IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-337

No. COA20-593

Filed 6 July 2021

Wake County, No. 18 CRS 223141

STATE OF NORTH CAROLINA

v.

IVAN SALAZAR

Appeal by Defendant from Judgments entered 30 January 2020 by Judge Andrew T. Heath in Wake County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Sharon L. Smith for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Ivan Salazar (Defendant) appeals from Judgments entered upon jury verdicts finding Defendant guilty of one count each of Possession with Intent to Sell or Distribute Marijuana (PWISD-Marijuana), Possession of Marijuana greater than 1.5

ounces, and Possession of Marijuana Paraphernalia. The Record before us tends to show the following:

¶ 2 Just before 3 a.m. on 15 December 2018, Officer John Boyd (Officer Boyd) of the Fuquay-Varina Police Department was driving on North Main Street while on traffic patrol. As Officer Boyd approached the intersection of North Main Street and Sunset Lake Road, he saw a "blue Mustang" stopped in the opposite traffic lane although the traffic light was green and other cars were passing by. Officer Boyd slowed his patrol car as he drove past the blue Mustang and noticed the driver appeared to be asleep. Officer Boyd then pulled behind the blue Mustang and activated his blue lights—the driver did not seem to respond. Officer Boyd exited his patrol car, approached the driver's window of the blue Mustang, and knocked on the window—the driver, again, did not initially respond. The driver, later identified as Defendant, "eventually woke up," and Officer Boyd "asked [Defendant] what he was doing." Officer Boyd "could smell the strong odor of marijuana emitting from the vehicle as well as alcohol."

¶ 3 Based on these facts, Officer Boyd determined there was "reasonable suspicion [Defendant] had been driving while he was impaired," and Officer Boyd asked Defendant to step out of the vehicle. Officer Boyd noticed Defendant's eyes were "red" and "glassy." Officer Boyd conducted field sobriety tests on Defendant, the results of which led Officer Boyd to continue to believe Defendant was impaired. Eventually,

during the course of the stop, Defendant admitted he had recently smoked marijuana. Officer Boyd then asked if there was anything "else in the car" Officer Boyd might find. Defendant initially said there was not, but Defendant then told Officer Boyd there were "roaches" in the vehicle. Officer Boyd understood "roaches" to mean the ends of marijuana "blunts" that still have some marijuana in them after being smoked.

¶ 4 Eventually, Officer Chad Williford (Officer Williford) of the Fuquay-Varina Police Department arrived on the scene as backup. After Officer Williford arrived, Officer Boyd searched Defendant's vehicle. During the search, Officer Boyd could still smell marijuana in the vehicle, and he found a black book bag in the front passenger's seat. While searching the book bag, Officer Boyd found a mason jar containing what appeared to be marijuana, a plastic bag that appeared to contain marijuana, a vacuum-sealed bag that had been opened, a pill bottle that contained thirteen "roaches," and a scale. Officer Boyd also found Defendant's wallet containing $680 in currency in the form of thirty-three twenty-dollar bills and two ten-dollar bills in Defendant's car.

¶ 5 Officer Boyd arrested Defendant and took him to the station for processing on a Driving While Impaired charge while other officers continued to investigate the alleged marijuana found in the vehicle. On 13 August 2019, a Wake County Grand Jury indicted Defendant on charges of PWISD-Marijuana, Maintaining a Vehicle for

Keeping or Selling Marijuana, Felony Possession of Marijuana greater than 1.5 ounces, Possession of Drug Paraphernalia, and Carrying a Concealed Weapon. Defendant's arraignment hearing took place on 3 October 2019.

¶ 6 On 24 January 2020, Defendant filed a written Motion to Continue. The Motion to Continue alleged that on 7 January 2020, the State served Notices of Intent to Introduce Expert Testimony of a Dr. Volker Borneman and David G. Minser of Avazyme Labs "to introduce the results of the Avazyme, Inc. analysis of the seized evidence." According to Defendant, it was "imperative to Defendant's case that he be afforded the opportunity to seek his own, independent chemical analysis of the seized evidence[.]"

¶ 7 Defendant's case subsequently came on for trial on 27 January 2020. The trial court first heard Defendant's Motion to Continue. Defendant's trial counsel argued he did not receive the results of the Avazyme lab testing until 7 January 2020 and that he did not know the Defendant's trial had been calendared for 27 January until 20 January. Defense counsel asked the trial court to allow a continuance of the case for thirty days in order to "do what the State has already been allowed to do, which is to have my own independent tests of that sample of what they presume is marijuana" and so that counsel could "intelligently confront and cross-examine [the State's] expert witness." Defense counsel noted he did not think there would be any undue burden on the State if the trial court granted the Motion to Continue. Defense

counsel also informed the trial court he had an arraignment in another case in federal court the same week. The trial court denied the Motion to Continue and entered a written Order consistent with its ruling.

¶ 8 At trial, the State called Erin Tracy (Tracy), a forensic chemist with the Raleigh-Wake City County Bureau of Investigation (CCBI), who tested the evidence seized from Defendant, to testify as an expert who tested the evidence police seized from Defendant. Tracy testified, in her expert opinion, the evidence she tested was, in fact, Marijuana; however, CCBI did not have the testing capability to determine the amount of THC in the sample establishing the sample exceeded the allowable limit of THC for hemp. Defendant did not object to this testimony and does not challenge it on appeal.

¶ 9 Because CCBI could not establish the THC concentration in the alleged marijuana, the State sent the evidence to Avazyme Labs for additional testing to establish the THC concentration. The State called Dr. Volker Borneman (Dr. Borneman), President and CEO of Avazyme Labs, as an expert in forensic chemistry. Dr. Borneman testified to the general testing capabilities Avazyme possessed. The State asked Dr. Borneman about a lab report (Report) from testing performed on the alleged marijuana in this case. Dr. Borneman identified David Minser (Minser) as the analyst listed on the Report and described Minser as a "very, very experienced analytical chemist[.]" Dr. Borneman stated the Report indicated the "total THC" in

the sample was "13.51" percent. Based on Minser's Report, Dr. Borneman testified he had "no doubt" the evidence Minser tested was marijuana. On cross-examination, Dr. Borneman testified that, during testing, "the analyst takes different parts of the lot and samples it . . . till we have the two grams and then that sample gets extracted and analyzed" in order to "get a . . . sample that is representative of the whole lot." Dr. Borneman stated he was not able to determine from the Report how Minser sampled the lot in this case. On re-direct, the State introduced the Report into evidence. Defendant did not object to this testimony and does not challenge it on appeal.

¶ 10 Finally, the State called Minser to testify, and the trial court admitted him as an expert in forensic drug chemistry and bioanalytical analysis, extraction, and reporting. When the State asked Minser whether he was the analyst who tested the evidence in this case, he responded: "Well, we work as a team . . . I was responsible for generating the [certificate of analysis] . . . I pretty much guarantee I didn't do the extraction." The State moved to publish the Report to the jury so that the jury could "follow along"; the trial court granted the Motion. Minser testified, based on the results of the Report, the sample in this case was "definitely marijuana." On cross-examination, Minser reiterated there are "multiple parts" to the testing process including extraction, instrumentation, and processing. Minser could not confirm who did the extraction portion and stated the Report did not list who did. After defense

counsel finished cross-examination, counsel asked to be heard outside the presence of the jury at some point.

¶ 11 After re-direct, the trial court afforded defense counsel the opportunity to be heard outside the jury's presence. Defense counsel moved to strike the Report because, according to counsel, "a *Melendez-Diaz* issue [arose] in that they're now trying to put into evidence a report that's been generated without bringing all the analysts to court to actually testify, which would violate the confrontation clause under *Melendez-Diaz*." Counsel also moved for a mistrial because, even if the trial court granted Defendant's Motion to Strike, the evidence was "highly prejudicial" and striking the evidence would not cure that prejudice. On voir dire, Minser testified analysts responsible for generating reports were responsible for:

> reviewing everything that comes into that report, which includes looking at the extraction information, looking at the instrumentation, and processing the instrumentation to get into the final data, the final numbers on the report. So the analyst is responsible for the overall making sure everything is legit that goes into this report, but that doesn't mean they're responsible for doing everything.

¶ 12 The trial court denied Defendant's Motion to Strike and Motion for Mistrial. The trial court based its conclusion on a Pennsylvania case, *Commonwealth v. Yohe*, 621 Pa. 527. 79 A.3d 520 (2013), and the North Carolina Supreme Court's decisions in *State v. Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156 (2013) and *State v. Brewington*, 367 N.C. 29, 743 S.E.2d 626 (2013).

¶ 13 At the close of the State's evidence, the trial court, on motion by Defendant, dismissed the charge of Maintaining a Vehicle for Keeping or Selling Marijuana. Defendant offered no evidence in his own defense. The remaining charges were submitted to the jury. The jury found Defendant guilty of PWISD-Marijuana, Possession of Marijuana greater than 1.5 ounces, and Possession of Marijuana Paraphernalia. The jury found Defendant not guilty of Carrying a Concealed Weapon. The trial court sentenced Defendant to three concurrent sentences; two sentences of six to seventeen months for the PWISD-Marijuana and Possession of Marijuana greater than 1.5 ounces and 10 days for the Possession of Marijuana Paraphernalia. The trial court suspended the sentences and placed Defendant on twenty-four months of supervised probation. Defendant gave oral notice of appeal in open court.

Issues

¶ 14 The issues on appeal are whether the trial court erred in: (I) denying Defendant's Motion to Continue in order to allow Defendant to conduct independent testing on evidence seized; and (II) denying Defendant's Motion for Mistrial where Defendant argues he was not allowed to cross-examine an analyst involved in the testing of evidence, in violation of his Sixth Amendment right to confront witnesses.

Analysis

I. Motion to Continue

¶ 15 In his first issue on appeal, Defendant contends the trial court abused its discretion by denying his Motion to Continue made on the eve of trial. "We review a trial court's resolution of a motion to continue for abuse of discretion." *State v. Wright*, 210 N.C. App. 52, 60, 708 S.E.2d 112, 119 (2011) (quoting *State v. Morgan*, 329 N.C. 131, 143, 604 S.E.2d 886, 894 (2004)).

¶ 16 As a preliminary matter, N.C. Gen. Stat. § 15A-952(c) provides:

> Unless otherwise provided, [a motion to continue] must be made at or before the time of arraignment if a written request is filed for arraignment and if arraignment is held prior to the session of court for which the trial is calendared. If arraignment is to be held at the session for which trial is calendared, the motions must be filed on or before five o'clock P.M. on the Wednesday prior to the session when trial of the case begins.
>
> If a written request for arraignment is not filed, then any motion listed in subsection (b) of this section must be filed not later than 21 days from the date of the return of the bill of indictment as a true bill.

N.C. Gen. Stat. § 15A-952(c) (2019). Here, Defendant's Motion to Continue—filed the Friday before trial was set to begin—was untimely. Defendant does not contend it was timely.

¶ 17 Nevertheless, although failure to file a motion to continue within the time required may constitute a waiver of the motion, the trial court still has discretion to allow the motion. N.C. Gen. Stat. § 15A-952(e) (2019); *see also State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982) ("This rule requiring the defendant to make

a showing of abuse by the trial court in denying his motion for a continuance should be applied with even greater vigor in cases such as this in which the defendant has waived his right to make a motion to continue by failing to file the motion within the time prescribed by G.S. 15A-952.").

¶ 18 In determining whether a trial court erred in denying a motion to continue, this Court has considered the following factors:

> (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant may suffer as a result of a denial of the continuance.

Wright, 210 N.C. App. at 60, 708 S.E.2d at 119 (quoting *State v. Barlowe*, 157 N.C. App. 249, 254, 578 S.E.2d 660, 663 (2003)).

¶ 19 The facts of this case are analogous to *State v. Wright*. In *Wright*, the defendant filed a motion to continue on the day the defendant's trial was scheduled to begin. *Id.* The motion stated the defendant's attorney had diligently prepared the matter for trial but needed a continuance to test evidence seized. *Id.* However, the evidence had been previously tested, and three of the defendant's previous attorneys had reviewed all of the evidence. *Id.* One of the attorneys made a motion for independent testing of the evidence at issue and had it tested. *Id.* This Court concluded, notwithstanding the fact the defendant's previous attorneys had

opportunities to test the evidence, because the defendant's last attorney had six months to prepare for trial and to obtain independent testing but waited until the day trial was scheduled to file the motion to continue, the trial court did not err in denying the motion. *Id*. at 61, 708 S.E.2d at 119.

¶ 20 Similarly, here, Defendant moved for a continuance in order to seek independent testing of the evidence seized in this matter on 24 January 2020—the Friday before trial started on Monday. During the hearing on Defendant's Motion to Continue, Defendant's attorney stated he received the lab results on 7 January 2020, twenty days before he filed the Motion to Continue. Additionally, Defendant was served with the State's Intent to Introduce Expert Testimony on 20 December 2019—more than a month before trial. Indeed, Defendant waited more than a year between his arrest and trial without making any apparent effort to have the evidence at issue independently tested.

¶ 21 Further, although Defendant requested the trial court allow a one-month continuance to allow Defendant to conduct his own testing, Defendant acknowledged he did not know what the results of this independent analysis would reveal. Defendant's trial counsel conceded during the hearing he had not yet engaged a testing lab. Moreover, "a motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986) (citations omitted). While Defendant contended the

continuance would not unduly burden the State and result in prejudice to him, Defendant did not support his Motion with an affidavit alleging likely prejudice requiring the continuance. Thus, on these facts, Defendant has failed to demonstrate he was entitled to a continuance. Therefore, the trial court did not abuse its discretion by denying Defendant's Motion to Continue.

II. Motion for Mistrial

¶ 22 Defendant also argues the trial court erred in denying his Motion for Mistrial. According to Defendant, because the analyst, or analysts, involved in the sampling and extraction of the evidence tested were not present at trial and the Report did not list the analysts, defense counsel could not confront all of the witnesses providing testimony—through the Report—against him.

¶ 23 As a threshold matter, we must determine whether this Court may address Defendant's Confrontation Clause claims. "In order to preserve a question for appellate review, a party must have presented the trial court with a *timely* request, objection or motion, stating the specific grounds [for relief] if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (citing N.C.R. App. P. 10(b)(1)) (emphasis added). "[T]o preserve for appellate review a trial court's decision to admit testimony, 'objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence' and not made only during a hearing out of the jury's presence . . . ." *State v. China*, 252 N.C. App.

30, 33, 797 S.E.2d 324, 327 (2017) (alterations in original) (citations omitted), *rev'd on other grounds*, 370 N.C. 627, 811 S.E.2d 145 (2018).

¶ 24 Here, Minser testified—before stating that the analysis he conducted and the Report he signed indicated the alleged marijuana was, in fact, marijuana based on the THC concentration—he was not the only analyst involved in the testing of the alleged marijuana in this case. Minser stated: "Well, we work as a team project, a team group at Avazyme. . . . I pretty much guarantee I didn't do the extraction." Immediately after Minser made this statement, the State moved to introduce the Report Minser signed after running his analysis. Defendant, with the knowledge Minser was not the only analyst involved in the testing, did not object to the Report's publication to the jury. When Minser testified the sample he tested was "definitely marijuana," defense counsel did not object. On cross-examination, defense counsel only asked questions clarifying the fact that Minser ran the testing equipment, analyzed the data, and generated and signed the Report but did not conduct the sampling and extraction process. After these questions, defense counsel asked to be heard outside the presence of the jury. On re-direct, Minser testified to the details of how Avazyme conducts the testing. Again, Minser testified he had no doubt the sample he tested in this case was marijuana based on the THC concentration. Again, Defendant did not object to this testimony.

¶ 25 After Minser's testimony, the trial court heard defense counsel outside the jury's presence. It was only then that defense counsel objected to Minser's testimony and the admission of the Report into evidence. As such, Defendant did not make a timely objection contemporaneous with the time the State introduced the evidence and in the jury's presence as our jurisprudence requires. *China*, 252 N.C. App. at 33, 797 S.E.2d at 327. Consequently, Defendant did not preserve this issue for appeal.

¶ 26 However, even if Defendant had preserved this issue for appeal, the trial court did not err in denying Defendant's Motion for Mistrial because the admission of the Report did not violate Defendant's right to confront witnesses against him. Generally, we review whether the trial court abused its discretion in denying a motion for mistrial. *State v. Simmons*, 191 N.C. App. 224, 227, 662 S.E.2d 559, 561 (2008). However, "a motion for mistrial must be granted if there occurs an incident of such a nature that it would render a fair and impartial trial impossible under the law." *State v. McCraw*, 300 N.C. 610, 620, 268 S.E.2d 173, 179 (1980) (citation omitted); *see also* N.C. Gen. Stat. § 15A-1061 (2019) ("The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.").

¶ 27 Defendant argues the Report should not have been admitted when the extraction analysts were not present for cross-examination at trial and, thus,

Defendant was irreparably prejudiced by this alleged violation of his right to confront testimony against him. We review alleged violations of a defendant's constitutional rights de novo. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted), *appeal dismissed and disc. rev. denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

¶ 28 The Sixth Amendment's Confrontation Clause "prohibits admission of 'testimonial' statements of a witness who did not appear at trial unless: (1) the party is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the witness." *State v. Glenn*, 220 N.C. App. 23, 25, 725 S.E.2d 58, 61 (2012) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004)). "[T]he burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution." *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010). "Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." *Id.* "[F]orensic analyses qualify as 'testimonial' statements, and forensic analysts are 'witnesses' to which the Confrontation Clause applies."

State v. Locklear, 363 N.C. 438, 452, 681 S.E.2d 293, 304-05 (2009) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 174 L. Ed. 2d 314, 322 (2009)).

¶ 29 Defendant argues, in light of the Supreme Court of the United States' opinion in *Melendez-Diaz v. Massachusetts*, the trial court's admission of the Report violated his right to confront witnesses when certain analysts who were a part of the testing of the relevant evidence were not subject to cross-examination. In *Melendez-Diaz*, the defendant faced drug charges and the prosecution introduced evidence of three certificates of analysis showing the substances police obtained from the defendant were cocaine. 557 U.S. at 308, 174 L. Ed. 2d at 320. However, the prosecution did not call the analysts who performed the tests and signed the certificates to testify at trial. *Id.* The Court concluded: "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 311, 174 L. Ed. 2d at 322 (citation and quotation marks omitted).

¶ 30 After *Melendez-Diaz*, the North Carolina Supreme Court addressed a similar issue in *State v. Locklear*. In *Locklear*, the defendant stood trial for murder. *Locklear*, 363 N.C. at 440, 681 S.E.2d at 298. The State introduced, and the trial court admitted into evidence, an autopsy report and testimony from the Chief Medical Examiner regarding the report when the Chief Medical Examiner had not conducted the autopsy. *Id.* at 451, 681 S.E.2d at 305. Instead, a pathologist and forensic dentist

had conducted the autopsy; however, the State did not call the pathologist or dentist to testify and failed to show that either witness was unavailable to testify or that the defendant had the opportunity to cross-examine them. *Id.* In light of the United States Supreme Court's decision in *Melendez-Diaz*, the North Carolina Supreme Court concluded the trial court erred in admitting the autopsy report and testimony because, "[t]he admission of such evidence [without testimony from the analyst responsible for the report] violated defendant's right to confront the witnesses against him[.]" *Id.* at 452, 681 S.E.2d at 305.

¶ 31 The circumstances of this case, however, do not implicate the same concerns present in *Melendez-Diaz* or *Locklear*. Here, the State did not merely seek to introduce the Report as substantive evidence of the chemical composition of the alleged marijuana without any testimony from the analysts who were responsible for the Report. The State introduced the Report during of Dr. Borneman's testimony and published the Report to the jury during Minser's direct examination. Indeed, Minser was not merely reciting the unsworn testimony of one who prepared the Report. *See Melendez-Diaz*, 557 U.S. at 334, 174 L. Ed. 2d at 336 (Kennedy, J., dissenting) (critiquing the Court's holding, in part, in that it "could be argued that the only analyst who must testify is the person who signed the certificate" even if the analyst took no part in the analysis); *see also Bullcoming v. New Mexico*, 564 U.S. 647, 663, 180 L. Ed. 2d 610, 623 (2011) ("when the State elected to introduce Caylor's

certification, Caylor became a witness Bullcoming had the right to confront"). To the contrary, Minser testified he was familiar with the testing procedures and instruments, and he was the analyst who ran the testing equipment, analyzed the data from the test, and signed the certificate of analysis. Thus, Minser's expert opinion testimony was independent and based on his own analysis. *See State v. Ortiz-Zape*, 367 N.C. 1, 9, 743 S.E.2d 156, 162 (2013) ("We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements.") (citation omitted). Therefore, introduction of the Report through Minser's testimony was also permissible and did not violate Defendant's right to confront witnesses against him. *See Bullcoming*, 564 U.S. at 652, 180 L. Ed. 2d at 616 ("The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."). Consequently, the trial court did not abuse its discretion in denying Defendant's Motion for a Mistrial.

Conclusion

¶ 32 Accordingly, for the foregoing reasons, the trial court did not abuse its discretion in denying Defendant's Motion to Continue and Motion for Mistrial.

NO ERROR.

Chief Judge STROUD and Judge GRIFFIN concur.

Report per Rule 30(e).