

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Case No. 06-0294
Case No. 06-0298

Appellant,

On Remand from the United
States Supreme Court

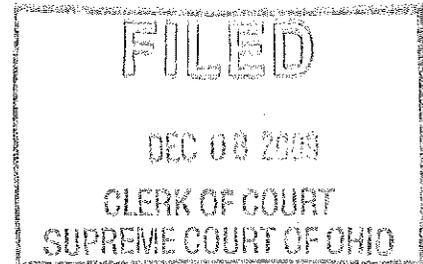
vs.

LEE A. CRAGER,

Appellee.

MERIT BRIEF OF APPELLEE, LEE A. CRAGER

Kevin P. Collins (0029811)
(COUNSEL OF RECORD)
COLLINS & LOWTHER, LPA
132 South Main Street
Marion, Ohio 43302
[Tel] (740) 223-1470
[Fax] (740) 223-1467
kevin@collinsandlowther.com



COUNSEL FOR APPELLEE, LEE A. CRAGER

Brent Yager
(COUNSEL OF RECORD)
MARION COUNTY PROSECUTING ATTORNEY
134 East Center Street
Marion, Ohio 43302
[Tel] (740) 223-4290
[Fax] (740) 223-4299
COUNSEL FOR APPELLANT,
STATE OF OHIO

Richard Cordray
Benjamin Mizer
ATTORNEY GENERAL OF OHIO
30 E. Broad Street, 17th floor
Columbus, Ohio 43215
[Tel](614)466-8980
COUNSEL FOR AMICUS CURIAE,
OHIO ATTORNEY GENERAL

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STATEMENT OF FACTS AND OF THE CASE

On September 13, 2004, Defendant-Appellee, Lee Crager, was tried by jury for killing Esta Boyd. The heart of the State's case was the results and interpretation of DNA testing performed on samples obtained from Mr. Crager and Esta Boyd. The testing was performed by the Ohio Bureau of Criminal Identification and Investigation (BCI). Test results and analysis were presented via Jennifer Duvall's two written laboratory reports and via the live testimony of her coworker, Steve Wiechman.

Ms. Duvall, a forensic scientist employed by BCI, performed the actual laboratory work on items of evidence she received from the police and the prosecutor. She performed two rounds of testing and produced two reports. (Tr., p.815) The first round involved testing samples from a vaginal swab, a penile swab, a stain from a pair of jeans, and a stain from a shirt. (Tr., p.805, State's Exhibit 56) A second round of testing was performed on samples obtained from a ring and three cigarettes. (Tr., p.816, State's Exhibit 57) Ms. Duvall generated two written reports, but did not testify at trial because she was on maternity leave. (Tr.,p.803)

Mr. Wiechman, also a forensic scientist employed by BCI, testified he did not do the testing, but performed a technical review. (Tr.,p.790, 802, 837) Actually, he performed a technical review of the second round of testing. But, for the first round, merely reviewed the file in preparation for trial. (Tr., 802, p.838) Based upon Ms. Duvall's notes and report, Wiechman reiterated her findings and testified that he concurred with her analysis and conclusions. Based on the test results, Mr. Wiechman testified the shirt taken from Lee Crager had a mixture of DNA. The major profile was consistent with Ms. Boyd's DNA, the minor profile was consistent

with Lee Crager. (Tr., p.812-813) He also testified the test results established that the ring taken from Ms. Boyd's finger had a mixture of DNA. The major profile was consistent with Ms. Boyd's DNA, the minor profile was consistent with Lee Crager. (Tr., p.820-821) Three of the 22 cigarette butts retrieved from the ashtray were tested. (Tr., p.822-823) Each of the three showed a mixture of DNA consistent with both Ms. Boyd and Lee Crager. (Tr., p.824)

Based on the results of Ms. Duvall's testing, Mr. Wiechman opined that only one in 1.028 quintillion people would be expected to have a DNA profile consistent with the major profile on the shirt. He further opined with regard to the ring: "take all the possible combinations that are in there and say, 'okay, how often would we expect to see any one person that couldn't be or that would have a combination within this particular mixture', and that particular number is 1 in 7,837,000,000." (Tr., p.822)

On September 16, 2004, Mr. Crager was found guilty of Aggravated Murder, Murder, and Aggravated Burglary. He was sentenced to life imprisonment with parole eligibility after twenty (20) years for Aggravated Murder and ten (10) years on the charge of Aggravated Burglary, to be served consecutively.

The Third District Court of Appeals reversed Mr. Crager's conviction holding that Ms. Duvall's reports were testimonial hearsay and their admission violated Mr. Crager's Sixth Amendment right to confrontation. *State v. Crager* (2005), 164 Ohio App.3d 816, 2006-Ohio-6868, ¶29-30 The Third District Court also noted that Mr. Wiechman's testimony was based on facts derived solely from Ms. Duvall's reports. Accordingly, the Court held that Wiechman's testimony as to the conclusions in Duvall's reports was improper because he did not have

personal knowledge of the actual DNA testing in this case and Ms. Duvall's reports should not have been admitted into evidence. *State v. Crager* (2005), 164 Ohio App.3d 816, 2006-Ohio-6868, ¶49.

This Court reversed the Third District Court of Appeals, holding, (1) records of scientific tests are not "testimonial" under *Crawford v. Washington* and (2) a criminal defendant's constitutional right to confrontation is not violated when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing. *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840, Syllabus.

On June 29, 2009, the United States Supreme Court granted certiorari, vacated the decision, and remanded the case to the Ohio Supreme Court for reconsideration in light of its opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. ____ (2009), issued on June 25, 2009.

Initially this Court remanded the case to the Marion County Common Pleas Court for trial. Both the Attorney General and the Marion County Prosecuting Attorney filed motions for reconsideration. On November 18, 2009, this Court granted the motions and directed the parties "to brief the issue of the impact of *Melendez-Diaz v. Massachusetts* (2009), ____ U.S. ____, 129 S.Ct. 2527, 174 L.Ed.2d 314, on this court's holding in paragraph two of the syllabus in *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840, 879 N.E.2d 745."

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW: THE CONFRONTATION CLAUSE AND EVID.R. 703 REQUIRE THE TESTIMONY OF A DNA ANALYST BE BASED UPON FACTS PERCEIVED BY THE ANALYST OR OTHERWISE ADMITTED PROPERLY INTO EVIDENCE.

The DNA Reports Were Inadmissible

In *Melendez-Diaz v. Massachusetts*, the Defendant had been convicted of trafficking in cocaine. At trial, the prosecution introduced certificates of state laboratory analysts stating that material seized by police and connected to petitioner was cocaine of a certain quantity. The United States Supreme Court reversed the conviction because the admission of the certificates violated petitioner's Sixth Amendment right to confront the witnesses against him. *Melendez-Diaz v. Massachusetts*, 557 U.S. ____, 129 S.Ct. 2527, 2531-2542 (2009). In a "rather straightforward application of [its] holding in *Crawford*", the Court stated:

"In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with" the analysts at trial." *Melendez-Diaz v. Massachusetts*, 557 U.S. ____, 129 S.Ct. 2527, 2532 (2009)

The *Melendez-Diaz* opinion leaves little doubt that records of scientific tests are "testimonial" under *Crawford v. Washington*. Thus, the starting point for this analysis is the premise that Ms. Duvall's DNA reports, like the certificates in *Melendez-Diaz*, are testimonial. Because Ms. Duvall did not testify and was not deposed, her written reports violated the Confrontation Clause and were not admissible.

The issue now before this Court is whether Mr. Wiechman's testimony was admissible even though Ms. Duvall's reports were not. Mr. Wiechman's testimony actually consisted of two significantly different parts. The first part was his reiteration of the actual results of the laboratory testing performed by Ms. Duvall. This in turn formed the factual predicate to the second part, his expert opinion interpreting those results.

Mr. Weichman's Testimony About the Actual Results of the DNA Testing Was Inadmissible

The record clearly establishes that Mr. Wiechman did not personally conduct the testing. He performed a "technical review." (Tr., p.802) Technical review is a process in which one analyst reviews the work of another to determine whether procedures were correctly followed and if the case approach was appropriate. (Tr., p.797)

Mr. Wiechman distinguished between actual "physical bench work" and interpretation of the resulting data. (Tr.,p.839-840) Here, Mr. Wiechman did not perform the physical bench work, Ms. Duvall did. For instance, she would have taken, "basically a Q-tip and swabbed the end of that ring to try to get a profile from anybody who possibly could have been in contact with that ring." (Tr.,p.820) The testing of known and unknown samples yielded charts known as electropherograms. From these charts, a sheet was used to determine a profile. (Tr.,p.803-804) Mr. Wiechman testified he reviewed "the notes she took while examining those items, the actual profiles she generated on the specific unknowns as well as the knowns, all of the conclusions, as well as the laboratory report that she generated that consisted of all the findings that she had within this case." His job was to "ma[k]e sure that the decisions or the conclusions that she came up with were consistent and were supported by her work that she did." (Tr. p. 803)

Mr. Wiechman neither performed nor observed the "physical bench work" on any of the samples in this case. He had no personal knowledge of the actual tests or the results of the tests. What he knew was based on the notes and charts generated by Ms. Duvall's bench work. The U.S. Supreme Court made clear in *Davis v. Washington* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second:

“[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it.” *Davis v. Washington*, 547 U. S. 813, 826, 126 S.Ct. 2266, 2276 (2006) (emphasis in original).

There can be no confrontation when statements are written in a report then recited by a coworker.

The Confrontation Clause requires that testimony about the factual predicates to an expert opinion be presented by a live witness with personal knowledge: “it is plainly inadequate for a witness who did not observe the conduct of the test or the handling of the substance tested to report someone else’s assertions as to the chain of custody of the substance, the test performed on it, and the results of that test. (‘I didn’t see the stuff being handled, I didn’t see the test being performed, and I didn’t see the results of the test. But I’ll tell you what my colleague wrote on these points.’)” *The Confrontation Blog*, Thoughts on Melendez-Diaz: chain of custody, products of a machine, who must testify, etc. , November 13, 2008, Richard D. Friedman (<http://confrontationright.blogspot.com/2008/11/thoughts-on-melendez-diaz-chain-of.html>).

Mr. Wiechman did not perceive the facts or data about which he testified. The Ohio Rules of Evidence prohibit witnesses from testifying about matters unless the witness possesses personal knowledge of those matters:

“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.” Ohio Evid.R. 602

Mr. Wiechman’s testimony about the DNA tests and the results of the tests violated both the Confrontation Clause and Ohio Evid.R. 602.

Mr. Weichman's Testimony About the Interpretation of the Results of the DNA Testing Was Inadmissible

Mr. Wiechman's opinion testimony violated both Evid.R. 703 and the Confrontation Clause. Mr. Crager acknowledges that the Confrontation Clause is satisfied if expert testimony is based on personally perceived facts or upon facts properly admitted at the hearing. Here, Mr. Weichman did not perceive the facts or data upon which his opinions were premised.

In Ohio, the "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Ohio Evid.R. 703. Mr. Weichman had no personal knowledge of the testing or the test results. Ms. Duvall's Reports were not admissible. Mr. Weichman's expert opinion testimony, based on facts and data contained in Ms. Duvall's reports, violated Ohio Evid.R. 703.

It is interesting to note that the Ohio Rule is much narrower than Federal Evid.R. 703, which provides:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

The United States Supreme Court will undoubtedly be called upon to determine the interplay between the Federal Evidence Rule and the Confrontation Clause: Does the Confrontation Clause permit an expert opinion, based upon facts or data not admitted into evidence and about which the witness has no personal knowledge? As interesting as that issue is, it is not the issue at hand.

CONCLUSION

For the reasons articulated above, the Third District Court of Appeals decision must be affirmed.

Respectfully submitted,



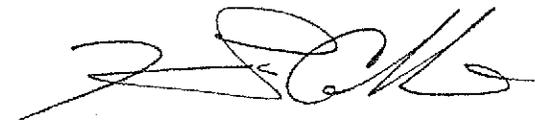
Kevin P. Collins (0029811)
COUNSEL FOR APPELLEE,
LEE A. CRAGER

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by regular U.S. Mail, postage prepaid, this 8th day of December, 2009, upon the following:

Brent W. Yager
Counsel for Appellant, State of Ohio
134 East Center Street
Marion, Ohio 43302

Richard Cordray
Attorney General
Benjamin Mizer
Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215



Kevin P. Collins (0029811)
COUNSEL FOR APPELLEE,
LEE A. CRAGER