

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL E. McDANIEL,

Defendant-Appellant.

UNPUBLISHED
December 3, 2002

No. 234028
Wayne Circuit Court
LC No. 00-000613

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

FITZGERALD, P.J., (*dissenting.*)

I strongly dissent from the majority's conclusion that the crime lab report was admissible under MRE 803(8) as a public record.

Defendant asserts that the admission of the crime lab report into evidence under the public records hearsay exception in MRE 803(8) was improper and that the improperly admitted hearsay evidence presents its own confrontation problem. I agree.

In this case, the chemist who conducted the analysis of the foil pack recovered from defendant was a Detroit police officer and an endorsed witness. However, he retired from the police department and apparently "didn't want to come down and testify."¹ The trial court therefore allowed the chemist's report into evidence under MRE 803(8).

The threshold question in examining whether a defendant's right to confrontation is violated by the admission of hearsay evidence is whether that evidence is admissible under the rules of evidence. If the evidence does not fit within a recognized hearsay exception, it must be excluded. MRE 802. I would hold that the lab report does not fit within the public records hearsay exception.

The parties do not dispute that the crime lab report in this case is hearsay. As a general rule, hearsay is not admissible evidence. MRE 802. However, there are numerous exceptions to

¹ The prosecutor told the court that after learning that the police chemist would not testify, he asked the laboratory to reanalyze the evidence but was told that because of the very small quantity of the substance, there might not be enough left to reanalyze. There is no indication in the record of an attempt at reanalysis.

the hearsay rule, one being the business records exception in MRE 803(8). MRE 803(8) provides that although hearsay, the following are not necessarily inadmissible:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.264; MSA 9.2324.

The question of whether crime lab reports that incriminate a criminal defendant fall within the public records exception of MRE 803(8) is an issue of first impression in Michigan. The majority relies on *People v Stacy*, 193 Mich App 19; 484 NW2d 675 (1992), in which this Court analyzed the rule's language excluding observations by police officers and other law enforcement personnel and concluded that the exclusion was intended to apply only to observations made by law enforcement officials at the scene of the crime while investigating a crime, and not to reports of routine matters made in nonadversarial settings. *Id.* at 33. The panel in *Stacy* further held that a defendant's confrontation rights are not infringed by the admission of a report under this rule because "the public records exception to the hearsay rule is among the 'safest' of such exceptions in terms of reliability," and that, therefore, "no independent inquiry into reliability is required for confrontation clause purposes when MRE 803(8) is satisfied."

However, I believe that there is a fundamental underlying tension between the fact that crime lab reports may be records of a public agency and the fact that they are also records prepared in anticipation of litigation. Records prepared in anticipation of litigation traditionally have been deemed outside the reach of the public and business records exception. *Palmer v Hoffman*, 318 US 109, 113-14; 63 S Ct 477; 87 L Ed 2d 645 (1943). Although public records generally bear adequate indicia of reliability, laboratory reports prepared in anticipation of trial may not. There can be little question that when police crime labs generate reports like the one at issue here they are acting as an arm of the state in assisting it to prevail in litigation and secure a conviction of the defendant. Police crime labs exist in large part to facilitate the investigation and prosecution of crimes. In a drug case, the laboratory test results regarding the identity of the substance and the quantity of the substance go to an element of the crime that must be proven beyond a reasonable doubt. The admission of the report without the presence of its author denied the defendant the opportunity to examine the chemist, to observe the witness at trial, and to cast doubt on the accuracy of the report. Accordingly, I would conclude that police crime lab reports prepared for a defendant's prosecution are not admissible as public records under MRE 803(8).

To allow the admission of such an evaluative report under the public records hearsay exception could constitute a momentous declaration. Indeed, once an evaluative report such as this is deemed to constitute a public record under MRE 803(8), a mere custodian of the report, who knows nothing about the science underlying the report, is sufficient to lay the necessary foundation for admission of the report. Once that door is opened, the specter of the prosecution submitting its case by means of unchallenged documentary evidence appears, and confrontation principles are compromised. Indeed, admitting a crime lab report without subjecting the chemist

a trial is even necessary if the prosecution can simply submit reports, the authors of which are not subject to cross-examination, to establish the elements of a crime.

/s/ E. Thomas Fitzgerald