[Cite as *State v. Jackson*, 2010-Ohio-820.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2007-A-0079**
- vs -	:	
TRAMAINE JACKSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2007 CR 179.

Judgment: Upon remand, affirmed, and conviction reinstated.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

James R. Willis, 113 St. Clair Building, #530, 113 St. Clair Avenue, N.E., Cleveland, OH 44114-1214 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} This case returns to us on remand from the Supreme Court of Ohio, for application of its decision in *State v. Pasqualone*, 121 Ohio St.3d 176, 2009-Ohio-315, which clarified that an attorney may waive a client's Sixth Amendment confrontational right to cross-examine witnesses, and, further, that when the state has followed the procedures of R.C. 2925.51 and the defendant fails to avail himself of the statute and demand the lab analyst to testify, the analyst's report may be admitted as prima facie evidence of the test results.

{¶2} **Substantive and Procedural Facts**

{¶3} After a two-day jury trial, appellant, Tramaine Jackson, was convicted of two counts of complicity to trafficking in drugs, with juvenile specifications, and two counts of drug possession of powder and crack cocaine that were discovered during a drug raid. At the time of the sweep, Mr. Jackson was found lying on the kitchen floor, with $483 scattered around him and drugs on a nearby kitchen table, as well as multiple other items of evidence indicative of drug dealing, such as scales and baggies.

{¶4} Mr. Jackson was sentenced to an eight-year term on the complicity to drug trafficking counts, to be served consecutively to two one-year concurrent terms for the counts of possession.

{¶5} Mr. Jackson appealed in *State v. Jackson*, 11th Dist. No. 2007-A-0079, 2008-Ohio-6976, raising eleven assignments of error, two of which are pertinent to our decision today.

{¶6} In *Pasqualone*, decided after our decision in *Jackson* and while the state's discretionary appeal to the Supreme Court of Ohio was pending, the court, while declining to address the nature of a lab report, clarified that the procedures of R.C. 2925.51 adequately protect a defendant's Sixth Amendment right to confront the lab analyst who created the report, a right which is waivable by a defendant's counsel.

{¶7} The Supreme Court of the United States in *Melendez-Diaz v. Mass.* (2009), 129 S.Ct. 2527, then clarified this conflicting issue among the states, holding that such lab reports are testimonial in nature, and, further, determined that "notice and demand" statutes of the prosecutor's intent to use the lab report as evidence, such as Ohio's R.C. 2925.51, adequately protect a defendant's right, and that the right may be waived by defense counsel.

{¶8} In light of this, the Supreme Court of Ohio granted the state's discretionary appeal in *State v. Jackson*, 121 Ohio St.3d 1449, 2009-Ohio-1820, remanding the case for us to revisit Mr. Jackson's third assignment of error to apply its holding in *Pasqualone.*

{¶9} Thus, with the guidance of the Supreme Court of Ohio, we vacate our earlier decision, and affirm Mr. Jackson's original conviction and sentence of the Ashtabula County Court of Common Pleas, finding the lab analyst's report in his case was properly admitted as prima facie evidence of the powder and crack cocaine found in Mr. Jackson's possession.

{¶10} Mr. Jackson's third assignment of error states:

{¶11} "[3.] The appellant's right to confrontation was violated when the trial court admitted a cocaine laboratory analysis report without permitting appellant the opportunity to cross-examine the chemist or technician who prepared it."

{¶12} **BCI Analysis Report as Testimonial Statement**

{¶13} In his third assignment of error, Mr. Jackson alleges that his right to confrontation was violated when the court admitted into evidence the drug laboratory analysis report from the Ohio Bureau of Criminal Investigation ("BCI") without affording him an opportunity to cross-examine the chemist or technician who prepared it.

{¶14} In light of the Supreme Court of Ohio's ruling in *Pasqualone*, and the Supreme Court of the United States ruling in *Melendez-Diaz*, both of which were issued after our decision, we must vacate our earlier decision, and affirm the trial court's finding

that Mr. Jackson waived his right to confront the analyst who prepared the report because he did not comply with the procedures set forth in R.C. 2925.51.[1]

{¶15} In *Jackson*, we originally found his argument to have merit insofar as no predicate foundation was laid for the admissibility of the report, which we determined was a business record exception pursuant to Evid.R. 803(6) on the basis of the Supreme Court of Ohio's holding in *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840. *Crager* held that scientific reports are "business records" pursuant to Evid.R. 803(6). See *Jackson* at ¶23, citing *Crager* at paragraph one of the syllabus (records of scientific tests are not "testimonial" under *Crawford*); see, also, *Pasqualone* at ¶12 (where the court acknowledged "that our decision in *Crager* strongly supports the argument that the [lab] report is not testimonial").

{¶16} In *Pasqualone,* the court resolved the question surrounding R.C. 2925.51, Ohio's "notice and demand" statute, in its determination that the statute adequately protects a defendant's right to confront the lab analyst who produced the report, and further, that such a right may be validly waived by a defendant's counsel. Thus, the court held that "regardless of whether the report is testimonial, [appellant] validly waived

1. In *Melendez-Diaz*, the Supreme Court of the United States resolved the nature of a lab analyst's report, explaining that such lab reports do not fall under the business records exception pursuant to Fed.R.Evid. 803(6) because such records are not kept in the regular course of business, rather they are created solely for the "production of evidence at trial." Id. at 2538. As such, they are testimonial in nature and the defendant has the constitutional right to cross-examine the analyst who conducted the report. The court also affirmed the Supreme Court of Ohio's ruling in *Pasqualone* that "notice and demand" statutes, such as R.C. 2925.51, do not violate a defendant's confrontational rights because "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 which he must do so. States are free to adopt procedural rules governing objections." Id. at 2541. Thus, the court determined that "under our decision in *Crawford* [*v. Washington* (2004), 541 U.S. 36], the analysts' affidavits were testimonial statements and the analysts were 'witnesses' for purposes of the Sixth Amendment. 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 2532, quoting *Crawford* at 54.

his right to cross-examine the analyst by failing to exercise the opportunity to demand the analyst's testimony afforded by R.C. 2925.51." Id. at ¶12.[2]

{¶17} The court began with a review of R.C. 2925.51 and the validity of such a waiver:

{¶18} "The statute specifically details the information the report must contain, R.C. 2925.51(A), and places a specific obligation on the prosecuting attorney to serve the report on the accused or the accused's attorney, R.C. 2925.51(B). The statute also requires that the report must contain notice of the accused's right to demand the testimony of the signer of the report, R.C. 2925.51(D), and specifies that the report will not be prima facie evidence of the test results if the accused or his attorney (if he is represented by one) demands the testimony of the report's signer within seven days of the accused's receipt of the report, a time that can be extended by the trial judge, R.C. 2925.51(C). The obvious import of R.C. 2925.51(C) is that if a demand is not made for the testimony of the signer of the report, the report will be prima facie evidence of the test results." Id. at ¶16.

{¶19} The court then addressed whether a defendant's attorney can waive this right and answered in the affirmative, distinguishing this right from certain basic rights a defendant must personally waive, which include the right to counsel, plead guilty, waive a jury, testify in his or her own defense, and appeal. Id. at ¶23. The court explained that a "lawyer must have 'full authority to manage the conduct of the trial. The

2. The Supreme Court of the United States recently revisited whether "notice and demand" statutes, such as Ohio's R.C. 2925.51, adequately protect a defendant's Sixth Amendment right to confront the lab analyst who created the actual report, in *Briscoe v. Virginia* (2010), 175 L.Ed.2d 966. On January 25, 2010, the court vacated the Supreme Court of Virginia's holding, remanding in light of its decision in *Melendez-Diaz*.

adversary process could not function effectively if every tactical decision required client approval.'" Id. at ¶24, quoting *Taylor v. Illinois* (1988), 484 U.S. 400, 418.

{¶20} Thus, the relevant inquiry as to whether Mr. Jackson's right to confrontation has been violated is "whether [h]e had an *opportunity* for cross-examination." (Emphasis in original.) Id. at ¶35. "[I]n other words, where a defendant chooses not to take advantage of the opportunity to cross-examine a witness, the defendant has not been denied his constitutional right to confrontation." Id. at ¶36. (Citation omitted.) See, also, *State v. McCausland*, No. 2008-2415, 2009-Ohio-5933, ¶13-14.

{¶21} In Mr. Jackson's case, the notarized report, which was signed by the lab technician, with valid notice of the prosecution's intent to use the report at trial, was sent following the procedures of R.C. 2925.51. Mr. Jackson's attorney did not demand the testimony of the analyst who signed the report within seven days from his receipt of the report pursuant to R.C. 2925.51(C). In fact, defense counsel did not object to the admission of the report until the close of the state's case-in-chief, and that objection rested on an improper foundation. That is, there was no true challenge as to the validity of the notice or his right to cross-examine the lab analyst. Instead, Mr. Jackson's counsel argued that the predicate foundation for the lab report's authenticity pursuant to Evid.R. 803(6) was not laid because only a detective testified as to the contents of the report, and therefore the report was erroneously admitted. *Jackson* at ¶28.

{¶22} While we recognize this argument had some merit based on the fact that prior precedent, such as the Supreme Court of Ohio's holding in *Crager,* implied such reports are business records, the fact remains that Mr. Jackson did not avail himself of the procedures of R.C. 2925.51. Quite simply, Mr. Jackson's right to cross-examine the

lab technician was not the basis for his objection. No request was made to cross-examine the technician pursuant to the procedures outlined in R.C. 2925.51, and neither the validity of the report nor the notice was challenged below.

{¶23} Thus, upon following the instruction of the Supreme Court of Ohio, we vacate our earlier judgment, and affirm the trial court's decision to admit the lab analyst's report. Notice was valid and timely, the analyst provided a notarized affidavit attached to the report, and no request, timely or otherwise, was received by the state. Therefore, we cannot say Mr. Jackson's confrontational rights were violated in this case.

{¶24} **Ineffective Assistance of Counsel**

{¶25} It is important to note that Mr. Jackson also raised this issue under his first assignment of error regarding his claim of ineffective assistance of counsel. Among his many issues, he argued that his counsel's performance was "substandard" because he failed to request an independent weight and content analysis of the powder and crack cocaine, and thus failed to protect his right to confrontation. *Jackson* at ¶57.

{¶26} As we noted in *Jackson*, pursuant to R.C. 2925.51(F), a defendant may obtain an independent analysis by making a written request within seven days of receiving the lab report and notice by the state. Mr. Jackson fails to show how the outcome of his trial would be different had trial counsel issued such a request.

{¶27} "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *** The Supreme Court of Ohio recognized that there are '(***) countless ways to provide effective assistance in any given case.'" *Jackson* at ¶37, quoting *State v. Janick*, 11th Dist. No. 2007-A-0070, 2008-Ohio-2133, ¶42, quoting *State v. Vinson*, 11th Dist. No. 2006-L-238, 2007-Ohio-5199, ¶29, citing

State v. Allen (Sept. 22, 2000), 11th Dist. No. 99-A-0050, 2000 Ohio App. LEXIS 4356, 10, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 687-689. "Thus, the Supreme Court of Ohio went on to state in *Bradley*, that 'judicial scrutiny of counsel's performance must be highly deferential.'" Id.

{¶28} "[B]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id., quoting *Vinson* at ¶30. "Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. Id." Id. at ¶38.

{¶29} "Thus, '[t]o warrant a reversal, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' Id. at ¶44, quoting *Vinson* at ¶30 (citations omitted)." Id. at ¶39.

{¶30} Originally, we found this issue to be moot, as we found the trial court erred in admitting the BCI report because the proper foundation had not been laid. Although not directed upon remand by the Supreme Court of Ohio to readdress the issue raised under this assignment of error, we are compelled to consider Mr. Jackson's argument, and we determine it is meritless as he failed to prove that but for his counsel's tactical decision not to call for an independent analyst, Mr. Jackson would have been acquitted.

{¶31} As the Supreme Court of Ohio made clear in *Pasqualone*, counsel's decision as to whether to cross-examine a particular witness is a matter of trial strategy. Id. at ¶31. See, also, *State v. Woods*, 4th Dist. No. 09CA3090, 2009-Ohio-6169, ¶25.

{¶32} The Supreme Court of the United States later aptly noted in *Melendez-Diaz* that "[d]efense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion." Id. at 2542.

{¶33} Indeed, Mr. Jackson's counsel did not assert Mr. Jackson's right to confront the lab analyst on cross-examination; he merely argued that the predicate foundation for the admission of the BCI report was not laid.

{¶34} Thus, we vacate our earlier decision, affirm the decision of the Ashtabula County Court of Common Pleas, and reinstate Mr. Jackson's conviction.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.