**THE SUPREME COURT OF YAG**
**STATE OF NEW JERSEY**
**----------X**
**THE STATE OF NEW JERSEY,**

**Prosecution,** **Docket No.: 003/2024**

**-v-**

**EUGENE BASIL a/k/a JEAN BASIL,**

**Respondent.**
**----------X**
Decided: July 20, 2010

**MAJORITY OPINION:**

In this appeal, the State claims that the Appellate Division erred in overturning defendant Eugene Basil's conviction of unlawful possession of a shotgun. This case involves two distinct constitutional issues, both arising from statements made by a young woman who refused to identify herself to police officers who were dispatched to the scene on the report of a man with a gun. The young woman identified defendant as the person who earlier had pointed a shotgun at her and directed the officers to the location of the discarded shotgun.

The first issue is whether the police had probable cause to arrest defendant. The Appellate Division concluded that defendant's arrest violated the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution and, accordingly, suppressed an incriminating statement made by defendant to police after his arrest. We conclude that the on-scene identification by a citizen informant and corroborative discovery of the shotgun gave the officers probable cause to arrest defendant, and therefore defendant's volunteered statement should not have been suppressed as the product of an unlawful arrest. We therefore

reverse the Appellate Division's suppression of defendant's incriminating statement to the police.

The second issue is whether the admission of the young woman's statement at trial violated defendant's right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. Because the police did not secure the woman's name and address, she could not be called as a witness at trial. Her identification of defendant as the person wielding the shotgun -- the critical piece of the State's case -- was introduced through the testimony of two police officers. The Appellate Division determined that the woman's hearsay statement was testimonial and defendant had never been given the opportunity to cross-examine her, and thus the admission of the statement violated the commands of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004), and Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed.2d 224 (2006). The appellate panel essentially found that the out-of-court statement was testimonial because at the time the unidentified woman made the statement to the police she was not witnessing or experiencing the type of ongoing emergency, as illustrated in Davis, that would provide an exception to the constitutional right of confrontation. Davis, *supra*.

At trial, the State presented three witnesses. While Officer Sullivan "was holding [defendant]," Officer Ruocco was approached by an eighteen- or nineteen-year-old black woman who "came from around the corner." She said, "[T]hat's him," pointing to defendant, "he's the one with the gun." She told the officer that she was standing on the corner (apparently with others) when defendant "pointed a shotgun

at their direction and stated get off the corner." She also "stated that the shotgun was thrown under a black Cadillac." Officer Sullivan retrieved the unloaded shotgun from underneath the car. The young woman did not want to become involved in the case "because she was scared for her safety." She just "left [and] walked away."

Following the young woman's statement and the discovery of the shotgun, defendant was placed in the back of a police car. Officer Ruocco did not consider defendant to be under arrest at that point. Once inside the station, according to Ruocco, defendant commented to him, "What the problem, you guys don't do your job. So I went inside and got my shotgun." At that point, Ruocco placed defendant under arrest, handcuffed him, and gave him the Miranda warnings. Officer Sullivan explained that the shotgun was not dusted for fingerprints because of defendant's reported admission to Officer Ruocco.

Defendant claimed that the police did not have probable cause to arrest him and therefore subjected him to an unreasonable seizure in violation of his constitutional rights. He sought to suppress a statement that he allegedly made after he was taken into custody. Defendant also challenged the admissibility of the non-appearing woman's statement to Officer Ruocco -- identifying defendant as the person wielding the shotgun -- on hearsay and confrontation grounds.

The Fourth Amendment permits a police officer to make a warrantless arrest of a defendant in a public place provided the officer has probable cause to believe the defendant committed a crime. In determining whether there was probable cause to make an arrest, a court must look to the totality of the circumstances, and view those

circumstances from the standpoint of an objectively reasonable police officer. In the instant matter, the young woman/informant was an identifiable citizen and purported to give information from her personal knowledge regarding events that occurred minutes earlier. This was a face-to-face encounter that allowed the officer to make an on-the-spot credibility assessment of the citizen informant. Importantly, the young woman's reliability was immediately corroborated by the discovery of the shotgun in the precise location where she said it was discarded.

From the standpoint of an objectively reasonable police officer, the combination of an identifiable citizen's account of events that she witnessed firsthand minutes earlier and the discovery of corroborative physical evidence -- the shotgun with which she was purportedly threatened -- in the location she described provided probable cause to arrest defendant.

We conclude that, under both the Fourth Amendment and Article I, Paragraph 7 of our State Constitution, the police had probable cause to arrest defendant, and therefore defendant's alleged spontaneous admission to Officer Ruocco did not occur during an unlawful seizure. Given our holding it makes little difference whether one characterizes defendant's custodial status as an investigative detention, as did the trial court, or the equivalent of an arrest, as did the Appellate Division. We note, however, that the police detained defendant, who was standing in front of his home, placed him in a patrol car against his will, and transported him to a local police precinct "for further investigation." The degree of the restraint on defendant's

freedom constituted, for Fourth Amendment purposes, an arrest, triggering the probable-cause requirement.

We next must decide whether the introduction of the young woman's hearsay statement to the police implicating defendant in a crime violated defendant's Sixth Amendment right to confront the witnesses against him. The young woman's out-of-court statement identifying defendant as the gunman was the critical piece of evidence in determining whether defendant was guilty of unlawfully possessing the shotgun. She was not called as a witness, presumably because she was "unavailable" due to the State's inability to locate her. Moreover, defendant never had a prior opportunity to cross-examine her.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Because "[t]he right of confrontation is an essential attribute of the right to a fair trial," a defendant must be given "a fair opportunity to defend against the State[']s accusations." State v. Branch, 182 N.J. 338 (2005). In Crawford v. Washington, the United States Supreme Court declared that the Sixth Amendment's Confrontation Clause prohibited the use of an out-of-court testimonial statement against a criminal defendant unless the witness was unavailable and the defendant was given a prior opportunity to cross-examine her. 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). Thus, the Confrontation Clause proscribes "the use of out-of-court testimonial hearsay, untested by cross-examination, as a substitute for in-court testimony." Crawford did not bar the use of all hearsay at trial. Out-of-court

*non-testimonial* statements, although subject to a State's hearsay rules, were "exempted . . . from Confrontation Clause scrutiny."

The Supreme Court applied the principles of Crawford and defined in greater detail the distinction between nontestimonial and testimonial statements. Statements are non-testimonial 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. In contrast, statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. See, Davis v. Washington and Hammon v. Indiana, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed.2d 224 (2006).

The government bears the burden of proving the constitutional admissibility of a statement in response to a Confrontation Clause challenge. Therefore, we must determine whether the State has met its burden. We conclude that the non-testifying witness's statement implicating defendant was testimonial, that is, the statement was the equivalent of bearing witness against defendant. Here, defendant was denied the opportunity of confronting his accuser. The State has not shown that this case presents the type of ongoing emergency, described in Davis, that would justify an end run around the Confrontation Clause. To too broadly construe the definition of a nontestimonial statement for Sixth Amendment purposes would swallow the

constitutional preference for the in-court testimony of a witness, and eviscerate the procedural protections provided by the Confrontation Clause.

Accepting the whole of the two officers' testimony, the State did not meet its burden of proving that the unavailable witness's statement was nontestimonial. Exceptions to constitutional rights -- including exceptions to the Confrontation Clause -- must be narrowly drawn. We conclude that the non-appearing witness's testimonial statement was inadmissible. Defendant's conviction, therefore, must be reversed and the matter remanded for a new trial.

In conclusion, we reverse the part of the judgment of the Appellate Division that suppressed defendant's verbal admission to the police on the ground that defendant was arrested without probable cause. The judgment of the Appellate Division holding that the non-appearing witness's statement implicating defendant in a crime was a testimonial statement barred by the Sixth Amendment's Confrontation Clause is affirmed.

**DISSENT:**

I agree with the majority's carefully reasoned conclusion that the police had probable cause to arrest defendant. However, I disagree with the majority's determination that the "volunteered" statement made by the defendant is admissible simply because the police had probable cause to arrest.

Probable cause to arrest gives the police the limited right to take the defendant into custody. The majority fails to consider whether the defendant's right to remain

silent and right not to incriminate himself has been violated. In fact, not only does the majority fail to address this issue, both the State and the defendant fail to fully consider this issue. It is arguable that the defendant's failure to directly address this issue acts as a waiver of the same. However, I believe that such an important constitutional issue may be preserved even if not directly argued, but tangentially included in the defendant's argument, as is the case here.

At the time the subject statement was made, Officer Ruocco had stated that he did not consider the defendant to be under arrest. I find this conclusion to be without merit. Was the defendant free to leave? Was he removed from the location near his home where the police first took him under their control? Was he in an interrogation room or other similar location within the police precinct? Clearly, the key to this issue is the fact that the defendant was being detained by the police, whether or not he had yet been "formally" placed under arrest, and is therefore entitled to the full protection of Miranda v. Arizona, 384 US 436 (1966). In Miranda, the defendant, while in police custody, was questioned by police officers and detectives in a room in which he was cut off from the outside world. The defendant was not given a full and effective warning of his rights at the outset of the interrogation process. As a result, the prosecution was barred from using the statement whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination. Miranda,

followed the decision in Escobedo v. Illinois, 378 U.S. 478, which stressed the need for protective devices to make the process of police interrogation conform to the dictates of the privilege.

In light of the failure to have a complete record before us, including the failure of all parties and the lower Courts to even consider the possible Fifth Amendment ramifications, I would remand this matter back to the trial Court for hearings and consideration of what I find to be a rather obvious oversight by all parties herein. I do note that failure to consider this issue, merely because it was not directly raised and deeming the same as waived, may result in this matter coming back before us on the issue of the possible ineffective assistance of counsel.

As to the second issue presented, which addresses the admissibility of certain testimony under Crawford v. Washington, the facts matter a great deal. The record before us offers two versions of what occurred. One as accepted by the majority. However, according to another version that is also based on testimony in the record, a visibly shaking woman approached two police officers immediately upon their arrival at the scene and told them defendant pointed a shotgun at her and told her to get off the corner. She also explained that defendant threw the shotgun underneath a nearby black Cadillac. During that brief discussion, the officers were with the woman, not the defendant. Only afterward did one of the officers head toward defendant and take control of him. From the moment the police arrived, one or two other males were also in the area. In the latter version, the woman spoke to police when both the alleged assailant and his nearby shotgun were unsecured.

Accordingly, the woman's excited utterances would be nontestimonial and admissible under Crawford.

In reaching its decision on the Crawford issue, my colleagues, like the Appellate Division, found that all danger had passed by the time the woman spoke to the police. That pivotal factual finding should not be made by appellate court judges who did not hear the live testimony presented. Instead, this case should be remanded to the trial court to make proper findings and analyze them under Crawford and its progeny. To the extent my colleagues take a different approach, I respectfully dissent.

At trial, Ruocco presented similar testimony: "She was shaking. She was pretty excited. She ha[d] a high tone of voice. She was scared." Those facts provide sufficient support for the trial court's conclusion that the woman's statements were "excited utterances" within the meaning of Rule 803(c)(2). Under Rule 803(c)(2), (1) "[a] statement relating to a startling event or condition," (2) "made while the declarant was under the stress of excitement caused by the event or condition," and (3) "without opportunity to deliberate or fabricate" is not excluded by the hearsay rule. To evaluate whether a statement qualifies as an "excited utterance," courts look to a number of factors:

> (1) the amount of time that transpired between the initial observation of the event and the subsequent declaration of the statement;
> (2) the circumstances of the event;
> (3) the mental or physical condition of the declarant;
> (4) the shock produced;
> (5) nature of the statement; and
> (6) whether the statement was made voluntarily or in response to a question.

[State v. Buda, 195 N.J. at 294 (2008).]

In light of those factors and the record in this case, the trial court did not abuse its discretion when it concluded that the woman's spontaneous comments were an excited utterance. It is significant that only minutes passed between the initial event and the woman's spontaneous comments to police on the scene. Moreover, the continuous presence of an unsecured, nearby shotgun presented a source of continuing stress to the woman during the intervening moments.

Officer Ruocco testified that "immediately upon arrival," an unidentified woman "came right up to me." At the time, he noticed two or three African-American males -- defendant and one or two others -- in the area. According to Officer Sullivan, whom Officer Ruocco credited with responsibility for controlling defendant, defendant was not restrained until (1) after the woman pointed him out and (2) after she told police that a shotgun was underneath the car. Only then did police gain control over defendant and the shotgun.

I agree with my colleagues that once the police had defendant and the scene under control, the danger that he would grab the shotgun and use it was over. But up until that point, the situation remained an ongoing emergency: a shotgun was loose on a public street, and someone who revealed he might use it was still unrestrained.

My colleagues ably describe Crawford and its progeny, which need not be recapped at length. With those guiding principles in mind, it is essential to return to the facts in the record. When the police arrived on the scene, they knew only of a

report of a male with a shotgun at 199 Bidwell Avenue. They did not know which of the two or three men gathered at that location had the weapon or where the gun was. At that moment, assuming that the 9-1-1 call was accurate -- as the police were required to do -- there was an unsecured shotgun in the vicinity of several unknown males, and someone -- who was both unknown and unrestrained -- either in possession of or near the weapon. That situation presented an ongoing emergency on a public street. Up until the time defendant was restrained or the shotgun secured, he had the capacity to retrieve the gun and use it; the mere presence of police officers at a distance would not necessarily stop a determined person from acting.

The victim supplied additional information. She related (1) where the gun was -- under a Cadillac -- and (2) who threw it there after pointing it at her -- defendant Basil, who was still nearby. And she gave that information to the police. Only then, according to Officer Sullivan, did the police effectively defuse the ongoing danger. They restrained defendant and retrieved the gun only after hearing the woman's statements. Clearly, any possible recollection of a particular defendant being restrained and the weapon being secured *prior* to the woman's spontaneous statement must be an error. Thus, the statement given was made at a time when a threat was still present and both the perpetrator and the weapon were potentially available to continue and carry out that threat.

United States v. Arnold, 486 F.3d 177 (6th Cir. 2007), is also instructive. In Arnold, a visibly shaken and upset victim told police responding to her 9-1-1 call that the defendant had threatened her with a gun and then, when the defendant returned

to the scene, exclaimed, "that's him, that's the guy that pulled the gun on me" and "he's got a gun on him." Id. at 180. The Sixth Circuit found that the victim's unprompted words both before and after the defendant arrived on the scene were intended simply to get police protection from a man with a gun during a precarious, ongoing emergency. Id. at 190-92. The court found that the arrival of the police alone did not end the emergency. Id. at 190. As a result, the court concluded that the victim's excited utterances were nontestimonial and therefore admissible. Id. at 190-93.

See, also: Long v. United States, 940 A.2d 87 (D.C. 2007) (concluding that victim's statements to police that defendant cut his face, and exclamation, "There she is," after spotting assailant, were nontestimonial because they were "frantic," "the situation was uncertain," and "[v]iewed objectively, [the officer]'s questions were designed to find out whether there was any continuing danger and respond to the situation with which he was confronted"); State v. Warsame, 735 N.W.2d 684 (Minn. 2007) (finding that statements of domestic violence victim to officer that her boyfriend had beaten her, made after victim "left her home and took to the street with injuries at a time when she was in obvious distress and when [her boyfriend] was still at large," were nontestimonial); State v. Hembertt, 696 N.W.2d 473 (Neb. 2005) (concluding that statements of upset, crying domestic violence victim that defendant attacked her and threatened her with knife were nontestimonial because they "were not made in anticipation of eventual prosecution, but were made to assist in securing the scene and apprehending the suspect"); State v. Ayer, 917 A.2d 214, 225 (N.H.

2006) (finding that inculpatory statements made to police without prompting by defendant's hysterically crying wife after shooting were nontestimonial because information related to "an armed assailant, who . . . was loose, and could have remained in the immediate vicinity or could have gone elsewhere in search of other victims"); State v. Ohlson, 168 P.3d 1273 (Wash. 2007) (finding that statements taken by police from "upset" and "shaken up" minors five minutes after defendant yelled slurs at them and nearly hit them with his car multiple times were nontestimonial because there was "every reason to believe . . . that [defendant] might return" and "situation presented an ongoing emergency" at least until officer "completed her initial triage of the situation").

We did not hear the testimony of Officers Ruocco and Sullivan; the trial court did. The trial judge is therefore in a far better position to evaluate that testimony and answer the pivotal questions raised by defendant's post-trial Crawford challenge. I would therefore remand to the trial court to find the relevant facts and apply them to the principles discussed above. Ideally, the issue before us should have been sorted out at trial, when memories were fresher, in response to a proper, focused objection. Instead, defendant voiced a hearsay objection to the admission of the woman's statements to the police. He relied on State v. Alston, 312 N.J. Super. 102, 112 (App. Div. 1998), which held that a detective's "testimony as to the substance of an anonymous phone call was inadmissible hearsay which violated [defendants'] Sixth Amendment right to be confronted by the witnesses against them." Defendant even specifically quoted to the trial court a passage from Alston decrying the hearsay

nature of the testimony in that case. Id. at 113. The trial court, however, reminded the parties that he had already found that the statement was an excited utterance -- and thus admissible as an exception to the hearsay rule.

I agree with my colleagues that it is far preferable to have witnesses testify in open court so that they may be subjected to cross-examination. We know from this case, though, that the witness was visibly frightened and refused to give her name or address or get involved further because she was scared for her safety. It is unrealistic to suggest, as my colleagues do, that police should threaten visibly nervous, shaking witnesses who report violent crimes with arrest on a material witness warrant. That approach, if not used sparingly, would result in less, not more, cooperation from the public.

For the reasons set forth above, I respectfully dissent from my colleagues' Crawford analysis and their rejection of the jury's verdict based on the present state of the record.