Rel\03\23\2007\Williams

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2006-2007

CR-05-1585

Carlos Raymond Williams

v.

State

Appeal from Montgomery Circuit Court
(CC-06-141)

McMillan, Judge.

AFFIRMED BY UNPUBLISHED MEMORANDUM.

Shaw and Wise, JJ., concur. Baschab, P.J., concurs in the result. Welch, J., dissents, with opinion.

WELCH, Judge, dissenting.

I believe that the majority has exceeded the scope of its authority by going outside the trial record to determine that the certificate of analysis prepared by the Alabama Department of Forensic Sciences ("DFS") that was admitted into evidence and seen by the jury was a properly signed and notarized document. Therefore, I must respectfully dissent.

Carlos Raymond Williams, the appellant, claims that the trial court erred in overruling his objection to the admission of Exhibit 2, the DFS certificate of analysis of the putative cocaine that served as the basis of Williams's prosecution. The putative cocaine was admitted into evidence as Exhibit 1.

The record shows that Williams objected to Exhibit 2 as follows:

> "Q. [BY THE PROSECUTOR, MR. DAVIDSON]: Let me show you what's been marked as State's Exhibit 2 for identification purposes, and ask if you -- if you recognize this?
>
> "A. [BY THE WITNESS, MONTGOMERY POLICE OFFICER BARTLETT]: I do.
>
> "Q.: And what is that?
>
> "A.: This is the receipt we get back from DFS. It gives us the results of the evidence that we submitted.

"Q.: Now, is there a number on that form?

"A.: There is.

"Q.: And what's that number?

"A.: 05MG02463.

"Q.: The same number that was on the drugs you submitted?

"A.: Correct.

"MR. DAVIDSON: Judge, we would move to offer Exhibit 2 into evidence.

"MR. BLEVINS [DEFENSE COUNSEL]: Objection; lack of proper predicate and conformity with statutory requirements.

"THE COURT: Overruled. Admitted.

"(State's Exhibit Number 2 was admitted into evidence.)

"Q.: Did that document evidence a result of testing on those drugs you submitted?

"A.: It does.

"Q.: And what was the result?

"MR. BLEVINS: Judge, if I could have a continuing objection on all the testimony based upon this document.

"THE COURT: You have a continuing objection. Overruled.

"A.: The Results of Analysis reads, 'Laboratory analysis of the solid material revealed the presence

> of cocaine base, a controlled substance. One – Weight in grams, 1.12 grams.'
>
> "MR. DAVIDSON: No further questions, Your Honor."

(R. 91-92.)

On appeal Williams argues that the "certificate of analysis introduced in lieu of testimony[] clearly shows that it is neither signed or notarized." (Williams's brief at p. 15.) Williams is correct. The index of exhibits in the trial record (R. 85) is followed by a page identifying Exhibit 1 as the putative cocaine (R. 86), a copy of Exhibit 2 (R. 87) and then the clerk's certificate of completion. (R. 88.) The record of the exhibits admitted at trial shows that Exhibit 2 consists of a single page, which is not signed or notarized.

In its unpublished memorandum, the majority states:

> "The record, however, does not support the appellant's argument and is, therefore, without merit. Although the forensic certificate of analysis to which the appellant refers, on page 87 of the clerk's record, does not include the second page of the document, the certificate of analysis can be found in its entirety on pages 16 and 17 of the clerk's record. This copy also includes the circuit judge's initials with a check mark indicating that he had seen the document, which had been attached to the State's motion of intent to offer proof by a certificate of analysis which was filed with the court. The document also indicates that the circuit judge forwarded a copy of this motion and document to defense counsel. Therefore,

> the circuit judge was aware of the legal propriety of the certificate."

The issue in this case is not whether the trial judge at some point saw the certificate of analysis. The issue is whether the certificate of analysis was properly admitted in the trial of this case before the jury. The jury could convict the defendant only if it was convinced beyond a reasonable doubt that the defendant possessed cocaine. The jury could be so convinced only if the state proved before the jury that the substance possessed by the defendant was in fact cocaine. To do this without expert testimony the State had to submit a certificate of analysis that met the statutory requirements of § 12-21-300, Ala. Code 1975.

An examination of the document found at pages 16 and 17 of the clerk's record is an attachment to the State's "Notice of Discovery to Defendant, Intent to Use Prior Convictions, Intent to Invoke Sentencing Enhancements, Intent to Offer Proof by a Certificate of Analysis, and Motion for Discovery by the State." (CR. 14-17.) The certificate of analysis on pages 16 and 17 of the clerk's record is not the actual document offered and admitted at trial. While it appears to be a copy of the DFS certificate of analysis sought to be used

in this case, it does not have the evidence identification sticker used to denominate the document that was actually admitted into evidence as Exhibit 2. While the certificate shown on pages 16 and 17 of the clerk's record did consist of two pages -- the second page of which is signed and notarized and thus properly admissible -- it is not the same piece of paper that was actually offered into evidence by the State as Exhibit 2. When considering whether an exhibit was properly admitted at trial, we can look only at the transcript of the trial and the exhibits offered at trial to determine the actual evidence that was offered and admitted. King v. Garrett, 613 So. 2d 1283, 1284 (Ala. 1993) ("If the record does not contain the matter or materials considered by the trial court, then this Court has no basis upon which to review the trial court's judgment.").

The record of the proceedings before the jury show that Exhibit 2 was a one-page document that was not signed or notarized. The document identified by the evidence identification sticker as Exhibit 2 was placed into the record of the trial following the index of exhibits. The fact that in another part of the record, the clerk's file, which does

not contain the trial proceedings, a complete copy of the DFS certificate of analysis can be found, but with no evidence identification sticker affixed thereto, does not allow an inference that Exhibit 2, as admitted, was a two-page document that was signed and notarized.

The State could have filed a motion to supplement the record if it believed that Exhibit 2 as admitted contained two pages and that the court reporter or clerk had misplaced or lost the second page of Exhibit 2. Rule 10(f), Ala. R. App. P. The trial court would then have held a hearing to determine whether the second page of the document had been omitted from Exhibit 2 at trial. This Court could have requested the original of the exhibit pursuant to Rule 13, Ala. R. App. P., and on its own initiative noted that the document denominated as Exhibit 2 was in fact a signed and notarized document. However, this Court is not authorized to look at a separate part of the record of the case, which contains documents the jury did not see during the trial of the defendant, and determine that the evidence admitted at the trial before the jury was in proper form. Nor can this Court determine that because a valid certificate of analysis did

exist, the fact that the valid certificate was not admitted into evidence before the jury does not matter.

Because the DFS certificate of analysis actually admitted at trial was not signed and notarized, it did not meet the statutory requirements of § 12-21-300, Ala. Code 1975. Accordingly, it could not properly be admitted as evidence in this case, and the trial court erred in overruling Williams's objection to that evidence at trial.

For the reasons set forth above, I would reverse the judgment of the trial court and remand this cause for a new trial. Therefore, I must respectfully dissent.