[Cite as *State v. Farrar*, 2010-Ohio-2461.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93060

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEREMY FARRAR

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514898

BEFORE: Dyke, J., Rocco, P.J., and McMonagle, J.

RELEASED: June 3, 2010

JOURNALIZED:

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ANN DYKE, J.:

{¶ 1} Defendant Jeremy Farrar appeals from his convictions for four counts of trafficking in less than two hundred grams of marijuana. For the reasons set forth below, we find that defendant's confrontation rights were violated, so we reverse the convictions and remand for a retrial.

{¶ 2} On August 27, 2008, defendant was indicted pursuant to a four-count indictment. Counts 1 and 2 arose in connection with defendant's alleged actions on April 3, 2008, and charged him with selling or offering to sell a controlled substance, in violation of R.C. 2925.03(A)(1), and knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, in violation of R.C. 2925.03(A)(2). Counts 3 and 4 arose in connection with defendant's alleged actions on April 7, 2008, and charged him with selling or offering to sell a controlled substance, in violation of R.C. 2925.03(A)(1), and knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, in violation of R.C. 2925.03(A)(2). Defendant subsequently demanded the "in court testimony of the attesting witness to the laboratory reports as required under ORC 2925 [R.C. 2925.51]."

{¶ 3} The matter proceeded to a jury trial on February 12, 2009. For its case, the state presented the testimony of Det. Bryan Byard of the Bedford Police Department, Bureau of Criminal Investigation forensic scientist Shervonne

Bufford, and the confidential informant.

{¶ 4} Det. Byard testified that he is assigned to a multi-jurisdictional drug task force. He received complaints at a bar on Northfield Road in Bedford, Ohio, and contacted a paid, confidential informant to set up drug buys. On April 3, 2008, the informant was checked for contraband and given marked money. He was then fitted with audio surveillance equipment that enabled Det. Byard to listen to the informant's conversations from within the bar.

{¶ 5} The informant eventually began playing pool with defendant in the bar. The informant asked defendant if he could get drugs for him and defendant agreed to sell him $20 of marijuana. Defendant then left the bar and returned with $10 of marijuana, which he offered to give to the informant, then sold to him.

{¶ 6} The informant then began repeatedly calling defendant for additional drugs. On April 7, 2008, defendant agreed to sell him additional marijuana for $30.

{¶ 7} Over defense objection, the state presented an affidavit from Barbara DiPietro that outlined her training, the tests she performed, and her test results, i.e., that the evidence from the first sale constituted 1.2 grams of marijuana and the evidence from the second sale constituted 3.6 grams of marijuana.

{¶ 8} The defense claimed that the criminal design had originated with the informant. The defense presented evidence that the informant called the defendant numerous times, and that the defendant evaded the informant's calls.

The defense also established that defendant suffers from mental illness, which renders him suggestible.

{¶ 9} Defendant was convicted of all four offenses and was sentenced to a total of 24 months of community control sanctions, completion of an out-patient treatment program, 80 days of electronic home monitoring, 120 hours of community service, and a six-month driver's license suspension. Defendant now appeals and assigns two errors for our review.

{¶ 10} For his first assignment of error, defendant complains that he invoked the procedure set forth in R.C. 2925.51 to require the analyst who prepared the laboratory report of the drugs, Barbara DiPietro, to testify. The state presented an affidavit from DiPietro regarding her training, the tests she employed, and her results, and also presented testimony from analyst Shervonne Bufford.

{¶ 11} R.C. 2925.51 provides that laboratory reports may constitute prima-facie evidence of content, weight, and identity of controlled substances. An exception is set forth in subsection C, however. This provision reads:

{¶ 12} "The report shall not be prima-facie evidence of the contents, identity, and weight or the existence and number of unit dosages of the substance 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 the accused or the accused's attorney's receipt of the report. The time may be extended by a trial judge in the interests of justice."

{¶ 13} The Sixth Amendment's Confrontation Clause provides, in all criminal

prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. *Crawford v. Washington* (2004), 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177. The Confrontation Clause applies to testimonial hearsay, with testimony defined typically as a solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224.

{¶ 14} In *Melendez-Diaz v. Massachusetts* (2009), ___ U.S.___, 129 S.Ct. 2527, 174 L.Ed.2d 314, the Supreme Court held that "certificates of analysis" showing the results of the forensic analysis performed on suspected controlled substances fall within the "core class of testimonial statements." Id. They are therefore subject to confrontation under the Sixth Amendment, and the analysts who performed the tests are required to testify in person. Id. The Court explained that the "certificates" that showed the weight and composition of the substances are functionally identical to live, in-court testimony, as they do "precisely what a witness does on direct examination." Therefore, 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 confront the analysts at trial. Id.

{¶ 15} The *Melendez-Diaz* Court also noted some states, such as Ohio, permit the defendant to assert, or forfeit by silence, his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report, and stated:

{¶ 16} “In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. See, e.g., Ga.Code Ann. § 35-3-154.1 (2006); Tex.Code Crim. Proc. Ann., Art. 38.41, § 4 (Vernon 2005); *Ohio Rev. Code Ann. § 2925.51***(C)** (West 2006). Contrary to the dissent's perception, these statutes shift no burden whatever. The defendant always has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the time within which he must do so. States are free to adopt procedural rules governing objections. ” Id. (Emphasis added.)

{¶ 17} In *State v. Moore,* Cuyahoga App. No. 85828, 2010-Ohio-1569, this court likewise held that R.C. 2925.51 is a “notice and demand” statute that authorizes the introduction of the laboratory report of the suspected controlled substance without the analyst's testimony, and provides an exception whereby the defendant may simply object within seven days of receiving the lab report and require the analyst to testify. This court therefore held that “R.C. 2925.51 complies with the rationale of *Melendez-Diaz* and satisfies the Sixth Amendment.” Because Moore did not object to the use of the report and requested testimony from the analyst, he failed to assert a proper objection to the use of the report as prima facie evidence of the content, weight, and identity of the substance.

{¶ 18} In this matter, defendant invoked the procedure set forth in R.C.

2925.51 and demanded that the analyst testify at trial. Over defense objection, a different analyst testified, and the state presented the affidavit of the analyst, who examined the controlled substances in this matter. We conclude that this procedure violated defendant's rights of confrontation as set forth in *Melendez-Diaz v. Massachusetts,* supra.

{¶ 19} The state argues that the error is harmless since defendant was convicted of the offenses of trafficking for his "offer to sell" the substances. We cannot accept this argument, because R.C. 2925.03(A)(1) plainly makes it unlawful to "Sell or offer to sell *a controlled substance*" and R.C. 2925.03(A)(2) makes it unlawful to "Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a *controlled substance* * * *." (Emphasis added.) Thus, it is essential to establish that the seized material is in fact a controlled substance. Accordingly, the error is not harmless.

{¶ 20} Defendant's first assignment of error is well-taken.

{¶ 21} In his second assignment of error, defendant challenges the manifest weight of the evidence supporting his conviction, and asserts the defense of entrapment. In light of our disposition of the first assignment of error, this assignment of error is moot.

{¶ 22} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said 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.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., CONCURS.
CHRISTINE T. MCMONAGLE, J., CONCURS IN JUDGMENT ONLY