

[Cite as *State v. Moore*, 2010-Ohio-1569.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 85828

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TERRANCE MOORE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-427648 and CR-445445

BEFORE: Kilbane, J., Rocco, P.J., and Jones, J.

RELEASED: April 8, 2010

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, J.:

{¶ 1} Upon remand from the United States Supreme Court, this court was ordered to reconsider its previous ruling in *State v. Moore*, 8th Dist. No. 85828, 2008-Ohio-2359 (*Moore 2*), in light of the recently decided *Melendez-Diaz v. Massachusetts* (2009), 557 U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314. Specifically, we must consider whether appellant Terrance Moore's ("Moore's") Sixth Amendment right of confrontation was violated at trial. The State admitted into evidence lab reports stating substances seized from Moore's residence were cocaine, but failed to produce the analyst who actually performed the testing at trial. Finding that Moore failed to demand the testimony of the original analyst in conformity with R.C. 2925.51(C), we affirm.

Factual and Procedural Background

{¶ 2} On May 9, 2002, Cleveland Police Detective Michelle Rivera ("Detective Rivera") and a confidential informant went to the home of a reported drug dealer to purchase cocaine. Detective Rivera purchased cocaine at the home and indicated that she was interested in purchasing even more. Detective Rivera, the confidential informant, and the dealer all drove to a parking lot in Bedford Heights to meet a supplier.

{¶ 3} The supplier, later identified as Moore, arrived and sold the dealer cocaine, which Detective Rivera subsequently purchased. Meanwhile, undercover detectives in a nearby unmarked car documented Moore's license

plate number and continued to follow him. Later that evening, police obtained a search warrant and searched Moore's trailer home, finding numerous plastic bags of cocaine, an electronic scale believed to contain cocaine residue, and a gun in the back of the trailer. Moore was immediately taken into custody.

{¶ 4} On August 28, 2002, Moore was indicted on five counts in Case No. CR-427648. Counts 1 and 2 charged Moore with drug trafficking, in violation of R.C. 2925.03. Counts 3 and 4 charged Moore with drug possession, in violation of R.C. 2925.11. Count 5 charged Moore with having a weapon while under disability, in violation of R.C. 2923.13.

{¶ 5} In October 2003, Moore was released on bond. On November 2, 2003, Moore sold six grams of crack cocaine to a confidential informant. On November 4, 2003, Moore met with the same confidential informant in order to sell him an additional 100 grams of crack cocaine. That same day, police searched Moore's trailer home and seized over 100 grams of crack cocaine.

{¶ 6} On November 20, 2003, Moore was indicted on an additional 11 counts in Case No. CR-445445. Counts 4, 5, 7, 8, 10, and 12 charged Moore with drug trafficking, in violation of R.C. 2925.03. Count 6, 9, 11, 13 charged Moore with possession of drugs, in violation of R.C. 2925.11. Count 14 charged Moore with possession of criminal tools, in violation of R.C. 2923.24.

Counts 7, 8, 9, 10, and 11 all contained major drug offender specifications. Counts 1, 2, 3, and 15 applied only to a codefendant.

{¶ 7} On June 9, 2004, the matter proceeded to a bench trial on both cases. During trial, the State called two chemists employed with the Cleveland Police Department's Scientific Investigation Unit, Tracy Kramer ("Kramer") and Scott Miller ("Miller"), to testify regarding the test results of the drugs found in Moore's trailer. However, neither Kramer nor Miller actually performed all of the testing. Chemist Crystal Seals ("Seals") actually performed the majority of the testing that concluded that the seized drugs were, in fact, cocaine. However, Seals was no longer employed with the Cleveland Police Department's Scientific Investigation Unit and was unavailable to testify. The lab reports confirming Seals's analysis were also admitted into evidence.

{¶ 8} In Case No. CR-427648, the trial court granted Moore's Crim.R. 29 motion with respect to Count 1, drug trafficking, and found Moore guilty of Count 2, drug trafficking, Counts 3 and 4, drug possession, and Count 5, having a weapon while under disability. In Case No. CR-445445, the trial court found Moore guilty of Counts 4 and 5, drug trafficking; guilty of Counts 6 and 13, drug possession; guilty of Counts 7, 8, and 10, drug trafficking with major drug offender specifications; Counts 9 and 11, drug possession with

major drug offender specifications, and; guilty of Count 14, possession of criminal tools. Moore was found not guilty of Count 12, drug trafficking.

{¶ 9} On December 13, 2004, the trial court sentenced Moore to an aggregate sentence of twelve years of imprisonment.

{¶ 10} Moore timely appealed in *State v. Moore*, 8th Dist. No. 85828, 2006-Ohio-277 (“*Moore 1*”). In *Moore 1*, Moore argued that the admission of the lab reports, with only the testimony of Kramer and Miller, violated his right of confrontation and constituted inadmissible hearsay. Relying on R.C. 2925.51(A), this court affirmed Moore’s conviction and held:

“[T]he laboratory reports admitted at trial constituted prima facie evidence of the content, identity, and weight of the drugs. Had Moore desired to cross-examine Chemist Crystal Seals concerning her analysis, he needed to demand the testimony within seven days of receipt of the report. R.C. 2925.51(C). Because Moore did not do so, the trial court did not violate Moore’s right of confrontation, nor did it admit impermissible hearsay when it admitted the report without the testimony of Seals.”

{¶ 11} Subsequently, the case was appealed to the Ohio Supreme Court, which remanded the case for further consideration in light of their recent decision in *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840, 879 N.E.2d 745. In *Crager*, the Ohio Supreme Court concluded that DNA reports could be admitted into evidence without the testimony of the analyst and without

violating a defendant's confrontation rights because the reports were nontestimonial.

{¶ 12} In *Moore 2*, this court considered Moore's claims in light of *Crager* and analogized the lab reports documenting drug composition to the DNA reports at issue in *Crager*. We reasoned that, like the DNA reports in *Crager*, drug analysis reports are neutral and have the power to exonerate or convict. Consequently, we determined that they are nontestimonial and do not violate a defendant's confrontation rights. *Moore 2* at ¶9-14.

{¶ 13} Moore subsequently appealed to the Ohio Supreme Court, which denied review. Moore appealed to the United States Supreme Court, which remanded the case for further consideration in light of its recent holding in *Melendez-Diaz*, *supra*.

Analysis

{¶ 14} In *Melendez-Diaz*, the court considered whether a defendant's Sixth Amendment right of confrontation was violated when the State introduced certificates from analysts at the state laboratory without requiring them to actually appear in court and testify. The court began its analysis with a review of *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

{¶ 15} *Crawford* is the seminal case on a defendant's Sixth Amendment right of confrontation. In *Crawford*, the court considered whether a

tape-recorded statement made by the defendant's wife could be introduced as evidence at trial, when the wife did not testify at trial because of the defendant's marital privilege. The court concluded that the wife's tape-recorded statements to police officers describing the events leading up to her husband's arrest were testimonial in nature, and because there was no opportunity to testify at trial and cross-examine her, the admission of the tape-recorded statements violated Crawford's Sixth Amendment right of confrontation.

{¶ 16} In *Melendez-Diaz*, the court relied heavily on its analysis in *Crawford*, supra, in reaching its decision. In *Melendez-Diaz*, police officers received a tip that a K-Mart store employee, Thomas Wright ("Wright"), often received phone calls at work, then was picked up in the front of the store and dropped back off a short time later. Police set up surveillance near the store and searched Wright when he exited the car. Police found four small bags containing cocaine. Police then arrested Melendez-Diaz and two other men who were still in the car. *Id.* at 2530.

{¶ 17} On the drive to the police station, officers observed all three men fidgeting in the backseat. A later search of the backseat revealed a large plastic bag containing 19 smaller plastic bags filled with cocaine. Melendez-Diaz was subsequently charged with distributing cocaine and drug trafficking. *Id.* at 2531.

{¶ 18} At trial, the State submitted into evidence the plastic bags containing cocaine and three certificates from the laboratory that stated the seized substances tested positive for cocaine. Melendez-Diaz objected on the basis of *Crawford*, supra, which held that a defendant has the right to confront witnesses against him and Melendez-Diaz had no opportunity to cross-examine the analysts who tested the seized substances. The trial court overruled the objection based on a Massachusetts state law that stated such certificates were “prima facie evidence of the composition, quality, and the net weight of the narcotic.” Mass. Gen. Laws Chapter 111.13; *Melendez-Diaz* at 2531.

{¶ 19} Ultimately, the United States Supreme Court agreed with Melendez-Diaz, concluding that the admission of such certificates, absent the testimony of the analyst who performed the tests, violated a defendant’s Sixth Amendment right of confrontation. In so holding, the court rationalized that the certificates were testimonial because the certificates covered the identical material that would be elicited on direct examination of the analyst who performed the tests. However, the admission of the certificate did not provide a mechanism for the defendant to cross-examine the analyst’s methods or findings. *Id.* at 2532-34.

{¶ 20} The court also recognized that scientific testing is not always neutral, but often requires an analyst to exercise their own judgment and

discretion in selecting tests and interpreting results. The court dismissed the State's argument that a defendant has the power to subpoena the analysts, finding that the subpoena power is insufficient where the analyst is unavailable or refuses to appear. *Id.* at 2537, 2540.

{¶ 21} Finally, the court noted that a criminal defendant always has the burden of asserting his Sixth Amendment right of confrontation. However, the court also noted that states do have the ability to regulate the period of time in which a defendant may object through "notice and demand" statutes. These statutes, in place in many states, require that the prosecution provide the defendant with notice of its intent to use an analyst's report at trial. The defendant is then afforded a certain period of time to object and require that the analyst testify at trial. *Id.* at 2541.

{¶ 22} Moore argues that his Sixth Amendment right of confrontation was violated when the state was permitted to introduce lab certificates stating that the seized substances were cocaine, when the chemist who actually performed the tests did not testify. Rather, the State elicited testimony from both Kramer and Miller, other chemists who worked alongside Seals. Seals actually performed the majority of the tests. Moore maintains that such testimony violates his Sixth Amendment right of confrontation.

Kramer's Testimony

{¶ 23} Tracy Kramer testified that she was working at the lab when Detective Michelle Witherspoon (“Detective Witherspoon”) dropped off State’s Exhibit 43, a police field evidence bag marked “laboratory.” Kramer and Cleveland Police Officer Judy Gunther (“Officer Gunther”) accepted the evidence. (Tr. 863-864.)

{¶ 24} Kramer testified that she was working with Seals at the time and that, while Seals actually performed the testing, the two worked as a team. Kramer was present throughout the testing and reviewed the lab report. Kramer and Seals performed both a Scott’s test and analyzed the evidence with a gas chromatograph mass spectrometer. Both tests revealed that the evidence tested positive for cocaine.

Miller’s Testimony

{¶ 25} Scott Miller testified that he was working at the lab with Seals when Detective Witherspoon brought State’s Exhibits 51, 52, 55, 56, 57, 59, and 62 into the lab. The exhibits were received by Kramer and Officer Gunther.

{¶ 26} Three tests were performed on the majority of the exhibits — a Scott’s test, a gas chromatograph mass spectrometer test, and an infrared spectrophotometry test. A few of the exhibits were tested using only two methods because some exhibits contained too small a sample for all three tests. The objects tested included an electronic scale, two bowls containing

rock-like substances, two plates, a large spoon, a hammer, and several off-white substances. All of the objects tested positive for cocaine. The off-white, rock-like substances were all determined to be cocaine, weighing 2.674 grams, 4.44 grams, and .45 grams, respectively. Miller testified that while he was not the primary analyst, he was present during all of the testing and reviewed the lab reports.

R.C. 2925.51

{¶ 27} Pursuant to R.C. 2925.51(A), “a laboratory report from the bureau of criminal identification and investigation, * * * is prima-facie evidence of the content, identity, and weight * * * of the substance.” While this statute appears to violate the holding in *Melendez-Diaz*, which analyzed a newly identical Massachusetts statute, R.C. 2925.51 contains a critical exception.

{¶ 28} R.C. 2925.51(C) specifically states, “[t]he report shall *not* be prime-facie evidence * * * if the accused or the accused’s attorney demands the testimony of the person signing the report, by serving the demand upon the prosecuting attorney within seven days * * * from receipt of the report.” (Emphasis added.)

{¶ 29} This is precisely the type of “notice and demand” statute addressed in *Melendez-Diaz*. *Melendez-Diaz* at 2541. Although the statute does allow the introduction of the lab report without the analyst’s testimony, it specifically provides an exception whereby the defendant may simply object

within seven days of receiving the lab report and the analyst will be required to testify. *Melendez-Diaz* noted that a defendant must always make the appropriate objection in order to preserve his Sixth Amendment right of confrontation. *Id.* Further, *Melendez-Diaz* also referenced “notice and demand” statutes as an appropriate way to allow the defendant to view the report and decide whether he wishes to cross-examine the analyst. *Id.* at 2541-2542.

{¶ 30} Consequently, we find that R.C. 2925.51 complies with the rationale of *Melendez-Diaz* and satisfies the Sixth Amendment. Since Moore failed to object in conformity with R.C. 2925.51, Moore’s conviction is affirmed.

{¶ 31} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR