by the United States and Ohio Constitutions. The State argues that the trial court did not abuse its discretion in admitting Cassie Davis' testimony given at the defendant's parole hearing because the State demonstrated that Ms. Davis was unavailable and Smith had a prior opportunity to cross-examine Davis about her accusations against Smith.

{¶ 4} In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the United States Supreme court held that out-of-court statements that are testimonial are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether the statements are deemed reliable by the trial court.

{¶ 5} Evid.R. 804(B)(5) provides the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

{¶ 6} "(1) *Former testimony*. Testimony given as a witness at another

hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability."

{¶ 7} Evid.R. 804(A) provides in pertinent part:

{¶ 8} "(A) **Definition of unavailability.** 'Unavailability as a witness' includes any of the following situations in which the declarant:

{¶ 9} "(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means."

{¶ 10} As a general constitutional principle, the State bears the burden in criminal cases to produce the declarant regarding hearsay made at a prior judicial hearing, or to establish that the declarant is unavailable to testify. See *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597. The prosecution must satisfy this burden in order to utilize hearsay made at the prior judicial proceeding. Likewise, the right of confrontation under the Ohio Constitution requires the prosecution to use live testimony where reasonably possible. See *State v. Storch* (1993), 66 Ohio St.3d 280, 612 N.Ed.2d 305.

{¶ 11} The Confrontation Clause of the Sixth Amendment and Evid.R. 804(B)(1) normally require a showing by the State that the hearsay declarant is

unavailable despite reasonable efforts made in good faith to secure his presence for trial. *State v. Keairns* (1984), 9 Ohio St.3d 228. A showing of unavailability must be based on testimony of witnesses rather than hearsay. Id. at syllabus 3.

{¶ 12} In *Keairns*, the prosecutor sought to introduce the former testimony of a witness at the defendant's first trial for murder which ended in a hung jury. The prosecutor represented to the court that subpoenas had been issued for the witness but were unserved, and that the sheriff had made a "continual search" for the witness. The trial court found that the State had demonstrated the witness' unavailability and permitted the former testimony at the first trial to be admitted. The court of appeals reversed and the State appealed. In affirming the court of appeals, Justice James Celebreeze wrote:

{¶ 13} "A review of the record shows that the prosecution offered no sworn testimony of its efforts to find the witness. The sole support offered consisted of representations of the prosecutor that subpoenas had been issued, that Huff was not present for the second trial, and that he had 'specifically asked the Sheriff to make a continued search for her and they ha[d] done that.' Appellee never conceded that * * * the prosecution had made any efforts, reasonable or otherwise. A showing of unavailability under Evid.R. 804 must be based on testimony of witnesses rather than hearsay not under oath unless unavailability is conceded by the party against whom the statement is being offered. The prosecutor's representations clearly do not meet this requirement. Furthermore, the mere statement that a 'continued search' had been made lacks sufficient particularity to enable the court to determine what steps had been taken and whether they were reasonable. See *Valenzuela v. Griffin*

(C.A.10, 1981), 654 F.2d 707, 710. ('A simple statement by the prosecutor that the state had issued a subpoena and bench warrant and "had been looking for her" is not enough.') The issuance of a subpoena alone does not constitute a sufficient effort when other reasonable methods are also available. Appellant has offered no explanation as to why steps such as those taken in *Madison* would not have been reasonable as to the facts of this case. Unlike *Madison*, the record contains no testimony regarding unavailability, and fails to disclose with particularity what steps were taken. It only contains representations of lesser detail than those rejected in *Smith*. The evidence of record is insufficient to establish the showings of unavailability required by Evid.R. 804 or the Confrontation Clause."

{¶ 14} In *Valenzuela v. Griffin* (C.A. 10, 1981), 654 F.2d 707, which was cited by the Ohio Supreme Court in *Keairns*, the Tenth Circuit held that the prosecution's statement that the government had "been looking for her" and that a subpoena and a bench warrant had been issued, coupled with proof of service of a subpoena, did not provide a sufficient showing of a good-faith effort to justify the admission of preliminary hearing testimony under the exception to the confrontation requirement of the Sixth Amendment. The court stated:

{¶ 15} "Taken alone, the conclusory statements by the prosecution clearly are insufficient to demonstrate good faith. See *Wilson v. Bowie*, 408 F.2d 1105 (9th Cir. 1969). In *Roberts and Poe v. Turner*, supra, the prosecutors satisfied the burden of showing witness unavailability by presenting detailed, sworn testimony of their efforts to procure witnesses. These cases indicate the necessity of presenting evidence of the good faith of the prosecution whenever the state seeks to introduce former

testimony based on the unavailability of the witness.

{¶ 16} "If there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. 'The lengths to which the prosecution must go to produce a witness * * * is a question of reasonableness.' *California v. Green*, 399 U.S. (149), at 189, n.22 (90 S.Ct. 1930, 1951, 26 L.Ed.2d 489) (concurring opinion, citing *Barber v. Page*, supra). The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. *Ohio v. Roberts*, 448 U.S. at 74, 100 S.Ct. at 2543.

{¶ 17} "While service of process on the witness is evidence of prosecutorial good faith, the prosecution's duty does not end when service is accomplished. See *United States v. Mann*, 590 F.2d 361, 368 (1st Cir. 1978) ('Implicit * * * in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a present witness from becoming absent.'). Suppose at the time of service the witness unequivocally voiced the intent to be absent from the trial. Surely the good faith standard would not be met unless the prosecution took additional steps to secure the presence of the witness at trial. In the instant case the service was November 11, 1976, for a trial date more than three months later, February 22, 1977. We believe a fair reading of *Roberts* and the other cases requires that the prosecution show what efforts have been made closer to the trial date. A simple statement by the prosecutor that the state had issued a subpoena and bench warrant and 'had been looking for her' is not enough. The court must be informed of when the prosecution learned that the witness might not

appear and of the steps taken to secure the witness' presence after the likelihood of nonappearance became known. Because the prosecution failed to present such evidence, we find it failed to establish a predicate for the admission of the taped testimony."

{¶ 18} On the second day of the trial, the State moved to have the complaining witness, Cassie Davis, declared unavailable pursuant to Evid.R. 804(A)(2)(3) or (5) and to permit the State to present her testimony given at a parole revocation hearing conducted at an earlier date. The State represented that Cassie Davis was timely served with a subpoena to appear for the trial on August 18, 2008, but she informed the prosecutor's investigator, Gary Ware, that she was unwilling to testify at the trial.

{¶ 19} On August 19, 2008, the trial court conducted the "unavailability" hearing. Detective Thomas Racklow of the Dayton Police Department testified he spoke with Cassie Davis at her apartment on Friday before the trial. Racklow testified that Davis informed him she had received a subpoena to appear on Monday for trial. Racklow stated that when Davis did not appear for trial, he went to her apartment but Davis did not answer the door. Racklow said he went downstairs to Davis' sister Amy's apartment and spoke with her about Cassie Davis' whereabouts. Racklow testified that Amy Davis told him that her sister was at home and "won't answer the door." (Tr. 57 unavailability hearing.)

{¶ 20} Gary Ware testified that he spoke with Cassie Davis on the Friday before trial and she acknowledged that she received her subpoena to appear for trial but she told Ware "she would not come to court." (Tr. 68, Id.) Ware testified that

Cassie Davis told him the reason she was not going to come to court was she was pregnant and she was afraid "it would create too much stress and she might lose the baby." (Tr. 68, Id.) Ware testified he told Cassie Davis that a warrant could be issued for her, but Davis told him she would hide "and there's no way we were going to get her into a courtroom." (Tr. 69, Id.) Ware testified he gave Cassie Davis' sister a ride to court on Monday the first day of trial and knocked on Cassie Davis' apartment door but no one answered. (Tr. 70, Id.)

{¶ 21} At the conclusion of the hearing, the trial court found that the State had made reasonable efforts to secure the alleged victim's appearance and found the State had proven her "unavailability" for purposes of using her former testimony at Smith's parole revocation hearing. The court then stated it would issue a material witness warrant for Cassie Davis. (Tr. 74, Id.)

{¶ 22} A redacted tape recording of the parole hearing wherein Cassie Davis testified against Smith was played for the jury over Smith's objection. The former testimony was presented to the jury before the material witness warrant was issued and before it could be determined whether it might bear fruit. The next day the trial concluded and Smith was found guilty of the charges previously mentioned.

{¶ 23} We agree with Smith that the State failed to demonstrate that it had exerted reasonable efforts to secure Cassie Davis' appearance for trial. The State knew as early as the Friday before trial that the sole witness who could convict the defendant had received a subpoena and had no intention to appear for trial. The State was informed by Ms. Davis' sister that Ms. Davis intended to hide in her apartment and refuse to answer the door if requested to come to court. The trial

court permitted the State to introduce the witness' former testimony even before efforts to bring her to court under a material witness warrant had been attempted. Surely, the defendant's constitutional right to confront his accuser requires something more than the efforts that were used to secure Ms. Davis' appearance than was demonstrated by the State of Ohio. The appellant's assignment is Sustained.

{¶ 24} The judgment of the trial court is **Reversed** and **Remanded** for further proceedings.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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