

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-185

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

Forsyth County  
Nos. 04 CRS 053548 - 053549

DANIEL PALESTINO

Appeal by defendant from judgments entered 7 July 2005 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 29 September 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M. Manthei, for the State.*

*David Childers, for defendant-appellant.*

TYSON, Judge.

Daniel Palestino ("defendant") appeals from judgment entered after a jury found him to be guilty of trafficking in marijuana, knowingly maintaining a place in violation of controlled substance act, trafficking in methamphetamine, and possession with intent to sell and deliver marijuana. We find no error.

#### I. Background

The State's evidence tended to show in February and March 2004 the Winston-Salem Police Department established surveillance of an apartment located at 4558 June Avenue, due to their suspicion that the apartment was being used as a "stash house" for illegal drugs.

Police observed defendant entering the apartment with a key on 27 February and 2 March 2004. On 19 March 2004, police approached defendant in the parking lot of the apartment building. Defendant produced a key to the apartment and told the officers that the last time he was in the apartment he observed a big bag of marijuana in the closet. Defendant possessed approximately \$4,000.00 in cash on his person. Police obtained consent to search the apartment from the lessee. Upon a search of the apartment, police found: (1) methamphetamine; (2) marijuana; (3) digital scales; (4) a fire safe containing \$7,520.00; (5) a plastic bag full of crack cocaine in the pocket of a white leather coat; (6) a bottle of acetone; and (7) receipts in defendant's name for gasoline and rental furniture.

At trial, North Carolina State Bureau of Investigation Special Agent Sheila Bayler ("Agent Bayler") was tendered and accepted as an expert in the field of chemistry specializing in the analysis of evidence to determine if material is a controlled substance. Over defendant's objection, Agent Bayler testified based upon notes and reports prepared by Agent Michael Gurdziel. She proffered her opinion that State's Exhibit 5 contained fifty-one-and-two-tenths pounds of marijuana and State's Exhibit 1 contained twenty-eight-and-two-tenths grams of amphetamine and methamphetamine.

A jury found defendant guilty of trafficking in marijuana, knowingly maintaining a place in violation of Controlled Substances Act, trafficking in methamphetamine, possession with intent to sell and deliver marijuana, and possession with intent to sell and deliver methamphetamine. The trial court consolidated the

convictions and sentenced defendant to consecutive sentences of thirty-five to forty-two months and seventy to eighty-four months imprisonment. Defendant appeals.

## II. Issue

Defendant's sole argument on appeal is the trial court violated his Sixth Amendment right to confront the witnesses against him by allowing Agent Bayler to testify regarding the results of the chemical analysis performed on evidence seized based upon field notes and test results of another agent.

Defendant's remaining assignments of error are not addressed in his brief to this Court and are deemed abandoned. N.C.R. App. P. 28(b)(6) (2006).

## III. *Crawford v. Washington*

Defendant relies on the decision of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), to support his contention that admission of Agent Bayler's testimony violated his Sixth Amendment guarantee to confront the witnesses against him. Defendant acknowledges this Court's decision in *State v. Delaney*, 171 N.C. App. 141, 613 S.E.2d 699 (2005).

In *Delaney*, a State Bureau of Investigation agent testified as an expert in the analysis of controlled substances and offered an opinion of the identity of substances taken from the defendant's property based upon testing conducted by a colleague who was not called to testify. 171 N.C. App. at 142, 613 S.E.2d at 700. This Court concluded that expert testimony based on analysis conducted by someone other than the testifying expert does not violate a

defendant's right to confrontation under *Crawford* rationale. *Id.* at 144, 613 S.E.2d at 701. We recognized, under well-settled law, that an expert may base an opinion on tests performed by others in the field and noted that the defendant in *Delaney* was allowed the opportunity to cross-examine the testifying agent regarding his opinions. 171 N.C. App. at 144, 613 S.E.2d at 701. Defendant, however, asserts that the "well-settled law" relied upon in its reasoning of *Delaney* is inconsistent with *Crawford* and Agent Bayler's testimony was inadmissible hearsay evidence.

We are bound by this Court's decision in *Delaney* and conclude that Agent Bayler's testimony about the results of analysis conducted by Agent Gurdziel is non-testimonial under *Crawford* and does not violate the Confrontation Clause. *Id.*; see *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137 (2006) (The defendant's right of confrontation under *Crawford* was not violated by admission of reports filed by a State Bureau of Investigation agent who did not testify at trial.). In *State v. Walker*, we held the testimony of an expert regarding a forensic firearms report conducted by another agent, and the admission of such a report, did not violate the defendant's right to confrontation. 170 N.C. App. 632, 635, 613 S.E.2d 330, 333, *disc. rev. denied*, 359 N.C. 856, 620 S.E.2d 196 (2005). This assignment of error is overruled.

#### IV. Conclusion

The trial court did not err in allowing Agent Bayler to testify and offer her opinion based upon tests performed by another agent where defendant was afforded the right to fully cross examine

Agent Bayler. Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued.

No Error.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).