

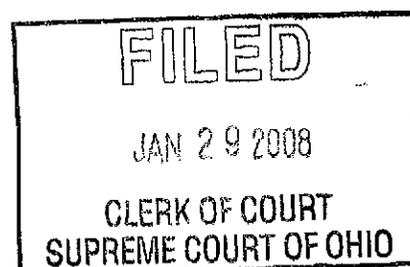
IN THE SUPREME COURT OF OHIO

STATE OF OHIO)	CASE NO. 2007-2443
)	
Appellant)	On Appeal from the Ashtabula
)	County Court of Appeals,
vs.)	Eleventh Appellate District
)	
THOMAS A. PASQUALONE)	
)	
Appellee)	

**APPELLEE'S MEMORANDUM IN RESPONSE TO
MEMORANDUM IN SUPPORT OF JURISDICTION**

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**EXPLANATION OF WHY THIS CASE
DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL
QUESTION AND IS NOT OF GREAT GENERAL INTEREST**

In *State v. Pasqualone*, 11th Dist. No. 2007-A-0005, 2007-Ohio-6725, the Eleventh District Court of Appeals narrowly tailored its analysis of the constitutionality of Ohio R.C. 2925.51 and determined it was unconstitutional as applied. The appellate court's decision both upholds the constitutionality of the statute and ensures the protection of a defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Ohio R.C. 2925.51 grants to the State of Ohio a "shortcut" allowing the State to avoid the necessity of calling the laboratory analyst as a witness in a criminal trial in order to prove the existence of and/or the content, identity, and weight of an alleged illegal substance. In order to exercise this shortcut, that State must meet certain requirements as set forth by the statute. It must timely provide the defense with the laboratory report as well as meet certain other notice requirements. In this case, the Eleventh District Court of Appeals decision refines those notice requirements. Specifically, the appellate court correctly determined that the statute implicates a defendant's rights under the Sixth Amendment and that in order to *constitutionally* make use of this shortcut, independently of the procedures required by Ohio R.C. 2925.51, the record must affirmatively demonstrate that a defendant knowingly, intelligently, and voluntarily waived his constitutional right to confront the laboratory analyst. The Eleventh District Court of Appeals concluded, "we disagree . . . that such a waiver can be accomplished by a warning contained in the report, which is only served on the defendant's attorney." Thus, the conclusion rendered by the Eleventh District Court of

Appeals requires the State of Ohio to ensure that a defendant actually receives notice of the existence of the report and of his or her right to demand the testimony of the analyst. Service of the report, with its accompanying warnings, on the accused's attorney alone will no longer be sufficient.

While Appellee agrees that the protection of a defendant's constitutional rights is of utmost significance and is most certainly a matter of great general interest, the decision of the Eleventh District Court of Appeals *properly* protects the confrontation rights of criminal defendants under the Sixth Amendment by refining the notice requirements under a statute designed to permit the State to proceed without the necessity or expense of producing the testimony of a laboratory analyst to introduce a laboratory report. This decision reiterates the concept that a defendant may waive his rights, but the waiver must be knowing, intelligent, and voluntary. This is certainly not a foreign concept, and it is one that has been repeatedly upheld by this Court time and again.

Moreover, the burden which the appellate court's opinion in *State v. Pasqualone* has placed on the State in this instance is insignificant in comparison to the constitutional rights protected.

For these reasons, this case does not involve a substantial constitutional question and is not of great general interest.

ARGUMENT

FIRST PROPOSITION OF LAW

ADMISSION OF A LABORATORY ANALYSIS REPORT PURSUANT TO R.C. 2925.51 DOES NOT VIOLATE A DEFENDANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellant's First Proposition of Law is correct *if* the admission of the laboratory analysis report is properly done – i.e., as long as the defendant has received notice about the existence of the laboratory report and his right to demand the testimony of the analyst, as indicated by the appellate court in this case.

Crawford v. Washington (2004), 541 U.S. 36, 124 S.Ct. 1354, determined that where testimonial evidence is at issue, the Sixth Amendment prohibits the admission of such evidence unless there is unavailability of the witness and the defendant had a prior opportunity for cross-examination.

Thus, the issue as framed after *Crawford v. Washington*, has become one of whether or not the evidence is “testimonial” in nature. If it is, then the constitution requires that the defendant receive certain procedural guarantees afforded to him by the confrontation clause of the Sixth Amendment which commands, “not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.*

Appellant first asks this Court to determine that the statement at issue, the laboratory report, is not testimonial evidence under *Crawford*, but rather is a business record and therefore admissible pursuant to Evid. R. 803. Appellant's argument rides on

the idea, developed further by a prior decision of this Court, that under *Crawford*, “business records” generally are not within the scope of Confrontation Clause concerns.

This argument confuses the two issues. A business record can nevertheless be *testimonial* evidence for purposes of *Crawford*. The issue is *not* whether or not the report is a business record for purposes of Evid. R. 803. Rather, the issue is whether or not the report is *testimonial* for purposes of *Crawford v. Washington*.

Appellant relies on this Court’s recent decision in *State v. Crager*, 2007-Ohio-6840 in support of its argument. In *State v. Crager*, *supra*, this Court concluded that DNA reports, including those prepared by BCI at the request of the prosecution, are “nontestimonial” and therefore admissible as business records under Evid. R. 803.

Specifically, this Court held:

“We hold that records of scientific tests are not “testimonial” under *Crawford*. This conclusion applies to include those situations in which the tests are conducted by a government agency at the request of the state for the specific purpose of potentially being used as evidence in the criminal prosecution of a particular individual.”

However, as noted by the dissent in *State v. Crager*, this holding conflicts with this Court’s decision in *State v. Stahl*, 111 Ohio St. 3d 186, 2006-Ohio-5482, where this Court concluded that for Confrontation Clause purposes, a testimonial statement includes one made “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* As also stated by the dissent in *State v. Crager*, the autopsy report found admissible in *State v. Craig*, 110 Ohio St. 3d 306, 2006-Ohio-4571, is distinguishable from the laboratory report created in this case. The autopsy report was nontestimonial because the report was prepared for an independent purpose and was concerned with independent issues – it was

not prepared as evidence against a specific person at the behest of the prosecution in anticipation of litigation. Using the *Stahl* test in this case, the laboratory analyst objectively had to believe that his findings would be used at trial against a known defendant – the defendant in this case. Thus, it is clearly testimonial in nature.

It is also significant to note that, unlike any of the cases discussed so far, this case presents another twist – the laboratory report to be presented in this case was never introduced through the testimony of a qualified witness. Even in *State v. Crager, supra*, and *State v. Craig, supra*, the laboratory reports at issue in those cases were properly authenticated through the testimony of a qualified witness with knowledge as required under Evid. R. 803(6). In this case, under R.C. 2925.51, the State seeks the introduction of a laboratory report, testimonial in nature, without a knowing, intelligent and voluntary waiver of confrontation rights by the defendant *and* without any independent authentication of the report itself. This was quite properly deemed unacceptable by the Eleventh District Court of Appeals under the framework of the defendant’s Sixth Amendment rights under the Constitution.

SECOND PROPOSITION OF LAW

A DEFENDANT'S WAIVER IS KNOWING, INTELLIGENT, AND VOLUNTARY WHEN THE PROSECUTION COMPLIES WITH THE PROCEDURE SET FORTH IN R.C. 2925.51(B).

Appellant's Second Proposition of Law presupposes the constitutionality of the procedures set forth in the statute R.C. 2925.51. That is precisely what the Eleventh District Court of Appeals has correctly analyzed, and determined that those procedures may not, in a given case, pass constitutional muster.

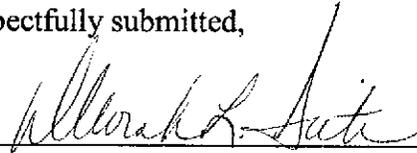
The appellate court has said that merely following the procedures set forth in the statute may fail to establish a knowing, intelligent and voluntary waiver of a defendant's confrontation rights. Independent of those procedures, there must be something in the record to show that a defendant himself has actually received notice about the existence of the laboratory report and his right to demand the testimony of the analyst. This is of minimal inconvenience to the State to allow it to make use of the legislatively enacted shortcut given to it and to avoid the necessity of presenting the testimony of the laboratory analyst.

The Eleventh District Court of Appeals has correctly determined that in order for the statute to be constitutional as applied, the record must demonstrate that the defendant knowingly, intelligently, and voluntarily waived his constitutional right to confront the laboratory analyst. He can not have done so without actual knowledge of the report and of his right to demand the testimony of the analyst.

CONCLUSION

Ohio R.C. 2925.51 provides the State with a shortcut to avoid the necessity of the expense and inconvenience of requiring the personal testimony of the laboratory analyst or even the proper in court authentication of the laboratory report created by the laboratory analyst. That statute has not been determined to be unconstitutional on its face. Under the appellate court's decision, the State will retain its shortcut. It need only take the additional step of ensuring that a defendant himself, and not just his legal counsel, actually receives notice of the existence of the report and of his right to demand the testimony of the analyst. In this manner, the State can make use of the procedures which it has been allowed by statute and also demonstrate a knowing, intelligent, and voluntary waiver of a defendant's constitutional right to confront the laboratory analyst. The decision of the Eleventh District Court of Appeals was correct and this court should decline jurisdiction of this matter.

Respectfully submitted,

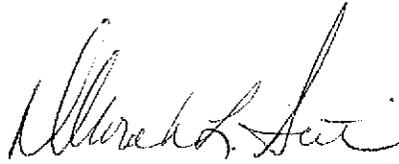


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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was sent via ordinary U.S. Mail this 27th day of January, 2008, to:

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