NO. COA09-1052

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v. Lenoir County
Nos. 08 CRS 2061, 51336-37

CHRISTOPHER LAMONT WILLIAMS

Appeal by Defendant from judgment entered 5 March 2009 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 27 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Daniel Hirschman, for the State.

John T. Hall, for Defendant.

BEASLEY, Judge.

On appeal, Defendant argues that the trial court erred by admitting the lab report analysis of a non-testifying witness. Because the admission of the lab results violated Defendant's right of confrontation, we reverse and hold that Defendant is entitled to a new trial in part and find no error in part.

On 11 April 2008, Officer Chad Rouse of the Kinston Department of Public Safety was in his vehicle patrolling Fields Street in Lenoir County, North Carolina. While driving east along Fields Street, Rouse noticed a woman standing by the curb waving her arms, attempting to get his attention. Rouse drove to where the woman

was standing, rolled down his window, and asked the woman if she needed help. Due to an apparent speech impediment, the woman had difficulty communicating with Rouse. However, because the woman repeatedly pointed to a "no trespassing sign" and a man wearing a striped shirt walking down the street, Rouse decided to investigate further.

Rouse parked his car, got out, and began to approach Defendant, Christopher Lamont Williams. Once Defendant became aware of Rouse's approach, he began slowly backing away. When Rouse was approximately four feet away, Defendant turned, pulled out a pistol, and began to run. Rouse drew his weapon and began to chase the fleeing Defendant, radioing for assistance while he ran.

Defendant discarded the pistol while running from Rouse. As the chase continued, Defendant discarded the "multicolored golf shirt" he was wearing and a clear plastic bag that he pulled from his pocket. Once several other officers arrived to assist with Defendant's capture, Rouse went back to collect the items discarded by Defendant during the chase. Defendant was later apprehended by several of the officers that arrived to help Rouse.

Following his arrest, Defendant was indicted with charges of possession of marijuana, resisting a public officer, habitual felon status, and possession of a firearm by a felon. Following a trial on 5 March 2009, Defendant was found guilty of the crimes for which he was indicted. Defendant appeals his conviction arguing that the trial court erred by: (I) admitting hearsay statements about a chemical analysis by a non-testifying witness; (II) allowing the

State to publish to the jury, a portion of Defendant's prior criminal record; and (III) denying his motion to dismiss made at the close of all the evidence.

I.

Following his chase of Defendant, Rouse collected a clear plastic bag containing a green leafy substance that had been discarded by Defendant. After testing the substance at the State Bureau of Investigation, it was determined that the bag contained marijuana. However, the lab technician that conducted the analysis did not testify at trial. Defendant contends that the trial court erred by admitting the lab report results into evidence without the testimony of the lab technician that conducted the analysis. We agree.

"Under the Confrontation Clause of the Sixth Amendment to the United States Constitution, an accused is guaranteed the right to be confronted with his adverse witnesses." *State v. Ward*, 354 N.C. 231, 260, 555 S.E.2d 251, 269 (2001) (citation omitted). Generally, our Court's determination "of whether [a] defendant's Sixth Amendment right of confrontation was violated is three-fold: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004) (citing *Crawford v. Washington*, 541 U.S. 36, __, 158 L. Ed. 2d 177, 203 (2004)). *Crawford* provided several examples of "testimonial" evidence, including

"extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[.]" *Crawford,* 541 U.S. at 51-52, 158 L. Ed. 2d at 184 (citation and quotations omitted). Recently, in *Melendez-Diaz v. Massachusetts*, the United States Supreme Court held that "certificates of analysis" showing that a seized substance was illegal contraband was testimonial evidence. __ U.S. __, __, 174 L. Ed. 2d 314, 321 (2009). The Supreme Court reasoned that

> under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with" the analysts at trial.

Id. at __, 174 L. Ed. 2d at 321-22 (citation omitted).

Applying the United States Supreme Court's reasoning in *Melendez-Diaz*, our Supreme Court determined that the introduction of evidence of forensic analyses introduced by the State violated a defendant's right to confrontation. *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 305 (2009). There, the trial court admitted the analyses of a forensic pathologist and a forensic dentist who did not testify at trial. *Id.* The Supreme Court of North Carolina reasoned that because "[t]he State failed to show that either witness was unavailable to testify or that defendant had been given a prior opportunity to cross-examine them[,]" the defendant's right to confront the witnesses against him was violated. *Id.*

Preliminarily, we note that Defendant's trial concluded in March 2009. *Melendez-Diaz* was not decided until 25 June 2009. However, despite being decided after Defendant's case was finalized, the Supreme Court's reasoning in *Melendez-Diaz* is applicable in the instant case.

> [W]hen a decision of [the Supreme] Court merely . . . [applies] settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

United States v. Johnson, 457 U.S. 537, 549, 73 L. Ed. 2d 202, 213 (1982) (citations omitted).

The Supreme Court's decision in *Melendez-Diaz* was not a new rule and was based on the principles set forth in C*rawford*. *See Melendez-Diaz*, __ U.S. at __, 174 L. Ed. 2d at 321-22; *see also*, *Teague v. Lane*, 489 U.S. 288, 301, 103 L. Ed. 2d 334, 349 (1989) ("In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."). Because the Supreme Court's decision in *Melendez-Diaz* is based on an old rule, the Court's reasoning is applicable to the instant case.

Here, the trial court's decision to admit the State Bureau of Investigation lab report was erroneous. Relying on the lab report, Officer Rouse testified that the discarded bag contained "marijuana, Schedule IV, weight 4.6 grams." At no point during the trial did the lab technician that analyzed the seized substance

testify. Moreover, the State offered no evidence that the lab technician was unavailable to testify or that Defendant had a prior opportunity to cross-examine the lab technician.

In light of the Supreme Court's decision in *Melendez-Diaz*, we hold that the trial court's decision to admit the evidence from the State Bureau of Investigation lab report was erroneous. Furthermore, because the only competent evidence identifying the substance as marijuana was inadmissible, "it is possible that the jury could have reached a different conclusion regarding the guilt of [D]efendant." *State v. Brewington*, __ N.C. App. __, __, 693 S.E.2d 182, 192 (2010). Without additional evidence, the State has failed to show that the admission of State Bureau of Investigation's lab report was "harmless beyond a reasonable doubt." *Id.* Accordingly, Defendant is entitled to a new trial on the charge of misdemeanor possession of marijuana up to one-half ounce. *See id.*

II.

Following an opening statement, the State sought to move its first exhibit into evidence. The State explained:

> Exhibit Number 1 is attached to the indictment. It's a certified copy of the indictment in 06 CRS 53980 charging Christopher Williams with the felony of possession of stolen goods. It's a certified copy of the transcript of plea and a certified copy of the judgment and commitment and [I] would ask that that document be admitted into evidence in this case.

The trial court overruled an objection by Defendant's counsel and allowed the document to be admitted into evidence. The trial court

cautioned the jury that "[y]ou are reminded that the defendant is not on trial for this offense. The only thing it establishes is that he does have a prior felony record." Later, at the close of the State's evidence, the trial court allowed the State to publish Exhibit 1 into evidence. On appeal, Defendant argues that the trial court erred by publishing to the jury the indictment of the case for which he was being tried. We disagree.

The North Carolina General Assembly has provided that "[a]t no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury." N.C. Gen. Stat. § 15A-1221(b) (2009). "The legislature apparently intended that jurors not be given a distorted view of the case before them by an initial exposure to the case through the stilted language of indictments and other pleadings." *State v. Leggett*, 305 N.C. 213, 218, 287 S.E.2d 832, 836 (1982). While the reading of indictments for the cases currently before the jury is impermissible, the statute allows publication of prior indictments during the sentencing proceedings. *State v. Flowers*, 347 N.C. 1, 36, 489 S.E.2d 391, 411 (1997). Our Supreme Court also noted that they have also found "no error in a case in which a prior indictment was read to the jury for the purpose of proving the existence of a prior felony." *Id.*

In this case, following a motion by the State, the trial court allowed the admission of the "document" into evidence. Later, at the close of the State's case, the trial court allowed Exhibit 1 to be published to the jury. At the close of evidence, the trial

court allowed the jury to view Exhibit 1. The indictments and information provided in Exhibit 1 pertain to prior indictments and were not prohibited by N.C. Gen. Stat. § 15A-1221(b). The trial court also provided a limiting instruction informing jurors that the indictment is admissible only as evidence of Defendant's prior felony record.

Accordingly, we hold that the trial court did not err by publishing evidence of Defendant's prior convictions to the jury.

III.

Finally, Defendant argues that because the trial court erroneously allowed jurors to view copies of Defendant's indictments, the State was unable to prove the charge of possession of a firearm by a convicted felon with competent evidence. We disagree.

As discussed above, the trial court's publication of Exhibit 1 to the jury was not erroneous. Prior indictments are a method by which the trial court can prove Defendant's prior convictions. N.C. Gen. Stat. § 15A-1340.14(f)(2) (2009). Therefore, jurors learned that Defendant was convicted of a prior felony by "[a]n original or copy of the court record of the prior conviction." *Id*. Accordingly, we find prejudicial error as to issue I and no error as to issues II and III.

Reversed and ordered new trial in part and no error in part.

Judges MCGEE and STEELMAN concur.

Report per Rule 30(e).