[Cite as *State v. Wynn*, 2009-Ohio-6744.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-04-120
	:	O P I N I O N
- vs -	:	12/21/2009
ANTHONY D. WYNN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-10-1909

Robin N. Piper, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

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BRESSLER, P.J.

{¶1} Defendant-appellant, Anthony D. Wynn, appeals his conviction and sentence in the Butler County Court of Common Pleas on two counts of trafficking in marijuana.

{¶2} On December 6 and 20, 2007, Detective Joe Buschelman of the West Chester Township Police Department arranged for confidential informants to make controlled buys of marijuana from Anthony Wynn. On both occasions, the informants purchased "green leafy vegetation" from Wynn and then turned the substance over to

Detective Buschelman, who, after looking at it and smelling it, "could tell" it was marijuana. Subsequent testing of the substance by the Ohio Bureau of Criminal Identification and Investigation ("BCI") confirmed it was marijuana.

{¶3} Wynn was indicted on two counts of trafficking in marijuana, both felonies of the fifth degree, in violation of R.C. 2925.03(A)(1). Following a jury trial, Wynn was convicted as charged and sentenced accordingly.

{¶4} Wynn now appeals, assigning the following as error:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AT TRIAL IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN ADMITTING TESTIMONIAL HEARSAY IN THE FORM OF AN UNAUTHENTICATED DRUG ANALYSIS REPORT, OVER THE OBJECTION OF APPELLANT, AND SAID ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT."

{¶6} Wynn argues the trial court erred by admitting into evidence an unauthenticated BCI drug analysis report stating that the substance allegedly purchased from him by the confidential informants was marijuana, because under *Melendez-Diaz v. Massachusetts* (2009), ___ U.S. ___, 129 S.Ct. 2527, the report was hearsay, and therefore its admission violated his constitutional right of confrontation. He further argues the trial court's error in admitting the report cannot be deemed to have been harmless beyond a reasonable doubt.

{¶7} The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, *Pointer v. Texas* (1965), 380 U.S. 400, 403-406, 85 S.Ct. 1065, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." See *Davis v. Washington* (2006), 547 U.S. 813, 821, 126 S.Ct. 2266. See, also, Section 10, Article I,

Ohio Constitution (in any trial, in any court, the accused shall be allowed to meet the witnesses face to face).

{¶8} In *Ohio v. Roberts* (1980), 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, the court held:

{¶9} "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

{¶10} However, the applicability of *Roberts* was substantially narrowed by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354. In *Crawford*, the United States Supreme Court held that the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford* described the "core class of testimonial statements" covered by the Confrontation Clause as including "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; *** extrajudicial statements *** contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, *** [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, ***." Id. at 51-52 (internal quotation marks and citations omitted).

{¶11} *Crawford* noted that "not all hearsay implicates the Sixth Amendment's core concerns," id. at 51, and indicated that "hearsay exceptions [that] covered

statements that by their nature [are] not testimonial—for example, business records or statements in furtherance of a conspiracy," do not implicate the Confrontation Clause. Id. at 56. However, *Crawford* found that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." Id. at 51. As a result, the *Crawford* court held:

{¶12} "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts* [448 U.S. 56]*,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." [Footnote omitted.] Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford* at 68.

{¶13} In *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840, paragraphs one and two of the syllabus, the court held that "[r]ecords of scientific tests are not 'testimonial' under *Crawford* ***[,]" and that "[a] criminal defendant's constitutional right to confrontation is not violated when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing." However, *Crager* was vacated and remanded for further consideration pursuant to *Melendez-Diaz*, 129 S.Ct. 2527. See *Crager v. Ohio* (2009), __ U.S. __, 129 S.Ct. 2856.

{¶14} In *Melendez-Diaz*, the United States Supreme Court held that forensic

analysts' "certificates of analysis" pertaining to drugs seized by police constituted affidavits that fell within the core class of testimonial statements covered by the Confrontation Clause and that the analysts were "witnesses" for purposes of the Sixth Amendment. Consequently, the court found that absent a showing that the analysts were unavailable to testify at trial *and* that the accused had a prior opportunity to cross-examine them, the accused was entitled to be confronted with the analysts at his trial. Id. at 2532.

{¶15} The *Melendez-Diaz* court also determined that (1) the certificates of analysis or affidavits were not removed from the operation of the Confrontation Clause on the theory they were akin to official and business records, id. at 2538; (2) the analysts who prepare such certificates or affidavits are not removed from the operation of the Confrontation Clause on the basis that they are not "accusatory" witnesses or conventional witnesses, or that their testimony consists of neutral, scientific testing, id. at 2534-2536; and (3) a defendant's ability to subpoena an analyst did not obviate the state's obligation to produce the analyst for cross-examination, id. at 2540.

{¶16} At Wynn's trial, which was held more than a year *after* the decision in *Crager* was issued but three months *before* the decision in *Melendez-Diaz* was issued, BCI forensic scientist Beverly Wiltshire testified that the tests she performed on the vegetation forming the basis of count one in the indictment revealed the substance was marijuana. Her lab report on the substance was admitted into evidence without objection. However, when the state asked Wiltshire to identify her co-worker's lab report on the vegetation that formed the basis of count two of the indictment, Wynn's defense counsel objected to Wiltshire being asked "about an examination, [sic] laboratory test that she did not perform." The trial court overruled the objection, finding that, under *Crager*, the second lab report fell within the business record exception to the hearsay

rule, and its admission did not violate Wynn's confrontational rights because the reports were nontestimonial.

{¶17} Relying on *Melendez-Diaz*, Wynn argues the trial court committed reversible error by refusing to exclude from evidence the second lab report. However, any error the trial court may have committed in admitting the second lab report was harmless beyond a reasonable doubt.

{¶18} In *Washington v. Recuenco* (2006), 548 U.S. 212, 218-219, 126 S.Ct. 2546, the court stated:

{¶19} "We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, '"most constitutional errors can be harmless."' *Neder v. United States,* 527 U.S. 1, 8, 119 S.Ct. 1827, *** (1999) (quoting *Arizona v. Fulminante,* 499 U.S. 279, 306, 111 S.Ct. 1246, *** [1991]). '"[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis."' 527 U.S., at 8, 119 S.Ct. 1827 (quoting *Rose v. Clark,* 478 U.S. 570, 579, 106 S.Ct. 3101, *** [1986]). Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal. [Footnote omitted.] In such cases, the error 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' *Neder, supra,* at 9, 119 S.Ct. 1827 (emphasis deleted)."

{¶20} This court has held that "even if 'evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless "beyond a reasonable doubt" if the remaining evidence alone comprises "overwhelming" proof of defendant's guilt.'" *State v. Harris*, Butler App. No. CA2007-11-280, 2008-Ohio-4504, ¶29, quoting *State v. Murphy*, Butler App. No. CA2007-03-073, 2008-Ohio-3382,

¶29, citing *State v. Williams* (1983), 6 Ohio St.3d 281, 290.

{¶21} In this case, even when the second lab report is excluded from consideration, the remaining evidence against Wynn comprised overwhelming proof of his guilt on the second count of the indictment. Id. In *State v. Baker* (Dec. 21, 2000), Fayette App. No. CA99-10-030, p. 3, this court stated:

{¶22} "Generally, it is impossible to ascertain the chemical composition of a substance by merely looking at it, much less by ingesting it. *** [M]ost substances, including crack cocaine, cannot be positively identified without analysis or testing. This is especially true with controlled substances comprised of white powdery material.

{¶23} "The recognized exception in controlled substance cases is marijuana. A police officer or other person can testify that a substance is marijuana from visual observation because '[m]arijuana, [is] not *** an extract or preparation difficult or impossible to characterize without chemical analysis [because it consists] of the dried leaves, stems and seeds of a plant which anyone reasonably familiar therewith should be able to identify by appearance ***." Id., quoting *State v. Maupin* (1975), 42 Ohio St.2d 473, 480. See, also, *State v. McKee*, 91 Ohio St.3d 292, 294-297, 2001-Ohio-41 (noting that *Maupin* was decided before the Rules of Evidence were adopted in this state, but holding that "the experience and knowledge of a drug user lay witness can establish his or her competence to express an opinion on the identity of a controlled substance if a foundation for this testimony is first established").

{¶24} At trial, Detective Buschelman identified the substances purchased from Wynn as marijuana based on his training, education, and experience. Detective Buschelman testified that he has extensive training in identifying marijuana and other drugs, that he has made "well over 3 or 400" marijuana arrests, and that he has come into contact with marijuana several times and assisted other officers who have come into

contact with marijuana. Detective Buschelman's testimony, alone, was sufficient to prove that the substance purchased from Wynn was marijuana.

{¶25} It should also be noted that, at his trial, Wynn never questioned that the substance that formed the basis of the charges against him was marijuana. Instead, his defense was based entirely on his claim that he was not the person who sold the marijuana to the state's confidential informants—a claim the jury clearly rejected.

{¶26} Furthermore, Wynn was charged with trafficking marijuana under R.C. 2925.03(A)(1), which required the state to prove that he knowingly sold or *offered* to sell marijuana. The crimes were complete when Wynn offered to sell the marijuana to the officers. See, generally, *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, ¶9 (person can be convicted of offering to sell a controlled substance without actually transferring a controlled substance to the buyer).

{¶27} Here, the state placed into evidence the recorded phone calls between Wynn and the confidential informants. Those recordings demonstrate that Wynn offered to sell marijuana to the confidential informants. This evidence alone was sufficient to convict Wynn of both charges.

{¶28} As to Wynn's claim that the second lab report was unauthenticated, this claim has been rendered moot in light of our finding that any error in the admission of the second lab report was harmless beyond a reasonable doubt.

{¶29} Wynn's sole assignment of error is overruled.

{¶30} Judgment affirmed.

YOUNG and RINGLAND, JJ., concur.