

Appellate Court Decisions - Week of 1/2/13

Note: Anything that has "OVERVIEW" in front of it is the Lexis summary of a case.

First Appellate District of Ohio

Supreme Court of Ohio

Reconsideration of *State v. Hood*, Slip Opinion No. 2012-Ohio-6208

Evidence: Criminal Law: Confrontation Clause: Admission of Cell Phone Records

Cell phone records, if properly authenticated, are business records and are not testimonial under *Crawford v. Washington*.

Lack of authentication of records, not their hearsay nature, makes admission of records unconstitutional under Confrontation Clause.

Authentication may be provided only by custodian or other witness who is qualified to testify that records were kept in ordinary course of regularly conducted business.

Error in admission of evidence is harmless when other evidence of guilt is overwhelming.

The state of Ohio asked the Ohio Supreme Court to reconsider not the judgment in this case, but some portions of the opinion. The state's motion centered around the statement in the original opinion, "A hearsay violation itself violates the Confrontation Clause, and thus requires a heightened harmless-error analysis." *State v. Hood*, Slip Opinion 2012-Ohio-5559. The Court agreed that the statement was overbroad and modified the opinion "to clarify that it is not the hearsay nature of the cell-phone records at issue that made their admission constitutional error. Instead, it was their lack of authentication as business records that made their admission unconstitutional under the Confrontation Clause, because without that authentication, the records cannot be considered nontestimonial. We do not agree with the state that the trial court's error in admitting the unauthenticated records was not constitutional error."

Here is the summary of the original opinion from the week of 12/3/12:

James Hood was charged with murder and multiple counts of aggravated burglary, aggravated robbery, and kidnapping for allegedly breaking into a home with three other men and robbing nearly a dozen people. One of the co-conspirators, Samuel Peet, was shot dead during the course of the robbery. During Hood's trial, the state introduced cell-phone records it argued

showed Hood's communication with his co-conspirators and his whereabouts during the early morning in question. The issue on appeal is whether the introduction of that evidence violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.

The Supreme Court described the prosecution's attempt to use the cell phone records on page 6, paragraph 17 as follows: "When the prosecution first attempted to use cell-phone records in its direct examination of [Kareem] Hill [one of the co-conspirators], the defense objected, claiming that the records lacked verification or certification of their authenticity. The prosecution argued that the records fell under the business-records exception to the hearsay rule and that Hill could verify the records based on his own knowledge. The court determined that the prosecution could use the records to have Hill testify as long as another witness would authenticate the records. The prosecutor stated that Detective Carlin, who subpoenaed the records, would testify as to how she obtained them. The defense argued that Detective Carlin could not authenticate business records of another entity and entered a continuing objection on the record."

The defense used the phone records to impeach Hill's story on cross examination, then renewed its objection to the records after the state said it would use Detective Carlin's partner, Detective Veverka, to verify the records. The trial court stated, "I've done the case law research on it and my gut reaction is to subpoena Verizon on that basis. I guess Veverka would just have to come in and say that he issued it, how he's familiar with the business records of the company. That would be the testimony that would be proper."

Detective Veverka then testified that the records were obtained through subpoena and that he experience using cell-phone records in investigations. The defense cross-examined Veverka and essentially got him to admit that he was not an expert on cell phone records and cell phone technology, but the records were nevertheless admitted into evidence. The defense objected, stating "that the records had not been verified as a business record, had not been identified by any phone company, and contained the detectives personal notes, and that the alleged subpoenas were not in the record." The objection was overruled. At the end of the trial, Hood was convicted of one count of murder, nine counts of kidnapping, nine counts of aggravated robbery, and one count of aggravated burglary, as well as two firearm specification for each count, which were merged for sentencing purposes into a single specification. Hood was sentenced to an aggregate term of 21 years to life.

Hood appealed his convictions to the Eighth District Court of Appeals, arguing that it was error for the trial court to admit the cell phone records in violation of the Confrontation Clause. The appellate court held that even assuming it was error to admit the records, it was harmless error that did not contribute to Hood's conviction.

Hood then appealed to the Ohio Supreme Court on the following proposition of law: "Cell phone records are not admissible as business records without proper authentication. The admission of unauthenticated cell phone records under the business records exception violates the Confrontation Clause of the Sixth Amendment to the United States Constitution."

The Supreme Court of Ohio in its decision first determined that cell phone records are generally business records not prepared for litigation and therefore not testimonial, so the Confrontation Clause does not affect their admissibility. However, cell phone records can be barred from admission into evidence under the hearsay rule (803(6)). In this case, the Supreme Court ruled that no foundation was laid by a custodian of the record or any other qualified witness because Detective Veverka was not a custodian of the records. The records in this case also lacked a certification or affidavit authenticating them. Therefore, the records in this case were hearsay offered to prove that cell phone contact had occurred between co-conspirators up to the time of the crime and immediately afterward, and should not have been admitted.

A hearsay violation violates the Confrontation Clause and requires a heightened harmless error analysis – in other words, harmless beyond a reasonable doubt. Here, The Supreme Court of Ohio held that the admission of the cell phone records was harmless beyond a reasonable doubt because the evidence of Hood's guilty was overwhelming. The Court concluded that the records were of minimal probative value and merely cumulative in effect.

Sixth Circuit Court of Appeals

Attorney Questions

Nothing New