

IN THE SUPREME COURT OF OHIO

RICKIE L. MALOTT,

Appellant,

v.

STATE OF OHIO,

Appellees.

:
:
: On Appeal from the Fayette
: County Court of Appeals,
: Twelfth Appellate District
:
: Court of Appeals
: Case Nos. CA2007-02-006
: CA2007-02-007
: CA2007-02-008

MOTION FOR DELAYED APPEAL
PURSUANT TO RULE II, SECTION 2(A)(4)(a)

Comes now Appellant, Rickie L. Malott, Pro se, pursuant to Ohio Rules of Practice, Rule II, section 2(A)(4)(a). The Appellant respectfully seeks to file a delayed appeal of the judgment entered on May 5, 2008, by the Fayette County Court of Appeals, Twelfth Appellate District.

The Appellant asserts that the Prison Staff's failure to provide "meaningful access to the courts" is adequate reason for the delay. The facts supporting the motion are set forth in the attached Affidavit: and Exhibits A and Exhibit B in support of the Affidavit.

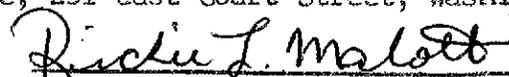
Respectfully submitted,



Rickie L. Malott, Pro se
Prison Id. No. #A517774
Chillicothe Corr. Inst.
P.O. Box 5500
Chillicothe, Ohio 45601

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for delayed Appeal was sent by ordinary U.S. mail to counsel of record for appellee, Kristina M. Rooker, Fayette County Prosecutor's Office, 251 east Court Street, Washington C.H., Ohio 43160.



Rickie L. Malott, Pro se

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AFFIDAVIT OF RICKIE L. MALOTT
IN SUPPORT OF MOTION FOR DELAYED APPEAL

Todd R. Barstow (COUNSEL OF RECORD)
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PRO SE APPELLANT, RICKIE L. MALOTT

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251 East Court Street
Washington C.H., Ohio 43160

COUNSEL FOR APPELLEES, FAYETTE
COUNTY PROSECUTOR'S OFFICE

IN THE SUPREME COURT OF OHIO

RICKIE L. MALOTT, :
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 Appellant, : On Appeal from the Fayette
 : County Court of Appeals,
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 STATE OF OHIO, : Court of Appeals
 : Case Nos. CA2007-02-006
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AFFIDAVIT OF RICKIE L. MALOTT
IN SUPPORT OF MOTION FOR DELAYED APPEAL

Comes now Defendant-Appellant, Rickie L. Malott, and after being duly sworn, states as follows:

1. I am the same, Ricki L. Malott, who is the Appellant in a criminal action styled, **State of Ohio v. Rickie L. Malott**, Fayette County Court of Appeals, Twelfth Appellate District, Case Nos. CA2007-02-006; and CA2007-02-007; and CA2007-02-008.

2. I have read the Motion for Delayed Appeal, pursuant to Rule II, section 2(A)(4)(a), and the facts and statements therein are true and accurate to the best of my knowledge, information and belief.

3. My Motion for Delayed appeal, pursuant to Rule II, section 2(A)(4)(a) is brought before the Court for a legitimate and proper purpose, and not to cause undue litigation and expense, or to needlessly burden the Court, and I believe that I am truly entitled to the relief sought therein, based upon existing law.

4. I received a letter from Todd W. barstow, Attorney at Law, dated May 6, 2008, stating that my direct appeal had been denied and that I would have until June 19, 2008, to have an appeal filed with the Supreme Court. See Exhi-

bit A.

5. Towards the end of May, 2008, I completed a cash-slip to have legal copies made through my assigned housing unit case manager, as per policy.

6. At some time during the month of June, 2008, the same housing unit case manager was escorted from the institution and subsequently indicted and charged for sexual battery. The staff member never returned, and as this date I have yet to receive the approved cash-slip.

7. Because the time for filing a timely appeal into the Ohio Supreme Court has lapsed I am forced to utilize the Motion for Delayed Appeal, to have my claims of constitutional violations "exhausted" for federal habeas corpus review.

8. My "right to appeal" has been infringed upon by staff failing to ensure that I have reasonable access to the courts as required by the applicable statutes.

9. I have since been able to rely on our housing unit sargeant to obtain the necessary cash-slip for copying of my legal documents. However, the time for filing a timely appeal to the Supreme Court of Ohio has passed.

10. I would have timely filed an appeal from the court of appeals in the fore mentioned appellate case nos. but for the obstruction by the staff member who failed to fulfill his obligations and faithfully perform his duties.

11. I assert as adequate reason for the delay in filing the Notice of Appeal and Memorandum in Support of Jurisdiction in a timely manner the foregoing facts, statements and attached Exhibits in support of this Affidavit, in support of the Motion for Delayed Appeal.

12. I hereby certify that the attached Exhibits are true and accurate copies of the originals.

Further, affiant saveth naught. The undersigned Ricki L. Malott, hereby

certifies under Oath that he has read the foregoing Affidavit, consisting of 12 paragraphs and 3 pages, and that the facts and statements contained therein are true and accurate facts and statements; and that the Exhibits attached hereto are true and accurate copies of the originals, to the best of his knowledge, information and belief.

Rickie L. Malott
Rickie L. Malott, Pro se

Sworn to, or affirmed, and subscribed in my presence this 25 day of

August, 2008.

Shea Murrell
NOTARY PUBLIC

My Commission Expires: 2/16/2011

EXHIBIT A

Todd W. Barstow

Telephone
614-338-1800

Attorney at Law
4185 East Main Street
Columbus, Ohio 43213

Facsimile
614-338-2247

May 6, 2008

Rickie Malott 517774
CCI PO Box 5500
Chillicothe, OH 45601

Re: State vs. Malott

Dear Mr. Malott,

Enclosed please find a copy of the Opinion from the Twelfth District Court of Appeals regarding your appeal. The Court affirmed all aspects of your cases from Fayette County. You now have until June 19, 2008 to file an appeal with the Supreme Court of Ohio, if you choose. I do not believe that the Supreme Court would accept your case. That is due to their decision in *State vs. Crager*, which contained similar legal arguments to your case. The Court of Appeals discusses the *Crager* case in its decision.

If you wish to continue to appeal this matter, please contact me at once. If you decide to proceed without my services, the Supreme Court's address is: Supreme Court of Ohio, 65 South Front Street, Columbus, OH 43215. Their telephone number is: 614-387-9000. You could also contact the Ohio Public Defender's Office to assist you in your appeal. Their address is: Ohio Public Defender Commission, 8 East Long Street, 11th Floor, Columbus, OH 43215. Their telephone number is: 614-466-4199.

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

RICKIE L. MALOTT,

Defendant-Appellant.

CASE NOS. CA2007-02-006
CA2007-02-007
CA2007-02-008

OPINION
5/5/2008

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 05CRI00266

David B. Bender, Fayette County Prosecuting Attorney, Kristina M. Rooker, 251 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Todd W. Barstow, 4185 East Main Street, Columbus, Ohio 43213, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Rickie Malott, appeals his conviction in the Fayette County Court of Common Pleas for trafficking in cocaine and possession of drug paraphernalia. We affirm the decision of the trial court.

{¶2} On December 13, 2005, the Fayette County Sheriff's Department executed a search warrant on appellant's residence. Deputies conducted a "no-knock" entrance into the residence, where several adult males were found. During the search, deputies discovered items believed to be drug paraphernalia and substances which appeared to be cocaine or

crack cocaine.

{¶13} Appellant was observed leaving the room with something in his hand and was ordered to the ground by one of the deputies. A lighter and crack pipe were located near appellant, and a plastic baggy containing a white powder was found in the pocket of his pants. Other items of drug paraphernalia were found in the residence, along with scales, blades for cutting cocaine and baggies, which are used for preparing drugs for sale.

{¶14} During the search, deputies discovered plastic baggies containing a white substance that appeared to be cocaine. The substances were field tested by deputies and these tests indicated positive for cocaine. The substances were delivered to Bureau of Criminal Identification and investigation (BCI), where they were weighed and tested. BCI issued a report indicating that the white substance removed from appellant's residence was cocaine weighing over 20 grams.

{¶15} At trial, deputies testified regarding the search and subsequent discovery of the cocaine, drug paraphernalia and other items in the residence that indicated drug trafficking was taking place. The BCI report was admitted into evidence, although the analyst who performed the testing and prepared the report did not testify. Appellant was convicted of trafficking in drugs and possession of drug paraphernalia and sentenced accordingly.

{¶16} On appeal, appellant raises two assignments of error for our review:

{¶17} "THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF TRAFFICKING IN DRUGS AS THAT VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY PERMITTING THE INTRODUCTION OF IMPERMISSIBLE HEARSAY, IN VIOLATION OF HIS RIGHT TO CONFRONTATION AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION."

{¶9} For ease of discussion, we begin by addressing appellant's second assignment of error in which he argues that the trial court violated his right to confrontation by admitting hearsay evidence. Specifically, appellant contends that his confrontation rights under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S. Ct. 1354, were violated when the court admitted the BCI report because the analyst who prepared the report did not testify and was not subject to cross-examination.

{¶10} In *Crawford*, the United States Supreme Court established a new approach to inquiries made under the Confrontation Clause. Prior to *Crawford*, an out-of-court statement by an unavailable witness was not barred by the Confrontation Clause if it bore adequate "indicia of reliability." *Ohio v. Roberts* (1980), 448 U.S. 56, 66, 100 S.Ct. 2531. However, in *Crawford*, the Supreme Court altered the analysis by holding that out-of-court statements presented in a criminal trial violate the Confrontation Clause unless the witness was unavailable and the defendant had a prior opportunity to cross-examine the person who made the statement. *Crawford*, 541 U.S. at 53-54, 124 S.Ct. 1354.

{¶11} The Ohio Supreme Court recently addressed *Crawford* in examining whether the admission of DNA reports without the testimony of the analyst who prepared the report violated the Confrontation Clause. *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840. The court found the key inquiry under *Crawford* was whether a particular statement was testimonial or nontestimonial. *Id.* at ¶41. It then determined that the reports of DNA analysis

prepared by an analyst at BCI were business records which fell under the hearsay exception of Evid.R. 803(6) and therefore, were not testimonial under *Crawford*.

{¶12} In analyzing the issue, the court examined its previous decision in *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, in which it found that autopsy reports were business records and therefore nontestimonial under *Crawford*. The court then found the autopsy report in *Craig* was not distinguishable from the DNA report in the case before it. The court further found that the report was not removed from the business record exception by the fact that the report was prepared by an analyst at BCI at the request of law enforcement or by the fact that it was anticipated that the report would be used at a trial. See *Crager* at ¶51, 68.

{¶13} We find that nothing in the drug analysis reports in the case at bar that would distinguish them from the DNA reports discussed by the Ohio Supreme Court in *Crager*. Like the DNA reports, the drug analysis report in this case was prepared by an analyst at BCI to document the objective findings of scientific testing. Moreover, the Ohio Supreme Court's holding in *Crager* addresses all scientific testing as it specifically determined "[r]ecords of scientific tests are not 'testimonial' under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354." *Crager* at paragraph one of the syllabus. Accordingly, we find that the drug analysis report in this case was a business record and nontestimonial under *Crawford*. Therefore, appellant's confrontation rights were not violated by the admission of the report without the testimony of the analyst who prepared it.

{¶14} The Ohio Revised Code specifically provides that a laboratory report of drug testing from BCI is prima facie evidence of the content, identity and weight of the substance. See R.C. 2925.51. The statute requires the state to serve a copy of the report on the defendant with notice of the defendant's right to demand the testimony of the person who

prepared the report. In this case, appellant was served with the report and given notice of his right to compel the analyst's testimony. Appellant did not assert his right to have the analyst testify at trial and the report was properly admitted into evidence.

{¶15} Accordingly, we find that appellant's Confrontation Clause rights under *Crawford* were not violated in this case when the drug analysis report was admitted into evidence without the testimony and opportunity for cross-examination of the analyst who prepared the report. Appellant's second assignment of error is overruled.

{¶16} In his first assignment of error, appellant contends that his conviction for trafficking in drugs was not supported by sufficient evidence and was against the manifest weight of the evidence. The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶33. In reviewing a record for sufficiency, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶17} While the test for sufficiency requires a determination as to whether the state has met its burden of production at trial, a manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *Wilson* at ¶34. In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether

in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* In such a review, an appellate court considers the credibility of the witnesses and the weight to be given the evidence. *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26. "However, these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence presented." *Id.*, citing *State v. DeHass* (1967), 10 Ohio St.2d 230. The discretionary power to overturn a conviction based on the manifest weight of the evidence is to be invoked only in those extraordinary circumstances to correct a manifest miscarriage of justice where the evidence presented weighs heavily in favor of acquittal. *Id.* at ¶25, citing *Thompkins*, 78 Ohio St.3d at 387.

{¶18} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Wilson* at ¶35, citing *State v. Lombardi*, Summit App. No. 22435, 2005-Ohio-4942, ¶9.

{¶19} Appellant contends that the evidence was insufficient to identify the substances found in his residence as cocaine. Appellant relies to a great extent on his argument above that the drug analysis report was inadmissible. He claims that without the drug analysis report, the testimony of the deputies was insufficient to establish that the substance was cocaine.

{¶20} However, as discussed above, the drug analysis report was properly admitted into evidence. Accordingly, there was evidence that the substance found in appellant's residence was cocaine. In addition, deputies testified that they found items in the residence

which are used in drug trafficking, including scales commonly used for weighing narcotics, scissors with a white residue, baking soda, a metal tray with drug residue, sandwich bags and razor blades. Considering the lab report, along with evidence of the other items found at appellant's residence that indicated drug trafficking, and the testimony of the deputies, appellant's conviction for trafficking in drugs was not against the manifest weight of the evidence. Appellant's first assignment of error is overruled.

{¶21} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>