

Evidence

Crawford Issues

Hardy v. Cross, 565 U.S. ___ (Dec. 12, 2011) (<http://www.supremecourt.gov/opinions/11pdf/11-74.pdf>). Reversing the Seventh Circuit, the Court held that the state court was not unreasonable in determining that the prosecution established the victim's unavailability for purposes of the confrontation clause. In the defendant's state court trial for kidnaping and sexual assault, the victim testified. After a mistrial, a retrial was scheduled for March 29, 2000. On March 20, the prosecutor informed the trial judge that the victim could not be located. On March 28, the State moved to have the victim declared unavailable and to introduce her prior testimony at the retrial. The State represented that it had remained in constant contact with the victim and her mother and that every indication had been that the victim, though very frightened, would testify. On March 3, however, the victim's mother and brother told the State's investigator that they did not know where the victim was; the mother also reported that the victim was "very fearful and very concerned" about testifying. About a week later, the investigator interviewed the victim's father, who had no idea where she was. On March 10, the victim's mother told the State that the victim had run away the day before. Thereafter, the prosecutor's office and police attempted to find the victim. Their efforts included: constant visits her home, at all hours; visits to her father's home; conversations with her family members; checks at, among other places, the Medical Examiner's office, local hospitals, the Department of Corrections, the victim's school, the Secretary of State's Office, the Department of Public Aid, and with the family of an old boyfriend of the victim. On a lead that the victim might be with an ex-boyfriend 40 miles away, a police detective visited the address but the victim had not been there. The State's efforts to find the victim continued until March 28, the day of the hearing on the State's motion. That morning, the victim's mother informed the detective that the victim had called approximately two weeks earlier saying that she did not want to testify and would not return. The victim's mother said that she still did not know where the victim was or how to contact her. The trial court granted the State's motion and admitted the victim's earlier testimony. The defendant was found guilty of sexual assault. On appeal, the state appellate court agreed that the victim was unavailable and that the trial court had properly admitted her prior testimony. The defendant then filed a petition for a writ of habeas corpus arguing that the state court had unreasonably applied clearly established Supreme Court precedents holding that the confrontation clause precludes the admission of the prior testimony of an allegedly unavailable witness unless the prosecution made a good-faith effort to obtain the declarant's presence at trial. The federal district court denied the petition; the Seventh Circuit reversed.

The Court began its analysis by noting that under *Barber v. Page*, 390 U. S. 719 (1968), "a witness is not 'unavailable' for purposes of the . . . confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." Here, the state court holding that the prosecution conducted the requisite good-faith search for the victim was not an unreasonable application of its precedents. The Seventh Circuit found that the State's efforts were inadequate for three main reasons. First, it faulted the State for failing to contact the victim's current boyfriend or any of her other friends in the area. But, the Court noted, there was no evidence suggesting that these individuals had information about her whereabouts. Second, the Seventh Circuit criticized the State for not making inquiries at the cosmetology school where the victim had been enrolled. However, because the victim had not attended the school for some time, there is no reason to believe that anyone there had better information about her location than did her family. Finally, the Seventh Circuit found that the State's efforts were insufficient because it failed to serve her with a subpoena after she expressed fear about testifying at the retrial. The Court noted: "We have never held that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes, and the issuance of a subpoena may do little good if a sexual assault witness is so fearful of an assailant that she is willing to risk his acquittal by failing to testify at trial." It

concluded: “when a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness’ presence, but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising.” (citation omitted).