IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO,	)	Case No. 07-2443
	)	
Plaintiff-Appellant,	)	On Appeal from the Ashtabula
-vs-	)	County Court of Appeals,
	)	Eleventh Appellate District
THOMAS A. PASQUALONE,	)	
	)	Ashtabula County Court of Appeals
Defendant-Appellee.	)	Case No. 2007-A-0005

MERIT BRIEF OF APPELLANT, STATE OF OHIO

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STATEMENT OF THE CASE

On January 20, 2006, an indictment was filed charging Thomas Pasqualone, appellant herein, with one Count of Possession of Cocaine, in violation of R.C. 2925.11(A)(C)(4)(a), a felony of the fifth degree. (T.d. 5.) On January 31, 2006, appellant entered a plea of not guilty to the charge. (T.d. 11.) At trial, the jury found appellant guilty of Possession of Cocaine. (T.d. 45.) Appellant was sentenced to a prison term of eight months. (T.d. 48.)

Appellee appealed his conviction to the Eleventh District Court of Appeals. The Eleventh District Court of Appeals reversed the decision of the trial court and remanded the case for a new trial. *Id.* at ¶56. The State of Ohio filed its notice of appeal and a memorandum in support of jurisdiction with this Honorable Court. On April 9, 2008, this Honorable Court accepted jurisdiction to hear the case and allowed the appeal.

STATEMENT OF THE FACTS

On November 9, 2005, while traveling northbound on Myers Road in Geneva, Trooper Jason Bonar of the Ohio State Highway Patrol observed a vehicle traveling southbound with a loud exhaust. (T.p. 125.) After the vehicle passed, Trooper Bonar noticed that the vehicle's rear license plate was not illuminated. (T.p. 125.)

Trooper Bonar turned around and proceeded to catch up with the vehicle. (T.p. 126.) He observed three occupants in the vehicle. (T.p. 126.) Trooper Bonar called his location into dispatch and initiated a traffic stop. (T.p. 126.) The vehicle pulled over and it appeared to be a normal traffic stop at that point. (T.p. 126.)

Trooper Bonar approached the driver's side of the vehicle. (T.p. 127.) When appellant rolled down the window Trooper Bonar smelled a strong odor of alcoholic beverage emanating from the vehicle. (T.p. 127.) Trooper Bonar asked appellant for his driver's license and appellant responded that he was not allowed to have a license. (T.p. 127.) Appellant was asked to step out of the vehicle and come back to the patrol car. (T.p. 127.) While appellant was walking to the patrol car, he kept reaching into his left pocket, as if he was trying to find something. (T.p. 127.) Appellant was told to remove his hand from his pocket. (T.p. 127.) Dispatch then confirmed appellant's suspension and he was placed under arrest. (T.p. 127.)

After appellant was handcuffed, Trooper Bonar conducted a search incident to arrest. (T.p. 128.) Trooper Bonar located a pack of cigarettes containing a large white rock in appellant's left front pocket. (T.p. 128-129.) The rock later tested positive for cocaine. (T.p. 129.)

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.

In its opinion, the Eleventh District Court of Appeals erroneously found that laboratory reports admitted pursuant to R.C. 2925.51 were testimonial in nature as set forth in *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354. *State v. Pasqualone.* 11th Dist. App. No. 2007-A-0005 at ¶44, 2007-Ohio-6725. In *Crawford,* the United States Supreme Court held that

testimonial out of court statements by witnesses are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross examine the witness. *Crawford* at syllabus. In doing so, the Court rejected the test set forth in *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, which focused on the reliability of the statements. *Id.* at 61.

The *Crawford* court declined to "spell out a comprehensive definition of testimonial" statements. *Id.* at 68. Instead, the Court indicated that at a minimum the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* The Court also indicated that statements covered under most of the hearsay exceptions, such as business records or statements in furtherance of a conspiracy, are not testimonial statements. *Id.* at 56.

The Supreme Court of the Untied States offered further elaboration as to what constitutes a testimonial statement in *Davis v. Washington* (2006), 126 S.Ct. 2266. The Court held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 2273-2274.

The Eleventh District Court of Appeals found that laboratory reports admitted pursuant to R.C. 2925.51 prevent a defendant from exercising his Sixth Amendment right to confrontation, thus are contrary to the decision in *Crawford.* R.C. 2925.51 provides that a laboratory report will serve as prima facie evidence of identity and weight of a controlled

substance. The prosecuting attorney is required to serve a copy of this report upon defense council. *Id.* If the defendant wishes to examine the preparer of the report, defense council must serve a demand upon the prosecuting attorney within seven days of receiving the report. *Id.*

The *Crawford* decision does not apply to R.C. 2925.51 because the statement at issue, the laboratory report, is not testimonial evidence. The laboratory report is a business record. As indicated in *Crawford*, business records are not testimonial statements. *Crawford* at 56.

Evid. R. 803 provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation * * *.

The laboratory report used in appellant's case is clearly a business record. It is a record of tests kept in the course of regularly conducted business activity. It is not testimonial in nature. Courts in several other jurisdictions have found that similar laboratory test reports were not testimonial in nature. See *People v. Johnson* (2004) 121 Cal.App.4th 1409, *People v. Hinojos-Mendoza* (2005), 140 P.3d 30, *Commonwealth v. Williams* (2005), 69 Va. Cir. 277, 2005 WL 3007781, *State v. Cao* (2006), 175 N.C. App. 434, *Brooks v. Commonwealth* (2006), 49 Va. App. 155, *State v. March* (2006), 2006 WL 1791336.

Moreover, this Honorable Court recently held in *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840 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." *Id.* at ¶78. As the scientific test at issue in the present case is similar to that of the DNA testing at issue in *Crager,* this holding should apply to the case at bar.

In *Crager*, this Honorable Court found that the DNA reports at issue were business records pursuant to Evid. R. 803(6). *Id.* at ¶11. The DNA reports were found to be nontestimonial, and this court rejected the position that the reports should be considered testimonial because they were produced by lab work "done at the request of the prosecution or because it was reasonably expected that the reports would be used at a criminal trial." *Id.* at ¶51.

This court stated that "BCI is not itself an 'arm' of law enforcement in the sense that the word implies a specific purpose to obtain incriminating results. * * * [A]lthough BCI conducts tests at the request of law enforcement personnel or other entities affiliated with the state, BCI maintains its independence to objectively test and analyze the samples it receives." *Id.* at ¶53. The scientific test reports in *Crager* were determined to be prepared in the ordinary course of business. *Id.* at ¶54. This court found that "records of laboratory protocols followed and of the resulting raw data are not accusatory and therefore are not 'testimonial.'" *Id.* at ¶78.

In the present case, the tests were conducted by the Ohio State Highway Patrol crime lab. (See, State's Exhibit No.2.) Like BCI, the Ohio State Highway Patrol crime lab is a government agency that "maintains its independence to objectively test and analyze the samples it receives." *Crager* at ¶52. The test could have inculpated or exculpated appellant and the State's involvement was not likely to have any impact on the results. *People v. Rawlins* (Feb. 19, 2008),

10 N.Y.3d 136, at [7], 2008 WL 423397. As in *Crager*, the laboratory report in the present case was prepared in the "ordinary course of regularly conducted business." *Id.* at ¶54. Accordingly, the laboratory report in the present case was not testimonial, therefore, its admission pursuant to R.C. 2925.51 did not violate appellee's right to confrontation.

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).

The Eleventh District Court of Appeals found that the notice provided to appellee under R.C. 2925.51 was insufficient for his waiver to be knowing, intelligent and voluntary. *Pasqualone* at ¶54. Specifically, the Court found that, for a waiver to be accomplished, "the record needs to affirmatively demonstrate that the defendant knowingly, intelligently, and voluntarily waived his constitutional right to confront the laboratory analyst." *Id.* at ¶52.

The State complied with all requirements set forth in R.C. 2925.51. The laboratory report was prepared by the Ohio State Highway Patrol Crime Lab, which is a laboratory operated by a law enforcement agency. The report was singed by Brandon S. Werry, the technician who performed the analysis. The report states both the type of substance and the weight of the substance that was analyzed. Included in the report is a notarized statement by Mr. Werry that he is employed by the Ohio State Highway Patrol Crime Lab and that this analysis is part of his regular job duties. The statement also outlines Mr. Werry's educational background and professional experience. The report further indicates that the tests were performed with due caution and the evidence was handled in accordance with established a accepted procedures

while in the custody of the laboratory. The State properly served appellee by serving a copy of the report upon his counsel of record. (T.p. 138.)

While the notification served upon appellee's counsel does not include the citation to the controlling statute, the notification very clearly states that "this report shall not be prima-facie evidence of the contents, identity, and weight or the existence and number of unit doses of the substance if the accused or this 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." This statement explains that unless appellee requested the technician, the report could be used as prima face evidence of the identity and weight of the substance at issue in his prosecution. Lack of a citation to a specific statute cannot support appellee's claims, as he was represented by competent legal counsel who if unaware of the statute most certainly could have researched this issue.

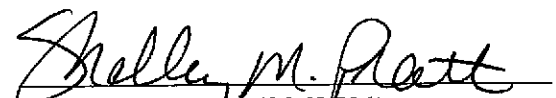
By not responding to the State's notice pursuant to R.C. 2925.51 appellee waived his right to have the lab technician testify. By choosing to waive the testimony of this witness, defense counsel was not waiving appellee's Sixth Amendment right to confront witnesses, as suggested by the majority in *Pasqualone*. Defense counsel was merely employing a tactical decision that was within his discretion in choosing not to call this witness. *Pasqualone* at ¶63(dissent). Defense counsel did not relinquish appellee's right to confront other witnesses. *Id.* at ¶62 (dissent). The drafters of R.C. 2925.51 recognized that trial counsel is competent to make this decision on a defendant's behalf and provided a method for the prosecuting attorney to serve defense counsel. *Id.* at ¶64 (dissent), R.C. 2925.51(B). As the State of Ohio complied with R.C. 2925.51(B), admission of the laboratory report was not an error. *Id.* at ¶65 (dissent).

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests this Honorable Court to reverse the decision of the Eleventh District Court of Appeals.

Respectfully submitted,

THOMAS L. SARTINI (0001937)
PROSECUTING ATTORNEY



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Merit Brief of Appellant, State of Ohio has been served via ordinary U.S. Mail, postage prepaid, this 24th day of April, 2008 upon Deborah L. Smith, Counsel for Appellee, at Guarnieri & Secrest, 151 East Market Street, P.O. Box 4270, Warren, Ohio 44482.

Shelley M. Pratt (0069721)
Assistant Prosecutor

APPENDIX

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO,	)	
	)	On Appeal from the Ashtabula
Plaintiff-Appellant,	)	County Court of Appeals,
-vs-	)	Eleventh Appellate District
	)	
THOMAS A. PASQUALONE,	)	Ashtabula County Court of Appeals
	)	Case No. 2007-A-0005
Defendant-Appellee.	)	07-2443

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

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COUNSEL FOR APPELLEE

FILED
DEC 31 2007
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

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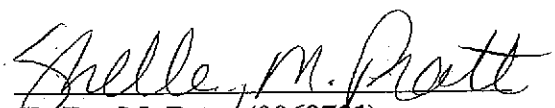
Appellant, the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Ashtabula County Court of Appeals, Eleventh Appellate District, entered in *State v. Pasqualone*, Court of Appeals Case No. 2007-A-0005, on December 17, 2007.

This case raises a substantial constitutional question, involves a felony, and is a case of public or great general interest.

Respectfully submitted,

THOMAS L. SARTINI (0001937)
PROSECUTING ATTORNEY



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COUNSEL FOR APPELLANT

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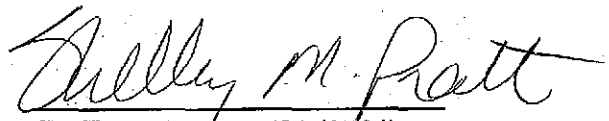
PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Notice of Appeal was served via ordinary U.S. Mail, postage prepaid, this 28th day of December, 2007, upon, Deborah L. Smith Counsel for Appellee, at Guarnieri & Secrest, P.L.L, 151 East Market Street, P.O. Box 4270, Warren, Ohio 44482.



Shelley M. Pratt (0069721)
Assistant Prosecutor

COURT OF APPEALS

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STATE OF OHIO)
)SS.
COUNTY OF ASHTABULA)

IN THE COURT OF APPEALS

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ELEVENTH DISTRICT

2007 DEC 17 P 1:15

CAROL A. HEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO. OH

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

THOMAS A. PASQUALONE,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2007-A-0005

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Ashtabula County Common Pleas Court is reversed and the matter is remanded to the trial court for further proceedings consistent with the opinion.

JUDGE TIMOTHY P. CANNON

MARY JANE TRAPP, J., concurs,

DIANE V. GRENDELL, J., concurs in part, dissents in part, with a Dissenting Opinion.

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THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2007-A-0005**
- vs -	:	
THOMAS A. PASQUALONE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 349.

Judgment: Reversed and remanded.

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Deborah L. Smith, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} This matter is submitted to this court on the record and the briefs of the parties. Appellant, Thomas A. Pasqualone, appeals the judgment entered by the Ashtabula County Court of Common Pleas. The trial court denied Pasqualone's motion to dismiss the indictment for a speedy-trial violation. In addition, the trial court sentenced Pasqualone to an eight-month prison term for his conviction for possession of cocaine.

{¶2} On November 9, 2005, Trooper Jason Bonar of the Ohio State Highway Patrol was on routine patrol working the midnight shift. Trooper Bonar noticed a vehicle with a loud exhaust system pass him in the opposite direction. In addition, after the car passed him, Trooper Bonar noticed that the vehicle's license plate light was not illuminated. Trooper Bonar turned his vehicle around and stopped the vehicle.

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{¶3} Pasqualone was driving the vehicle. He informed Trooper Bonar that he was not allowed to have a driver's license. After Trooper Bonar confirmed that Pasqualone's driver's license was suspended, he placed Pasqualone under arrest. During a search incident to the arrest, Trooper Bonar found a pack of cigarettes, which contained a large white rock. After advising Pasqualone of the *Miranda* warnings, Trooper Bonar asked Pasqualone whether the rock was "meth or crack?" Pasqualone told Trooper Bonar he did not know "what they gave me." Trooper Bonar field-tested the substance, and it tested positive for cocaine base. Later testing at the Ohio State Highway Patrol Crime Laboratory confirmed the substance was .446 grams of cocaine.

{¶4} Pasqualone was indicted on one count of possession of cocaine, in violation of R.C. 2925.11, a fifth-degree felony. Pasqualone pled not guilty to this charge.

{¶5} The state served Pasqualone's attorney with a copy of the laboratory report stating the substance contained cocaine. Pasqualone did not demand the analyst's testimony pursuant to R.C. 2925.51(C).

{¶6} A jury trial was held. The jury found Pasqualone guilty of the possession of cocaine charge. The trial court sentenced Pasqualone to an eight-month prison term for his conviction.

{¶7} Pasqualone raises two assignments of error. His first assignment of error is:

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{¶8} "The trial court erred in failing to dismiss the charge against defendant when he was denied his right to a speedy trial under Ohio R.C. 2945.71."

{¶9} "The standard of review of a speedy trial issue is to count the days of delay chargeable to either side, and determine whether the case was tried within the time limits set by R.C. 2945.71. *State v. Blumensaadt*, [11th Dist. No. 2000-L-107, 2001 Ohio App. LEXIS 4283, at *17]; See, also, *State v. Pierson*, 149 Ohio App.3d 318, 2002-Ohio-4515, at ¶12.

{¶10} "Speedy trial issues present mixed questions of law and fact. *State v. Hiatt* (1997), 120 Ohio App.3d 247, 261. We accept the facts as found by the trial court on some competent, credible evidence, but freely review the application of the law to the facts. Id." *State v. Kist*, 11th Dist. No. 2006-G-2745, 2007-Ohio-4773, at ¶17-18.

{¶11} Since Pasqualone was charged with a felony, he had to be brought to trial within 270 days of his arrest. R.C. 2945.71(C)(2). Further, any days Pasqualone spent in jail on this charge are counted as three days due to the triple-count provision of R.C. 2945.71(E).

{¶12} Pasqualone was arrested on November 10, 2005. His trial did not begin until September 11, 2006, 306 days after his arrest. Also, Pasqualone was held in jail on the pending charge from November 10, 2005 to November 17, 2005, when he posted bond. This time period, due to the triple-count analysis, counts as 21 days. Thus, his total time period prior to trial, without factoring in tolling events, was 320 days.

{¶13} R.C. 2945.72 provides, in pertinent part:

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{¶14} "The time within which an accused must be brought to trial, or in the case of felony, to preliminary hearing and trial, may be extended only by the following:

{¶15} " ***

{¶16} "(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

{¶17} " ***

{¶18} "(H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion."

{¶19} Initially, we will address the applicable tolling events under R.C. 2945.72(E).

{¶20} "A demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E)." *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus. On February 3, 2006, Pasqualone filed a request for a bill of particulars and a request for discovery. The state responded to these requests on February 10, 2006. Accordingly, these events tolled the period from February 3-10, 2006, for a total of seven days.

{¶21} A motion to suppress will toll the speedy-trial clock from the time the motion is filed until the trial court rules on the motion. *State v. Dach*, 11th Dist. Nos. 2005-T-0048 and 2005-T-0054, 2006-Ohio-3428, at ¶34. On March 1, 2006, Pasqualone filed a motion to suppress evidence relating to his arrest and a motion to suppress any statements he made. The state filed its response to these motions on March 14, 2006. The trial court denied Pasqualone's motions to suppress on March 24, 2006. The period from March 1-24, 2006 was tolled, for a total of 23 days.

{¶22} The Supreme Court of Ohio has held that "[a] motion in limine filed by a defendant tolls speedy-trial time for a reasonable period to allow the state an opportunity to respond and the court an opportunity to rule." *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, at paragraph two of the syllabus. On March 29, 2006, Pasqualone filed four motions in limine. On April 4, 2006, the state filed its response to Pasqualone's motions in limine. On May 11, 2006, the trial court ruled on Pasqualone's motions in limine. It granted two of the motions and denied the remaining two motions. Thus, the time period from March 29, 2006 through May 11, 2006 was tolled, for a total of 43 days.

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{¶23} Next, we will address the state's contention that its motion to continue was a tolling event pursuant to R.C. 2945.72(H).

{¶24} On May 2, 2006, the state filed a motion to continue the trial set for May 15, 2006, on the ground that a necessary witness, Brandon Werry, was unavailable. On May 11, 2006, the trial court granted the state's motion to continue and rescheduled the trial for September 11, 2006.

{¶25} Initially, we note that the trial court did not make any indication as to why the trial had to be postponed nearly four months due to the unavailability of the state's witness for the May trial date.

{¶26} Also, the state's "necessary witness," Brandon Werry, did not testify at Pasqualone's trial. In light of this occurrence, we do not agree with the state's classification of Werry as a "necessary witness." Werry was the laboratory analyst who prepared the report. The state introduced his report pursuant to the procedures set forth in R.C. 2925.51. If properly complied with, this statute permits a laboratory

analyst's report to serve as "prima-facie evidence of the content, identity, and weight" of a substance in certain drug cases. R.C. 2925.51(A). Accordingly, the state did not call Werry as a witness at the continued trial. Since the record does not support the state's contention that Werry was a "necessary witness," we cannot conclude that the continuance due to his unavailability was reasonable under R.C. 2945.72(H). Thus, we will charge this time against the state.

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{¶27} Pasqualone's speedy-trial time period was tolled seven days for the state to respond to his discovery request and demand for a bill of particulars, 23 days due to his motion to suppress, and 43 days as a result of filing the four motions in limine. Thus, a total of 73 days is tolled and charged against Pasqualone. Subtracting this total from the 320 days Pasqualone awaited trial, Pasqualone was brought to trial within 247 "chargeable" days. Accordingly, his speedy-trial rights were not violated.

{¶28} Pasqualone's first assignment of error is without merit.

{¶29} Pasqualone's second assignment of error is:

{¶30} "The admission of the laboratory analysis report pursuant to Ohio R.C. 2925.51 violated appellant's constitutional rights under the confrontation clause of the Sixth Amendment, rendering his conviction erroneous."

{¶31} At trial, Pasqualone objected to the admission of the laboratory report on the basis that his Sixth Amendment right to confront the preparer of the report was violated. On appeal, Pasqualone argues that R.C. 2925.51 is unconstitutional, both facially and as applied, because it permits hearsay evidence to be introduced in a criminal trial without affording the defendant an opportunity to confront the person who prepared the report. R.C. 2925.51 provides, in part:

{¶32} "(A) In any criminal prosecution for a violation of this chapter or Chapter 3719. of the Revised Code, a laboratory report from the bureau of criminal identification and investigation, a laboratory operated by another law enforcement agency, or a laboratory established by or under the authority of an institution of higher education that has its main campus in this state and that is accredited by the association of American universities or the north central association of colleges and secondary schools, primarily for the purpose of providing scientific services to law enforcement agencies and signed by the person performing the analysis, stating that the substance that is the basis of the alleged offense has been weighed and analyzed and stating the findings as to the content, weight, and identity of the substance and that it contains any amount of a controlled substance and the number and description of unit dosages, is prima-facie evidence of the content, identity, and weight or the existence and number of unit dosages of the substance. In any criminal prosecution for a violation of section 2925.041 of the Revised Code or a violation of this chapter or Chapter 3719. of the Revised Code that is based on the possession of chemicals sufficient to produce a compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V, a laboratory report from the bureau or from any laboratory that is operated or established as described in this division that is signed by the person performing the analysis, stating that the substances that are the basis of the alleged offense have been weighed and analyzed and stating the findings as to the content, weight, and identity of each of the substances, is prima-facie evidence of the content, identity, and weight of the substances.

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{¶33} "Attached to that report shall be a copy of a notarized statement by the signer of the report giving the name of the signer and stating that the signer is an employee of the laboratory issuing the report and that performing the analysis is a part of the signer's regular duties, and giving an outline of the signer's education, training, and experience for performing an analysis of materials included under this section. The signer shall attest that scientifically accepted tests were performed with due caution, and that the evidence was handled in accordance with established and accepted procedures while in the custody of the laboratory.

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{¶34} "(B) The prosecuting attorney shall serve a copy of the report on the attorney of record for the accused, or on the accused if the accused has no attorney, prior to any proceeding in which the report is to be used against the accused other than at a preliminary hearing or grand jury proceeding where the report may be used without having been previously served upon the accused.

{¶35} "(C) 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.

{¶36} "(D) Any report issued for use under this section shall contain notice of the right of the accused to demand, and the manner in which the accused shall demand, the testimony of the person signing the report."

{¶37} The Sixth Amendment to the United States Constitution affords criminal defendants the right to confront adverse witnesses. *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, at ¶13. Previously, the relevant inquiry in a Confrontation Clause analysis was the "reliability" of the statement. *State v. Smith*, 3d Dist. No. 1-05-39, 2006-Ohio-1661, at ¶11, citing *Ohio v. Roberts* (1980), 448 U.S. 56. However, the United States Supreme Court revisited this issue in *Crawford v. Washington* (2004), 541 U.S. 36. Subsequent to the *Crawford* decision, the initial inquiry now concerns whether the hearsay statement is "testimonial." *State v. Stahl*, 2006-Ohio-5482, at ¶16, quoting *Crawford v. Washington*, 541 U.S. at 68.

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{¶38} Pasqualone relies on the Third Appellate District's decision in *State v. Smith* to support his position. *State v. Smith*, 2006-Ohio-1661. In *Smith*, the Third District held that an analyst's report prepared pursuant to R.C. 2925.51 is testimonial and, therefore, a defendant has a right to confront the expert. Id. at ¶26. However, the court held that a defendant may waive that right, provided "*the defendant [is] fully informed as to the consequences of the waiver.*" (Emphasis in original.) Id. at ¶21. The court held that a written warning contained in the report itself is sufficient to conclude that a defendant's failure to demand the testimony of the expert indicates he or she is waiving the right to confront the witness, provided the warning informs the defendant that the "report will be used as prima facie evidence against" him or her if the testimony of the expert is not demanded. Id. at ¶26. In *Smith*, the Third District reversed the defendant's conviction and remanded the matter for a new trial because the court concluded that the warning contained in the report was not sufficient to adequately warn the defendant that he was waiving his right to confront the expert and,

thus, the defendant did not waive his Sixth Amendment right to confront the witness. Id. at ¶23-24, 27, and 39.

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{¶39} Other Ohio courts have previously addressed this issue and, for various reasons, have held that the defendant's rights to confrontation were not violated. See *State v. Moore*, 8th Dist. No. 85828, 2006-Ohio-277, at ¶25-29; *State v. Clark*, 11th Dist. Nos. 2001-P-0031, 2001-P-0033, 2001-P-0034, 2001-P-0057, and 2001-P-0058, 2004-Ohio-334, at ¶65-69; *State v. Fleming* (May 10, 1983), 10th Dist. No. 82AP-813, 1983 Ohio App. LEXIS 15683, at *7-9; *State v. Shields* (Nov. 1983), 5th Dist. No. CA-83-3, 1983 Ohio App. LEXIS 14322, at *3-4; *State v. Smith* (Sept. 23, 1981), 9th Dist. No. 1731, 1981 Ohio App. LEXIS 11150, at *6-10. All of these cases were decided prior to the Third District's decision in *State v. Smith*, and all but *State v. Moore* were decided prior to the United States Supreme Court's opinion in *Crawford v. Washington*.

{¶40} In 1981, in *State v. Smith*, the Ninth Appellate District conducted a significant analysis of R.C. 2925.51 and its impact on the Confrontation Clause. *State v. Smith*, 1981 Ohio App. LEXIS 11150, at *6-10. The court ultimately concluded that R.C. 2925.51 did not violate the Confrontation Clause. However, we note the Ninth District's analysis was based on the "reliability" of the report in an analysis pursuant to *Ohio v. Roberts*. Id. at *8.

{¶41} In *State v. Moore* and *State v. Clark*, the courts conducted a minimal analysis of this issue, summarily concluding that the defendant's failure to request a copy of the expert's report under R.C. 2925.51(C) precluded a finding that the defendant's confrontation rights were violated. *State v. Clark*, 2004-Ohio-334, at ¶66-68; *State v. Moore*, 2006-Ohio-277, at ¶28.

{¶42} We will conduct an independent analysis of whether the admission of the analyst's report violated Pasqualone's Confrontation Clause rights.

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{¶43} We initially need to determine whether the report in this matter was testimonial. The *Crawford* Court declined to adopt a formal definition of "testimonial." *State v. Stahl*, 2006-Ohio-5482, at ¶19. However, the Supreme Court of Ohio noted that the *Crawford* Court did provide three examples of a testimonial statement, including: (1) in-court testimony or its functional equivalent, including affidavits; (2) statements contained in formal testimonial materials, including depositions and affidavits; and (3) statements made where an objective declarant would reasonably believe the statement would be available to be used at a subsequent trial. (Secondary citations omitted.) Id., quoting *Crawford v. Washington*, 541 U.S. at 51-52.

{¶44} In this matter, an affidavit was attached to the report pursuant to R.C. 2925.51(A). Also, the purpose of the report was to provide "prima-facie evidence of the content, identity, and weight" of the controlled substance. Thus, the report, including the attached affidavit, was specifically intended to be used in a subsequent criminal trial. Accordingly, laboratory reports such as the one admitted in this matter meet all three of the examples of a testimonial statement given in *Crawford*. Thus, we conclude, as did the Third Appellate District, that such reports are testimonial in nature. See *State v. Smith*, 2006-Ohio-1661, at ¶26.

{¶45} Next, we address the issue of whether a defendant may waive the confrontation rights. The Third District held that "a criminal defendant can waive his confrontation rights by failing to demand the testimony of the laboratory technicians under R.C. 2925.51(C).". Id. at ¶18. Other courts have also held that a defendant can

waive his confrontation rights by failing to demand the testimony of the analyst. See *State v. Fleming*, 1983 Ohio App. LEXIS 15683, at *9; *State v. Shields*, 1983 Ohio App. LEXIS 14322, at *4.

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{¶46} In its analysis, the Third District held that the waiver of confrontation rights pursuant to R.C. 2925.51 "must be made knowingly, intelligently, and voluntarily." *State v. Smith*, 2006-Ohio-1661, at ¶21, citing *Boykin v. Alabama* (1969), 395 U.S. 238 and *State v. Ballard* (1981), 66 Ohio St.2d 473. The cases cited by the Third District, *Boykin v. Alabama* and *State v. Ballard*, concern the waiver of the right to confront witnesses under an analysis of whether a defendant entered a valid guilty plea. *Boykin v. Alabama*, 395 U.S. at 243. *State v. Ballard*, 66 Ohio St.2d at 478-480. There is a procedural difference between entering a guilty plea and failing to demand the testimony of an expert pursuant to R.C. 2925.51. However, the net effect of both occurrences is identical, in that the defendant gives up his constitutional right to confront witnesses. Thus, we agree with the Third District's conclusion that such a waiver must be made knowingly, voluntarily, and intelligently.

{¶47} In *State v. Smith*, the Third District found the language in the warning contained in the report was not sufficient to adequately inform the defendant of the rights he was waiving. *State v. Smith*, 2006-Ohio-1661, at ¶23-24. The court held, for a waiver to be sufficient, it must inform the defendant "that failure to make the demand [of the testimony of the person who prepared the report] will permit the laboratory report to serve as prima facie evidence of the conclusions in the report without the testimony of the technician." Id. at ¶24.

{¶48} The Third District concluded that "the purpose of serving the report on the defendant" under R.C. 2925.51(B) is to inform the defendant that the report will be admissible against him without the testimony of the analyst, unless that testimony is demanded. Id. at ¶23. In addition, we note the Tenth Appellate District explained "[a]t [no] time did the defendant claim that he misunderstood his responsibility pursuant to [R.C. 2925.51] to request the testimony of the analyst." *State v. Fleming*, 1983 Ohio App. LEXIS 15683, at *9. The concern we have with this approach is the assumption that the defendant personally received a copy of the report. R.C. 2925.51(B) requires that the state serve the report "on the attorney of record for the accused, or on the accused if the accused has no attorney." Thus, the appropriate question is whether an attorney can waive confrontation rights on behalf of his or her client. For the following reasons, we answer this question in the negative.

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{¶49} Permitting an attorney to make a limited waiver of a defendant's constitutional rights where there is a statute or rule providing that inaction will constitute waiver is not unprecedented. Under Crim.R. 23, a defendant in a "petty offense" case only receives a jury trial if he demands one. Ohio courts have upheld this rule requiring action on the part of the defendant's attorney in order to exercise the defendant's constitutional right to a jury trial. See *Middletown v. Flinchum* (Dec. 18, 2000), 12th Dist. No. CA99-11-193, 2000 Ohio App. LEXIS 5908, at *15, citing *Mentor v. Giordano* (1967), 9 Ohio St.2d 140, paragraph one of the syllabus. However, we note that Crim.R. 5(A)(5) requires the trial court to inform the defendant at the initial hearing of the necessity to make a demand for a jury trial in petty offense cases. Thus, the

defendant is put on notice that he needs to take affirmative action or his right to a jury trial will be waived.

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{¶50} In R.C. 2925.51, there is no safeguard similar to that in Crim.R. 5(A)(5) to ensure that a defendant actually receives notice about the existence of the report and his right to demand the testimony of the analyst. The statute specifically states that the report is to be served on the accused's attorney, if he or she has one. R.C. 2925.51(B).

{¶51} It could be argued that the procedures in R.C. 2925.51 are akin to the parties entering into a stipulation. However, a stipulation is binding on a criminal defendant if it is made by the defendant or by his or her attorney *in the defendant's presence* during the trial. *State v. Bryant*, 8th Dist. No. 79841, 2002-Ohio-2136, at ¶37, citing *State v. Robbins* (1964), 176 Ohio St. 362, paragraph two of the syllabus. Thus, we cannot consider an attorney's failure to act well before the trial as a binding stipulation on the defendant for purposes of R.C. 2925.51.

{¶52} We agree with the Third District's conclusion that a defendant's waiver of his or her confrontation rights under R.C. 2925.51 must be made knowingly, intelligently, and voluntarily. *State v. Smith*, 2006-Ohio-1661, at ¶23-24. However, we disagree with that court's conclusion that such waiver can be accomplished by a warning contained in the report, which is only served on the defendant's attorney. The record needs to affirmatively demonstrate that the defendant knowingly, intelligently, and voluntarily waived his constitutional right to confront the laboratory analyst.

{¶53} In this matter, we note the record demonstrates the state's intention to call the analyst as a witness. Werry was subpoenaed on two separate occasions. Further, the state filed two motions to continue due to the unavailability of Werry. Due to these

events, Pasqualone could have assumed that Werry was going to testify at trial. This assumption does not excuse Pasqualone's failure to request his testimony in the manner prescribed in R.C. 2925.51(C). However, the fact that the record demonstrates the state's repeated actions referring to its intention to call Werry as a witness weighs against a finding that Pasqualone knowingly, intelligently, and voluntarily waived his Sixth Amendment right to confront Werry.

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{¶54} We do not agree that R.C. 2925.51 is unconstitutional on its face. A defendant may waive his right to confront the analyst. However, that waiver must be made knowingly, intelligently, and voluntarily and reflected in the record. In this instant matter, the record does not demonstrate that Pasqualone knowingly, intelligently, and voluntarily waived his Sixth Amendment confrontation right to confront the analyst.

{¶55} Pasqualone's second assignment of error has merit to the extent indicated.

{¶56} The judgment of the trial court is reversed. This matter is remanded to the trial court to conduct a new trial.

MARY JANE TRAPP, J., concurs,

DIANE V. GRENDELL, J., concurs in part, dissents in part, with a Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in part, dissents in part, with a Dissenting Opinion.

{¶57} I concur in the majority's disposition of the first assignment of error and respectfully dissent from the disposition of the second assignment.

{¶58} The issue under the second assignment of error is whether the admission of the Ohio State Highway Patrol Crime Laboratory Report, pursuant to R.C. 2925.51, violated Pasqualone's Sixth Amendment right of confrontation.

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{¶59} Initially, the majority determines that such laboratory reports constitute "testimonial" evidence for the purposes of the Sixth Amendment. See *Crawford v. Washington* (2004), 541 U.S. 36. This issue is currently before the Ohio Supreme Court as a certified conflict between *State v. Crager*, 164 Ohio App.3d 816, 2005-Ohio-6868, and *State v. Cook*, 6th Dist. No. WD-04-029, 2005-Ohio-1550. The question certified is: "Are records of scientific tests, conducted by a government agency at the request of the State for the specific purpose of being used as evidence in the criminal prosecution of a specific individual, 'testimonial' under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.E.2d 177?" *State v. Crager*, 109 Ohio St.3d 1421, 2006-Ohio-1967.

{¶60} Assuming, arguendo, such reports are testimonial, the majority paradoxically concludes that R.C. 2925.51 is constitutional, but that the admission of the Crime Laboratory Report pursuant to R.C. 2925.51 violates Pasqualone's constitutional rights.

{¶61} The majority follows the analysis of the Third Appellate District in *State v. Smith*, 3rd Dist. No. 1-05-39, 2006-Ohio-1661. Essentially, the argument is that a defendant is able to waive his right to confront/cross-examine the laboratory technician who prepares the report, but that such waiver must be done "knowingly, intelligently, and voluntarily." The procedure set forth in R.C. 2925.51 will not guarantee that the right has been validly waived.

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{¶62} The error in this analysis is that a defendant who does not exercise his right to cross-examine the laboratory technician conducting the test and/or preparing the report proffered into evidence is not waiving his Sixth Amendment right to confront witnesses, but merely declining to exercise this right as to a particular witness. Thus, the majority is incorrect that the "net effect" of entering a guilty plea and failing to cross-examine the technician who prepares a laboratory report is the same. The entering of a guilty plea entails the permanent relinquishment of the right to cross-examine or even to summon witnesses in one's defense. When one fails to exercise the right to cross-examine as to a particular witness, they have not relinquished their right to exercise it as to another witness.

{¶63} This distinction has been recognized in hundreds of cases which stand for the proposition that the decision to cross-examine a witness, particularly laboratory technicians, is a "tactical decision" within the discretion of a defendant's trial counsel. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, at ¶220; *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, at ¶93 and ¶125; *State v. Russell*, 2nd Dist. No. 21458, 2007-Ohio-137, at ¶55 ("[t]rial counsel's decision to cross-examine a witness and the extent of such cross-examination are tactical matters") (citations omitted); *State v. Harco*, 11th Dist. No. 2005-A-0077, 2006-Ohio-3408, at ¶37 ("[t]he decision to call a witness is 'within the rubric of trial strategy and will not be second-guessed by a reviewing court'") (citations omitted). Taken to its logical conclusion, the majority's holding would require trial counsel to obtain the defendant's knowing, voluntary, and intelligent consent before foregoing the cross-examination of any witness, an obviously impossible situation.

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{¶64} Just as significantly, the drafters of R.C. 2925.51 recognized that the decision not to cross-examine the technician who has prepared a laboratory report is within the competence of trial counsel and does not require the defendant's knowing, voluntary, and intelligent consent. For this reason, the statute provides "[t]he prosecuting attorney shall serve a copy of the report on the attorney of record for the accused, or on the accused if the accused has no attorney ***." R.C. 2925.51(B).

{¶65} Since the prosecution served a copy of the Highway Patrol Crime Laboratory Report upon Pasqualone's defense counsel in accordance with R.C. 2925.51(B) and defense counsel failed to demand the testimony of "the person signing the report" as required by R.C. 2925.51(C), the admission of the laboratory report was not in error. Accordingly, the judgment of the trial court should be affirmed.

Evid. R. Rule 803

Baldwin's Ohio Revised Code Annotated **i. Currentness**

Ohio Rules of Evidence **(Refs & Annos)**

Article VIII. Hearsay

" src="https://statcont.westlaw.com/images/arrow.gif" border=0**Evid R 803 Hearsay exceptions; availability of declarant immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

<SUBSECT"**(2) Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

<SUBSECT"**(4) Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

<SUBSECT"**(6) Records of regularly conducted activity.** A memorandum, report, record, or

data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

<SUBSECT"**(8) Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law

<SUBSECT"**(10) Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 901(B)(10) or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

<SUBSECT"**(12) Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a

sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

<SUBSECT"**(14) Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

<SUBSECT"**(16) Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

<SUBSECT"**(17) Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

<SUBSECT"**(19) Reputation concerning personal or family history.** Reputation among members of the declarant's family by blood, adoption, or marriage or among the declarant's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant's personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

<SUBSECT"**(21) Reputation as to character.** Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

<SUBSECT"**(23) Judgment as to personal, family, or general history, or boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(Adopted eff. 7-1-80; amended eff. 7-1-06, 7-1-07)

HISTORICAL AND STATUTORY NOTES

Amendment Note: The 7-1-06 amendment added a new division (18); redesignated former divisions (18), (19), (20), (21), and (22) as divisions (19), (20), (21), (22), and (23); and made other nonsubstantive changes.

STAFF NOTES

2006

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2925. Drug Offenses (Refs & Annos)
Miscellaneous Provisions

2925.51 Laboratory report as prima-facie evidence of content; weight and identity of substance; rights of accused

(A) In any criminal prosecution for a violation of this chapter or Chapter 3719. of the Revised Code, a laboratory report from the bureau of criminal identification and investigation, a laboratory operated by another law enforcement agency, or a laboratory established by or under the authority of an institution of higher education that has its main campus in this state and that is accredited by the association of American universities or the north central association of colleges and secondary schools, primarily for the purpose of providing scientific services to law enforcement agencies and signed by the person performing the analysis, stating that the substance that is the basis of the alleged offense has been weighed and analyzed and stating the findings as to the content, weight, and identity of the substance and that it contains any amount of a controlled substance and the number and description of unit dosages, is prima-facie evidence of the content, identity, and weight or the existence and number of unit dosages of the substance. In any criminal prosecution for a violation of section 2925.041 of the Revised Code or a violation of this chapter or Chapter 3719. of the Revised Code that is based on the possession of chemicals sufficient to produce a compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V, a laboratory report from the bureau or from any laboratory that is operated or established as described in this division that is signed by the person performing the analysis, stating that the substances that are the basis of the alleged offense have been weighed and analyzed and stating the findings as to the content, weight, and identity of each of the substances, is prima-facie evidence of the content, identity, and weight of the substances.

Attached to that report shall be a copy of a notarized statement by the signer of the report giving the name of the signer and stating that the signer is an employee of the laboratory issuing the report and that performing the analysis is a part of the signer's regular duties, and giving an outline of the signer's education, training, and experience for performing an analysis of materials included under this section. The signer shall attest that scientifically accepted tests were performed with due caution, and that the evidence was handled in accordance with established and accepted procedures while in the custody of the laboratory.

(B) The prosecuting attorney shall serve a copy of the report on the attorney of record for the accused, or on the accused if the accused has no attorney, prior to any proceeding in which the report is to be used against the accused other than at a preliminary hearing or grand jury proceeding where the report may be used without having been previously served upon the accused.

(C) 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.

(D) Any report issued for use under this section shall contain notice of the right of the accused to demand, and the manner in which the accused shall demand, the testimony of the person signing the report.

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(E) Any person who is accused of a violation of this chapter or of Chapter 3719. of the Revised Code is entitled, upon written request made to the prosecuting attorney, to have a portion of the substance that is, or of each of the substances that are, the basis of the alleged violation preserved for the benefit of independent analysis performed by a laboratory analyst employed by the accused person, or, if the accused is indigent, by a qualified laboratory analyst appointed by the court. Such portion shall be a representative sample of the entire substance that is, or of each of the substances that are, the basis of the alleged violation and shall be of sufficient size, in the opinion of the court, to permit the accused's analyst to make a thorough scientific analysis concerning the identity of the substance or substances. The prosecuting attorney shall provide the accused's analyst with the sample portion at least fourteen days prior to trial, unless the trial is to be held in a court not of record or unless the accused person is charged with a minor misdemeanor, in which case the prosecuting attorney shall provide the accused's analyst with the sample portion at least three days prior to trial. If the prosecuting attorney determines that such a sample portion cannot be preserved and given to the accused's analyst, the prosecuting attorney shall so inform the accused person or his attorney. In such a circumstance, the accused person is entitled, upon written request made to the prosecuting attorney, to have the accused's privately employed or court appointed analyst present at an analysis of the substance that is, or the substances that are, the basis of the alleged violation, and, upon further written request, to receive copies of all recorded scientific data that result from the analysis and that can be used by an analyst in arriving at conclusions, findings, or opinions concerning the identity of the substance or substances subject to the analysis.

(F) In addition to the rights provided under division (E) of this section, any person who is accused of a violation of this chapter or of Chapter 3719. of the Revised Code that involves a bulk amount of a controlled substance, or any multiple thereof, or who is accused of a violation of section 2925.11 of the Revised Code, other than a minor misdemeanor violation, that involves marihuana, is entitled, upon written request made to the prosecuting attorney, to have a laboratory analyst of the accused's choice, or, if the accused is indigent, a qualified laboratory analyst appointed by the court present at a measurement or weighing of the substance that is the basis of the alleged violation. Also, the accused person is entitled, upon further written request, to receive copies of all recorded scientific data that result from the measurement or weighing and that can be used by an analyst in arriving at conclusions, findings, or opinions concerning the weight, volume, or number of unit doses of the substance subject to the measurement or weighing.

(2001 H 7, eff. 8-7-01; 1977 S 201, eff. 11-16-77; 1976 S 541; 1975 H 300)

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2001 H 7 added the second sentence in the first paragraph of division (A); inserted "or of each of the substances that are", "or the substances that are", and "or substances" throughout division (E); made changes to reflect gender neutral language; and made other nonsubstantive changes.

CROSS REFERENCES

Recovery of costs from juvenile drug abuse offenders, 2152.202

LIBRARY REFERENCES

Controlled Substances ⚷74.
Criminal Law ⚷388.2, 446.
Westlaw Topic Nos. 110, 96H.

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