SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 22 | Issue 3

1971

Recent Case: Constitutional Law - The Right to Confrontation - Admissibility of Hearsay [*Dutton v. Evans*, 400 U.S. 74 (1970)]

Case Western Reserve University Law Review

Recent Cases

CONSTITUTIONAL LAW — THE RIGHT TO CONFRONTATION — ADMISSIBILITY OF HEARSAY

Dutton v. Evans,
400 U. S. 74 (1970).

Since *Pointer v. Texas*[1] — which held the confrontation clause of the sixth amendment applicable to the states — several Supreme Court cases have dealt with the constitutional restraints on the admission of hearsay evidence and the right of a defendant to cross-examine the witnesses against him.[2] These cases have tended to limit the admissibility of hearsay and expand the guaranty of cross-examination. The Court's recent decision in *Dutton v. Evans*,[3] however, marks a departure from the rationale that had been developing in the post-*Pointer* decisions.

In *Dutton*, the state's hearsay testimony was admitted by a Georgia trial court against the defendant, Evans, although the prosecution had made no effort to secure the declarant's presence at the trial.[4] The hearsay was admitted because of Georgia's statutory hearsay exception for coconspirators' declarations made during the concealment phase of a conspiracy.[5] The testimony at issue in *Dutton* was given by a man named Shaw. At the trial, Shaw recalled a statement made to him by Williams, one of the principals to the murder for which Evans was being tried. Shaw testified that he had asked Williams about the latter's arraignment and that Williams had responded by denouncing Evans as the cause of his problems.[6] Shaw was cross-examined by Evans, but the hearsay-declarant, Williams, did not appear at the trial. The Supreme Court of Georgia upheld the admission of this testimony on appeal.[7] In a habeus cor-

---

[1] 380 U.S. 400 (1965).

[2] *See, e.g.*, Roberts v. Russell, 392 U.S. 293 (1968); Barber v. Page, 390 U.S. 719 (1968); Brookhart v. Janis, 384 U.S. 1 (1966).

[3] 400 U.S. 74 (1970).

[4] The statement was originally made in a federal penitentiary located in Georgia. *Id.* at 77. It would have been easy to secure the declarant's presence at the trial since he presumably was still incarcerated within the state. *See id.* at 88 n.19; *id.* at 102 n.4 (Marshall, J., dissenting).

[5] GA. CODE ANN. § 38-306 (1954).

[6] The exact statement attributed by Shaw to Williams was: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." 400 U.S. at 77.

[7] Evans v. State, 222 Ga. 392, 150 S.E.2d 240, *cert. denied*, 385 U.S. 953 (1966).

pus proceeding, the Court of Appeals for the Fifth Circuit found the evidence inadmissible and reversed Evans' conviction.[8] The Supreme Court then reversed the court of appeals, with five Justices agreeing that introduction of the testimony was not prohibited by the right to confrontation or other due process considerations.

The confrontation clause[9] raises several questions,[10] one of the more important of which is who are witnesses within the meaning of the clause. The Supreme Court has avoided laying down a broad theory about the requirements of the confrontation clause, and consequently this particular question has not been explicitly answered. In its decisions following *Pointer*, however, the Court has held that the confrontation clause prohibits the state from: (1) introducing an individual's testimony through a transcript from a preliminary hearing if the state failed to make reasonable efforts to produce him at the trial, even though the individual was fully cross-examined by the defendant at the preliminary hearing;[11] or (2) reading a document purporting to be a confession of another principal, even though police officers testify and are cross-examined on whether the confession was in fact made by the declarant-principal.[12] But the state may introduce out-of-court statements if the declarant also appears as a witness and is cross-examined at the trial itself.[13] Because these rules place limits on the use of hearsay (even where the nondeclarant witness can be fully cross-examined at trial), the Court has implicitly treated the hearsay-declarant as a witness for the purposes of the confrontation clause. Thus, prior to *Dutton*, Williams would definitely have been classified as a witness within the ambit of the right to confrontation.

In *Dutton*, the plurality opinion[14] by Mr. Justice Stewart took the unprecedented step of allowing hearsay to be introduced in the ab-

---

[8] Evans v. Dutton, 400 F.2d 826 (5th Cir. 1968), *rev'd*, 400 U.S. 74 (1970).

[9] The confrontation clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

[10] An examination of the clause's language and history is made in California v. Green, 399 U.S. 149, 175-79 (1970).

[11] *See* California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968).

[12] Douglas v. Alabama, 380 U.S. 415 (1965). *See also* Roberts v. Russell, 392 U.S. 293 (1968); Bruton v. United States, 391 U.S. 123 (1968); Brookhart v. Janis, 384 U.S. 1 (1966).

[13] California v. Green, 399 U.S. 149 (1970).

[14] The plurality consisted of Chief Justice Burger and Justices White, Stewart, and Blackmun. Mr. Justice Harlan concurred separately. Justices Black, Douglas, Marshall, and Brennan dissented in an opinion by Mr. Justice Marshall.

sence of any cross-examination of the declarant, but still failed to provide a general theory concerning the requirements of the confrontation clause. The opinion did not mention whether the hearsay-declarant is still considered a witness within the meaning of the confrontation clause. Instead, Mr. Justice Stewart apparently concluded that cross-examination of the declarant is not required when the Court is satisfied that the hearsay is reliable and that the jury is likely to give the "proper" weight to the testimony.[15] If the plurality still believes that the declarant is a witness for purposes of the right to confrontation (they appear to accept this view since they unhesitatingly affirm the precedents),[16] the reliability approach is difficult to reconcile with the absolute command of the sixth amendment that the witness be confronted.

Mr. Justice Stewart apparently would consider the confrontation clause inapplicable whenever the testimony fulfilled certain pragmatic tests of reliability. The *Dutton* plurality believed that these tests were satisfied by a combination of several factors: (1) the statement contained no express assertion of fact and therefore was presumed to warn the jury about its inherent lack of evidentiary value; (2) Williams' knowledge of the crime and its participants had been so firmly established that the Court believed cross-examination could not have shown that he was not in a position to know whether Evans was involved in the murder; (3) in view of Williams' apparent involvement in the crime, his recollection was deemed beyond impeachment by cross-examination; and (4) the circumstances surrounding the statement were considered sufficient to show that Williams probably did not lie.[17] The effect of relying on such tests in *Dutton*, or in future cases, is to abrogate the unequivocal right to confrontation, and to make the right instead turn on the Court's view of the value of confrontation in a particular case.

One difficulty with the plurality's approach is the uncertainty it creates about where a right to confrontation still exists. If Mr. Justice Stewart's reasoning were followed to its logical conclusion, cross-examination of a witness who actually appeared at trial could be prohibited consistently with the Constitution if his testimony satisfied the *Dutton* tests. A less drastic application of the *Dutton* rationale, however, would limit it to exceptions to the hearsay rule,

---

[15] 400 U.S. at 89. Mr. Justice Stewart also mentioned that the challenged hearsay evidence was not "devastating" or "crucial." *Id.* at 87.

[16] *Id.* at 84-90.

[17] *Id.* at 88-89.

thus leaving intact the unqualified right to cross-examine witnesses who appear at trial. This latter reading would treat witnesses who appear at trial differently from witnesses who utter hearsay and do not appear at trial. This position is difficult to accept because it gives the explicit right to confrontation different meanings where different witnesses are concerned.

Another problem with the plurality approach lies in determining when testimony is reliable enough to make it unnecessary for the hearsay declarant to testify. The dissent makes an equally cogent argument for the value of cross-examining the declarant Williams.[18] If unreliability becomes a prerequisite to cross-examination, it is questionable whether the Court will be able to delineate worthwhile, clear guidelines necessary to make a determination of what is unreliable. Most likely, the meaning of the confrontation clause would become very subjective and vague.[19]

The plurality also mentioned that the jury would give minimum weight to Shaw's testimony since the statement attributed to Williams contained "no express assertion about past fact."[20] This reasoning apparently implies that imprecise hearsay is less in need of cross-examination than clear and unequivocal statements. The opposite position, however, is equally persuasive because vague testimony is just the type which should be clarified by cross-examining the declarant.[21] Moreover, in view of the reasoning in *Bruton v. United States*[22] — holding that the judge's instructions to ignore an inadmissible confession of a codefendant did not provide sufficient protection to the other defendant — it is questionable whether the Court should rely on such simplistic assumptions about how the jury reacts to the testimony.[23]

---

[18] *Id.* at 103-04.

[19] From a psychological perspective, the Court's ability to ascertain the reliability of evidence is extremely questionable. *See generally* Marshall, *The Evidence*, 2 PSYCHOL. TODAY, Feb. 1969, at 48. Because the Court typically relies upon its own subjective notions of human behavior rather than upon empirical studies, its assessments of reliability would probably be worthless. A thorough discussion of the requirements for studying human behavior is made in E. NAGEL, THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION (1961).

[20] 400 U.S. at 88.

[21] Without stating its position in quite this way, the dissent argued that the vagueness of Williams' alleged statement could have been alleviated by cross-examining him. *Id.* at 103-04.

[22] 391 U.S. 123 (1968).

[23] Just as the Court's assessment of reliability is likely to be subjective, its traditional reliance on unscientific notions of human behavior would also inhibit an accurate appraisal of jury behavior. *See* note 19 *supra.*

Nevertheless, the plurality argued that cross-examination is unnecessary because the jury would not give undue weight to Williams' testimony. Reliable evidence should have a great impact on the jury,[24] and according to the above reasoning should be subject to full cross-examination. But Mr. Justice Stewart concluded just the opposite: that reliable evidence is actually less in need of cross-examination. Thus, the plurality does an abrupt about-face and adopts directly contrary positions. First, the slight impact of the testimony is claimed to reduce the need for cross-examination. Yet in the very next moment the need for cross-examination of the most persuasive testimony is completely ignored.

The opinion of the plurality clearly has left several important questions unanswered, and the situation is even further complicated by the lack of a majority opinion. Mr. Justice Harlan's concurring opinion takes a novel tack and states that confrontation pertains solely to the procedure followed in introducing evidence. By this view, cross-examination of *infrajudicial* evidence is all that is guaranteed by the sixth amendment, and consequently cross-examination of Shaw's infrajudicial statements was the sole mandate of the right to confrontation.[25] Mr. Justice Harlan does believe, however, that the introduction of hearsay is controlled by the general requirements of the due process clauses of the fifth and 14th amendments. In testing Shaw's statement by the "standard" of due process, he concludes that it is admissible because "a person weighing the necessity for hearsay evidence of [this] type . . . against the danger that a jury will give it undue credit might reasonably conclude that admission of the evidence would increase the likelihood of just determinations of truth."[26] This view of the constitutional restriction on hearsay suffers from vagueness similar to that of the plurality. It would be difficult, if not impossible, to predict the position any of these five Justices will take in new evaluations of exceptions to the hearsay rule.

Although the plurality purports to find no fault with earlier confrontation cases, the holdings of several of them are definitely threatened by *Dutton*. In *Douglas v. Alabama*,[27] the prosecutor read an

---

[24] Because the plurality assumes that vague, imprecise statements are not weighed heavily by the jury, it seems it would conversely agree that a very reliable statement has a great impact. This premise is meant only as a reflection of the plurality's internal logic, not as a scientific assessment of human behavior.

[25] 400 U.S. at 94-95.

[26] *Id.* at 99.

[27] 380 U.S. 415 (1965).

inculpating statement that he claimed was the confession of another principal. Although three police officers testified and were cross-examined about whether the confession was indeed made by the alleged principal, the Court held that only cross-examination of the declarant would satisfy the confrontation clause. In *Dutton*, the sole source of the hearsay was a fellow inmate of the declarant. The plurality tries to distinguish *Douglas* by saying the prosecutor misbehaved when he read the alleged confession;[28] but the distinction is tenuous. *Douglas* turned on the failure to cross-examine the declarant himself,[29] not on the fact that the prosecutor was a quasi-witness. Because the police who testified and were cross-examined in *Douglas* fulfilled the same function as did Shaw in the *Dutton* case, there is no meaningful difference between the two cases.

Brookhart v. Janis[30] also seems at odds with *Dutton*. *Brookhart* explicitly held that the admission of a codefendant's inculpating confession was violative of the right to confrontation if the codefendant was not present at the trial. A paper transcript was used by the state in *Brookhart*, and the plurality used this fact to distinguish it from *Dutton*.[31] The use of a paper transcript is indeed relevant to confrontation because of the consequent inability to observe the declarant's demeanor. In light of subsequent cases, however, *Brookhart* must be read as having been based principally on the denial of cross-examination of the declarant, rather than on the use of a paper transcript.[32] Looking only at the denial of cross-examination, *Brookhart* is squarely contrary to *Dutton*. Only if Williams had been cross-examined would the *Brookhart* rule have been satisfied. In any case, the declarant's demeanor was completely lost in *Dutton*, as well as in *Brookhart*. Consequently, the claimed distinction of a paper transcript is meaningless.

Dutton also poses a threat to the case of *Barber v. Page*.[33] According to *Barber*, a witness's testimony at a preliminary hearing

---

[28] 400 U.S. at 87.

[29] 380 U.S. at 419.

[30] 384 U.S. 1 (1966).

[31] 400 U.S. at 87. The plurality also mentions that *Brookhart* involved a wholesale denial of cross-examination in addition to the admission of the confession, implying that this fact distinguished *Brookhart* from *Dutton*. *Id.* But *Brookhart* explicitly held that the introduction of the codefendant's confession was, by itself, a violation of the right to confrontation. 384 U.S. at 4.

[32] *See, e.g.*, California v. Green, 399 U.S. 149, 188 (1970) (Harlan, J., concurring).

[33] 390 U.S. 719 (1968).