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MAR 04, 2014

Court of Appeals
Division III
State of Washington

31639-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DENISE L. JONES, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

ASSIGNMENT OF ERROR

1. The trial court erred in allowing an expert drug analyst to testify about the results of drug tests identifying the controlled substance that were conducted by other people who did not testify.

II.

ISSUE

1. Was the Sixth Amendment Confrontation Clause violated by the admission of the laboratory expert's independent opinion that the substance in question was methamphetamine?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

- A. THE TRIAL COURT DID NOT ERR IN ADMITTING THE EXPERT'S INDEPENDENT OPINION.

The defendant argues that the trial court erred by admitting the testimony of Mr. Trevor Allen who is a laboratory scientist at the Washington State Patrol

Crime Laboratory. The defendant's theory is that the rule espoused by *Crawford v. Washington*, 541 U.S. 36, 69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) regarding confrontation, was violated in this case because the person testifying as to the laboratory results had not done the actual tests on the material in question.

The defendant correctly sets forth the theory involved here but fails to note that the facts of this case do not fit defendant's theory. The Sixth Amendment Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, *supra*, the U.S. Supreme Court held that the right to confrontation prohibits "testimonial" statements by a non-testifying witness unless the witness is unavailable and previously subject to cross-examination by the defendant. *Crawford*, *supra*. The defendant wishes this court to expand the basic confrontation rules to prohibit testimony by any expert who did not perform the original forensic analysis.

The defendant claims a violation because he could not cross-examine the scientist who performed the original analysis. The petitioner constructs his arguments in this case based on the line of cases including *Melendez-Diaz*, *v. Massachusetts*, 557 U. S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), *Bullcoming v. New Mexico*, — U.S. —, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011)

and *State v. Lui*, 153 Wn. App. 304, 221 P.3d 948 (2009), *review granted*, 168 Wn.2d 1018 (2010).

Melendez-Diaz, supra, is factually distinguishable from this case. In *Melendez-Diaz, supra*, the prosecution submitted into evidence “certificates of analysis” that stated that a substance seized by law enforcement was in fact cocaine. The Supreme Court held that such certificates are testimonial statements. *Melendez-Diaz*, 557 U.S. at 311, 129 S. Ct. 2527. The error here was that the persons creating the testimonial documents were not subject to cross-examination by the defendant.

No “certificates of analysis” were admitted in this case.

In the *Bullcoming, supra*, case the error found by the U.S. Supreme Court was that the State used testimony from Mr. Razatos, a forensic expert who had no contact at all with the testing processes involved in the case. Justice Sotomayor in her concurrence noted:

Second, this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. Razatos conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing. The court below also recognized Razatos' total lack of connection to the test at issue. It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what

degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report.

Bullcoming v. New Mexico, 131 S. Ct. at 2722, (*Sotomayor, J., concurring*)
(*citations omitted*).

It appears from the *Bullcoming* case that it is permissible to elicit testimony from a secondary expert, so long as it is clear that the secondary expert is delivering an independent opinion, based on his or her understanding of the underlying tests. In this case, the State made it clear that Mr. Allen had independently examined the data and was not simply reading someone else's report.

Did you examine the data in this case?

A. I did.

Q. Based on that examination, do you yourself have an Independent opinion about the identity of this substance?

A. I do.

Q. What is your opinion?

RP 90-91.

The defendant cites to *Lui, supra*, a Division I case which is not helpful to the defendant. The defendant in *Lui* raised many of the same arguments as are being raised by the defendant here. The court distinguished *Lui's* arguments from those in *Melendez-Diaz, supra*, reasoning along the same lines as in this brief:

The underlying reports were not submitted in lieu of oral testimony. As stated before, that did not happen in this case either.

The decision in *State v. Manion*, 173 Wn. App. 610, 295 P.3d 270 (2013) examined the cases mentioned above and concluded that there is no violation of the Confrontation clause when the testifying expert testifies that he or she has formed an independent opinion. That independent opinion can be based in part on the tests performed by another, non-testifying individual. *Manion, Id.* at 632.

Certainly, Mr. Allen was qualified to testify as an expert. He has a BS degree in chemistry and had worked for the Washington State Patrol for 5-1/2 years at the time of the trial. RP 85. Mr. Allen undertook training at the WSP crime lab, as a member of the Northwest Association of Forensic Scientists and had testified as an expert in multiple Washington Counties. RP 86.

Mr. Allen testified that he was aware that the substance being tested had undergone a microcrystalline exam using a microscope and an infrared exam using an FTIR. Mr. Allen described the two tests and stated that he had examined the data that resulted from those tests. RP 90.

Mr. Allen testified that he had formed an independent opinion about the identity of the tested material, based on the two previously mentioned tests. RP 90. Mr. Allen testified that the substance in question was methamphetamine. RP 91.

On cross-examination Mr. Allen testified that he did not perform the original tests but he was the technical peer reviewer who examined the analytical data, the notes and the reports from the person who acquired the data. That person had changed employment and was employed in a crime lab in Sioux Falls, SD. RP 94.

Defense counsel attempted to bring up a “contamination” theory to which Mr. Allen responded with the cross-contamination procedures that each person in the laboratory uses. RP 93.

Mr. Allen repeated that his results were based on his independent evaluation of the data and notes. He also testified that he has the print-outs from the actual testing instrument. RP 96. Mr. Allen testified on redirect that he has used the exact machine in question easily hundreds of times. RP 96. Mr. Allen did not see anything in the printout or results that would indicate a contaminated sample. RP 96.

It is interesting that in the Washington cases addressing the “expert confrontation” issue, none mention that the defense bar (and any courts agreeing with the defense bar) are throwing ER 703 out the window. The defendant cites to *U.S. v. Cromer*, 389 F.3d 662 (2004) that *Crawford, supra*, supercedes state’s evidence rules. The defendant’s interpretation of *Cromer* is overbroad. What the *Cromer* court stated was: “If there is one theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that is no

longer subsumed by the *evidentiary rules governing the admission of hearsay statements*. *Cromer, Id.* at 679. Since the defendant has not raised any hearsay issues on appeal, the *Cromer* decision has no impact on this case.

V.

CONCLUSION

For the reasons stated above, the lower court's decision should be affirmed.

Dated this 4th day of March, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 31639-4-III
 v.)
)
DENISE L. JONES,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on March 4, 2014, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

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3/4/2014
(Date)

Spokane, WA
(Place)


(Signature)