IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JON PAUL DESROSIERS, *Appellant*.

No. 1 CA-CR 16-0287
FILED 6-6-2017

Appeal from the Superior Court in Mohave County
No. S8015CR201400280
The Honorable Steven F. Conn, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael T. O'Toole
Counsel for Appellee

Rideout Law PLLC, Lake Havasu City
By Wendy Marcus
Counsel for Appellant

MEMORANDUM DECISION

Judge Patricia A. Orozco[1] delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Donn Kessler joined.

O R O Z C O, Judge:

¶1 Jon Paul Desrosiers appeals his convictions and probation grants for possession of dangerous drugs and possession of drug paraphernalia. On appeal, he challenges the partial denial of his motion to suppress and the admission at trial of expert drug analysis testimony. Because Desrosiers has shown no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Police conducted surveillance of Desrosiers's residence in Bullhead City. They observed Desrosiers looking in both directions before retrieving a backpack from his black Ford Mustang and entering his residence. John Haltom, an individual with an outstanding federal arrest warrant and the subject of the surveillance, exited the residence with what appeared to be the same backpack and put it in his silver Ford Mustang.

¶3 Once the officers confirmed the identity of Haltom, they arrested him. Before the arrest, officers observed Desrosiers walk across the street to an unoccupied house and, after a search, located him hiding in the attic crawl space. When Desrosiers finally obeyed police commands to come down from the attic, he was nervous, dirty, covered in dirt and insulation, and sweating profusely. Desrosiers told police "he was there looking for a girl who used to live in the attic."

[1] The Honorable Patricia A. Orozco, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

¶4 Police obtained a search warrant and seized 111.3 grams of methamphetamine, a digital scale, and plastic bags from the backpack in Haltom's silver Mustang, 17.3 grams of methamphetamine in a jewelry box top located in a drawer in the master bedroom that also contained Desrosiers's paperwork, and a methamphetamine pipe on the couch in the living room.

¶5 Haltom testified for the defense that he was in prison on drug charges arising from this incident, had two prior felonies for possession of drugs for sale, and the methamphetamine found in the backpack and in the master bedroom, as well as the drug pipes found in the backpack and the living room, belonged to him. He testified he had intended to sell the four ounces of methamphetamine in the backpack.

¶6 The jury convicted Desrosiers of possession of dangerous drugs as a lesser-included offense of the charged crime of possession of dangerous drugs for sale, and possession of drug paraphernalia involving methamphetamine. The court suspended sentence and imposed two concurrent three-year probation terms. Desrosiers filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

DISCUSSION

A. Denial of Motion to Suppress

¶7 Desrosiers argues the superior court abused its discretion in denying his motion to suppress evidence seized in execution of a search warrant on his residence, because probable cause for the warrant was based on the discovery of contraband in an earlier illegal protective sweep. This court reviews a ruling on a motion to suppress for abuse of discretion. *State v. Butler*, 232 Ariz. 84, 87, ¶ 8 (2013).

¶8 Desrosiers's argument fails because the state conceded before the suppression hearing that the protective sweep was illegal, and the superior court followed the proper procedure for determining the validity of a search based on a warrant that includes illegally obtained information: It "excise[d] the illegally obtained information from the affidavit and then

determine[d] whether the remaining information [was] sufficient to establish probable cause." *State v. Gulbrandson*, 184 Ariz. 46, 58 (1995).[2]

¶9 The superior court did not abuse its discretion in concluding that the remaining information in the affidavit supplied sufficient probable cause to search the residence. In determining whether probable cause exists to issue a search warrant,

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983); *see also State v. Buccini*, 167 Ariz. 550, 556 (1991). "[T]he duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Gates*, 462 U.S. at 238 (internal punctuation and citation omitted). In reviewing the denial of a motion to suppress, we consider only the evidence submitted at the suppression hearing and view the facts in the light most favorable to upholding the trial court's ruling. *State v. Blackmore*, 186 Ariz. 630, 631 (1996); *State v. Box*, 205 Ariz. 492, 493, ¶ 2 (App. 2003).

¶10 The avowals in the affidavit supporting the warrant, after excision of the information obtained during the improper protective sweep, included the following: 1) The Lake Havasu City Police Department suspected "large quantities of methamphetamine" were possibly being picked up at Derosiers's residence; 2) John Haltom, who had an outstanding federal warrant for his arrest, was believed to be at Derosiers's residence; 3) During surveillance of Derosiers's residence, the date of

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[2] The state must also show "that information gained from the illegal entry did not affect the officer's decision to seek the warrant or the magistrate's decision to grant it." *Gulbrandson*, 184 Ariz. at 58. The officer testified that he would have sought a search warrant even if contraband had not been observed in the protective sweep. The reviewing court could also have reasonably found that the discovery of the glass pipe with burnt residue located on the couch during the protective sweep did not affect the magistrate's decision to issue the search warrant.

application for the search warrant, Haltom was observed bringing a bag from the residence and placing it in a silver Ford Mustang he was known to drive; 4) In a search of Haltom incident to his arrest on the outstanding warrant, police found a usable quantity of heroin; 5) While police were taking Haltom into custody, another officer searched a female exiting Desrosiers's residence, and found drug paraphernalia; and 6) Desrosiers left the scene as the officers approached, and was later found hiding in the attic of the house across the street. The superior court found that these avowals, when viewed in light of the officer's expert opinion in the affidavit that persons who use illegal drugs will maintain a quantity of drugs for their own use in their vehicles and residence, as well as paraphernalia to contain their supply, supported probable cause to believe that drugs and paraphernalia would be found in Desrosiers's residence and in Haltom's silver Ford Mustang.[3]

¶11 Because drugs and drug paraphernalia were found on two people exiting the residence, the owner of the residence hid from police, and there was information that drugs were being sold from the residence, there was more than sufficient probable cause to search the house. *See, e.g.*, *State v. Smith*, 112 Ariz. 531, 535-37 (1975) (concluding probable cause existed to search trailer defendant had just exited, after finding him in possession of narcotic drugs, drug paraphernalia, and a large quantity of currency, coupled with his attempt to avoid arrest); *State v. Aguilar*, 228 Ariz. 401, 403, ¶ 15 (App. 2011) (concluding probable cause existed to conduct warrantless search of motel room based on discovery of drugs on persons associated with the room and information from motel manager that drug sales were taking place in the room). The court did not abuse its discretion in concluding that probable cause existed to search the residence.

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[3] The court found that the affidavit supplied insufficient probable cause, however, to search Desrosiers's black Mustang parked on the street.

B. Expert Testimony

¶12 Desrosiers argues that the superior court erred, violating his confrontation rights, by allowing an expert to testify on the nature of the drugs seized based on tests performed by another expert who was no longer at the laboratory.

¶13 After hearing testimony before trial from a criminalist at the Department of Public Safety Western Regional Crime Laboratory, the court ruled that the criminalist could testify, in setting forth her conclusion, by relying on the content of handwritten notes made by a former criminalist at the laboratory, and opine on the nature of the drugs seized based on those notes and the results of testing she did not perform. The superior court found the expert's testimony in this case was analogous to that in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), in which a plurality of the Supreme Court found that expert testimony that DNA matched the DNA profile developed by a non-testifying expert did not violate the Confrontation Clause. *See id* at 2228.

¶14 Although we ordinarily review evidentiary rulings for abuse of discretion, we review evidentiary rulings that implicate a defendant's constitutional rights de novo. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42 (2006).

¶15 A defendant's confrontation rights are not violated by the testimony of an expert who offers an independent opinion in reliance on facts and data obtained by a non-testifying expert, if such facts and data are reasonably relied upon by experts in the field. *See, e.g.*, *State v. Joseph*, 230 Ariz. 296, 298-99, ¶¶ 7-13 (2012) (holding that medical examiner's testimony on victim's injuries and cause of death based on facts and photographs contained in autopsy report prepared by another did not violate Confrontation Clause); *State ex rel. Montgomery v. Karp*, 236 Ariz. 120, 123-25, ¶¶ 9-19 (App. 2014) (holding that criminalist's testimony on defendant's blood alcohol content based on facts and data obtained by non-testifying criminalist did not violate Confrontation Clause).

¶16 The basis for this rule is that "facts or data underlying the testifying expert's opinion are admissible for the limited purpose of showing the basis of the opinion, not to prove the truth of the matter asserted." *See State v. Smith*, 215 Ariz. 221, 229, ¶ 26 (2007) (holding that neither confrontation rights nor hearsay rules were violated by medical examiner's testimony on an autopsy he did not perform); *see also* Ariz. R. Evid. 703. "Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are

not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Williams*, 132 S. Ct. at 2227-28 (plurality opinion) (holding that expert testimony that DNA profile produced by outside laboratory from semen found on victim's vaginal swabs matched defendant's DNA profile did not violate Confrontation Clause); *but cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308-311 (2009) (holding that admission into evidence of "certificates of analysis" reporting the weight and nature of the illegal substances absent testimony from the analyst violated the Confrontation Clause); *Bullcoming v. New Mexico*, 564 U.S. 647, 651, 662 (2011) (holding that testimony of expert, who "had neither participated in nor observed the test" on a blood sample, relaying the opinion of a non-testifying expert as to defendant's blood alcohol concentration violated the Confrontation Clause). "In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and determine whether that opinion should be found credible." *Karp*, 236 Ariz. at 124, ¶ 14.

¶17 At trial, the criminalist explained she was assigned to the case as a technical reviewer, meaning she "look[ed] at the typed report to verify that the work that was done is accurately recorded on th[e] report." The technical review includes reviewing the analyst's handwritten notes and the generated chromatograms for accuracy. For this case, the criminalist testified she had reviewed the handwritten notes of the non-testifying expert and the printout of the results of the gas chromatography/mass spectrometry (GCMS) and concluded that the crystal substance weighing 111.3 grams found in the backpack in Haltom's Mustang, and the crystal substance weighing 17.3 grams found in the jewelry box top in the master bedroom contained methamphetamine.[4] The state did not offer, and the court did not admit into evidence, either the handwritten notes or the report from the non-testifying expert as exhibits, and the criminalist did not testify

[4] Assuming without deciding the expert's testimony included improper opinion about the weight of the substance seized, in light of the jury acquitting Derosiers of the possession for sale count, it cannot be inferred that the jury made improper use of the weight testimony and any error is harmless. *See State v. LeBlanc*, 186 Ariz. 437, 439 (1996) ("[Jurors] possess both common sense and a strong desire to properly perform their duties."); *see also State v. Barger*, 167 Ariz. 563, 567 (App. 1990) (explaining that because the jury acquitted the defendant of one aggravated assault charge, even if defendant's statement relevant to a justification defense was erroneously excluded, the error is moot as to that charge).

about opinions held by the non-testifying expert. Rather, of particular significance, the criminalist offered her independent opinion in reliance on the facts and data obtained by the non-testifying expert. Such testimony did not violate either the Confrontation Clause or the rules against hearsay. *See Joseph*, 230 Ariz. at 298-99, ¶¶ 7-13; *Karp*, 236 Ariz. at 123-25, ¶¶ 9-19; *cf. Williams*, 132 S. Ct. at 2228.

CONCLUSION

¶18 For the foregoing reasons, we affirm Desrosiers's convictions and probation grants.

AMY M. WOOD • Clerk of the Court
FILED: AA