[Cite as *State v. Mooney*, 2009-Ohio-5886.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- SANDRA L. MOONEY Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 09CA002 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Holmes County Municpal Court, Case No. 08CRB431
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	November 3, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CHRISTINE C. WILLIAMS Assistant Prosecuting Attorney for State of Ohio 164 East Jackson Street Millersburg, Ohio 44654	L. RAY JONES P.O. Box 592 215 West Washington Medina, Ohio 44258

Hoffman, J.

{¶1} Defendant-appellant Sandra Mooney appeals her conviction entered by the Holmes County Municipal Court on one count of possession of marijuana, in violation of R.C. 2925.11(A), following a bench trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On October 7, 2008, Appellant was served with a summons on a complaint, charging her with possession of drugs, to wit: marijuana less than 100 grams, in violation of R.C. 2925.11(A), a minor misdemeanor. The trial court scheduled her arraignment for October 15, 2008. On that day, Appellant requested a two week continuance in order to consult with an attorney. The trial court reset the matter for October 29, 2008. Appellant appeared on that date, and requested an additional two weeks continuance in order to speak with an attorney. Appellant executed a written waiver of her right to a speedy trial on November 12, 2008. The trial court scheduled the matter for trial on January 14, 2009. Appellant appeared before the trial court on that date and made an oral motion to dismiss. Via Judgment Entry filed January 14, 2009, the trial court indicated it would consider Appellant's oral motion to dismiss, and continued the trial until February 4, 2009.

{¶3} Prior to the commencement of trial, the trial court asked Appellant why she believed the case should be dismissed. Appellant responded she believed her constitutional right to cross-examine witnesses against her had been violated as there were no witnesses listed on the discovery the State provided to her. The trial court stated it would address the issue when witnesses were called, and overruled the motion

to dismiss as premature. Appellant requested a continuance in order to seek legal counsel. The trial court denied the request, noting it had granted Appellant two continuances in which to contact legal counsel, and she had been given over two months notice of the trial date which also gave her ample opportunity to secure counsel.

{¶4} The State called Agent Koula Zambounis, an intelligent specialist for Medway Drug Enforcement Agency, as its sole witness. Agent Zambounis testified her duties as an intelligent specialist include conducting undercover buys, intelligence gathering, surveillance, and report writing. The agent, who has worked for Medway for one year, stated she has participated in approximately two hundred undercover surveillance operations. Agent Zambounis testified Holmes County Deputy Joe Mullet contacted Medway and advised the agency of a new confidential informant who was willing to make controlled buys for the agency. Appellant objected on the grounds the informant was unavailable for cross-examination. The trial court overruled Appellant's objection. The trial court subsequently noted a continuing objection.

{¶5} Agent Zambounis indicated the confidential informant was familiar with Appellant as he had purchased marijuana from her in the past. Agent Zambounis stated the CI was nervous about doing the buy as he had never purchased marijuana from Appellant in the small amount the agency wanted him to buy from her. The standard protocol was conducted with respect to the CI, including a head-to-toe search of his person. After the CI was searched, Agent Zambounis transported him to the Pizza Hut in Millersburg, Holmes County, Ohio. The agent parked the unit vehicle parallel to the front door of the restaurant which provided her with a visual of Appellant, who was working inside. The CI exited the unit vehicle and entered the restaurant.

After a brief conversation between the confidential informant and Appellant, the two went outside behind the restaurant. Agent Zambounis noted there was no video of the outside conversation between the CI and Appellant. The agent testified she was able to hear by electronic means the conversation which took place inside the Pizza Hut between the confidential informant and Appellant. During this conversation, the confidential informant spoke to Appellant about the CI's recent arrest for DUI, and rumors around town he was a "snitch". The CI asked Appellant if they could do "something" that evening and Appellant advised him she would call him when she returned home from work. The confidential informant exited the front door of the Pizza Hut, entered the unit vehicle, and provided Agent Zambounis with a brief synopsis of what had transpired. The agent drove the CI to a secure location where he was searched by a senior agent. Approximately thirty minutes later, the CI made a controlled telephone call to Appellant at the Pizza Hut. During that conversation, Appellant advised the CI she would be leaving work in approximately thirty minutes and would call him when she returned to her residence.

{¶6} The confidential informant was searched and wired. Agent Zambounis and the CI proceeded to a secure location and waited for Appellant to telephone. Appellant telephoned the CI shortly before 11:00pm to let him know she was at home. The CI told her she would be there shortly. This telephone conversation was tape recorded. Agent Zambounis parked at a business approximately 300 feet from the front door of Appellant's residence. The CI was supplied with $150.00 of buy money. The CI exited the unit vehicle, proceeded to Appellant's residence, and entered through the front door. The conversation between the CI and Appellant was digitally recorded. The

two had a brief conversation which included a discussion about money the CI owed Appellant. The CI told Appellant he just wanted a small amount of drugs as he only had money given to him by a friend who was waiting for him in the car. Appellant told the CI she did not want to breakup the larger bag she had in the living room, but had something in the bedroom she could give him. The two proceeded to Appellant's bedroom. Appellant placed some marijuana in a plastic bag and handed it to the CI. The CI asked Appellant how much she wanted, but she responded "nothing for this, just catch me tomorrow." Thereafter, the CI exited the residence and returned to the unit vehicle. The CI advised Agent Zambounis he had observed three or four grocery bags of what appeared to be marijuana in the living room, and another three or four bags in Appellant's bedroom. The substance provided by Appellant to the CI subsequently tested positive for marijuana.

{¶7} Appellant attempted to cross-examination Agent Zambounis, but ultimately stated, "I don't have any questions right now. I'm not prepared for this." Tr. at 42. The State rested its case. Appellant did not call any witnesses on her behalf or take the stand in her own defense. The trial court found Appellant guilty and ordered her to pay a $150.00 fine, plus court costs. The trial court also suspended Appellant's driver's license for a period of five years. The trial court memorialized the conviction and sentence via Journal Entry filed February 4, 2009.

{¶8} It is from this conviction and sentence Appellant appeals, raising as her sole assignment of error:

{¶9} "I. IT WAS ERROR FOR THE COURT TO DENY THE DEFENDANT HER RIGHT OF CONFRONTATION AS GRANTED BY THE 6TH AMENDMENT OF THE US

CONSTITUTION, USCS CONST. AMEND SECTION 6 AS APPLIED TO THE STATES BY THE 14TH AMENDMENT TO THE US CONSTITUTION, US CONST. AMEND SECTION 14; ERROR IN ADMITTING THE PLASTIC BAG AS EVIDENCE, CIF-734'S HEARSAY DECLARATIONS AND ERROR IN ADMITTING THE LAB REPORT IN CONTRAVENTION OF CRIMINAL RULE 16 AND ORC 2951(B) AND 2925.51(A).

I

{¶10} Herein, Appellant maintains the trial court violated her right to confront witnesses against her by allowing Medway Agent Koula Zambounis to testify as to the statements made by the confidential informant, and by admitting a lab report and plastic bag of marijuana into evidence.

{¶11} The Sixth Amendment's Confrontation Clause provides, in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. *Crawford v. Washington* (2004), 541 U.S. 36, 42, 124 S.Ct. 1354. The Confrontation Clause applies to testimonial hearsay, with testimony defined typically as a solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266. Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C).

{¶12} We turn to Agent Zambounis' testimony as to the statements made to her by the confidential informant.

{¶13} In *United States v. Cromer* (6th Cir. 2004), 389 F.3d 662, the Sixth Circuit Court of Appeals considered whether the trial court's admission of a police officer's testimony, which was offered for the truth of the matter, concerning information provided

by a confidential informant violated the Confrontation Clause. The central issue at trial was whether the defendant was involved in illegal activity, and the statements of the confidential informant were the lynchpin of the government's case. The *Cromer* Court found the statements of the confidential informant were testimonial, and because they were offered for the truth of the matter, Cromer's constitutional right of confrontation was triggered. Id. at 675. Thus, admission of the officer's testimony was error, and in light of *Crawford,* the error was plain. The court concluded by finding Cromer's substantial rights were effected because "[i]n the context of a case as close as this one on the central issue of whether the defendant was involved in any illegal drug activities, the admission of these statements directly tying Cromer to the crime likely impacted the outcome of the trial." Id. at 679.

{¶14} The testimony to which Appellant objects includes the following:

{¶15} "Asst. Pros.: And can you give the Judge the substance of that conversation?

{¶16} "Witness (Agent Zambounis): Um, there was discussion about, um, the C.I. had been picked up and there were roomers [sic] in the town, um, a lot of people were making threats against him. They had heard he was a quote unquote "snitch" and he was having a conversation about this with [Appellant]. C.I. told her [he] was picked up actually for DUI and it had nothing to do with drugs and he hoped that they were still on good terms which [Appellant] stated that they were * * * it was actually during that point that she talked a little bit about the weight, um, she mentioned that she had knowledge about the difference between certain ounces and certain amount of marijuana and what was considered a felony and what was considered a misdemeanor.

And the C.I. said, well do you think we could do something tonight and she said I will call you as soon as I am home from work. * * *

{¶17} "* * *

{¶18} "we waited approximately thirty minutes or so and we made a controlled phone call * * * [Appellant] had a conversation with [the C.I.] which we have taped, here today, that she would be leaving in approximately thirty minutes or so and she would call shortly after said time, when she would, would return to her residence. * * * at approximately 22:57 hours we received a controlled phone call from [Appellant] * * * and all she stated was simply that hello, I'm home and the C.I. said alright, I'll be there shortly and she specified that she didn't feel comfortable talking about dope or money over the phone. He said, I'll be there as soon as I can.

{¶19} "* * *

{¶20} "[The C.I.] was supplied with the $150.00. I observed him exit the unit vehicle passenger side; enter the front door of the residence. Now when, as far as I heard over the wire or as you'll be able to her [sic] in the digital recorded, was in the residence. I heard what was to imagine by me what was the same voice that was on the telephone tape recording and the DVD recordings, sounds exactly the same to me. C.I. later exited and identified it as being [Appellant]. He stated he entered the residence; they had a brief conversation in the main living area. Um, they had a small brief discussion about the money that was owed. * * * the C.I. told [Appellant] he just wanted a small amount, but he only had the money that was given to [him] by * * * a friend that was waiting in the vehicle.

{¶21} "* * *

{¶22} "[The C.I.] said that when he walked into the residence that there, she didn't want to break up to do a small amount like that and asked is [sic] he wanted to smoke there and he said * * * He said that he, that he was able to observe * * * those Wal-Mart plastic shopping bags, that they were full of green and brown vegetable matter…

{¶23} "* * *

{¶24} "They spoke for a short time in the living room area and then finally, you know finally she said she didn't want to break up anything of what she had but she had something in the bedroom. Um, she went to the bedroom and he followed and stood in the doorway, and where he also…

{¶25} "* * *

{¶26} "…C.I. observed, um he said, several other, I'm assuming three or four more of those plastic Wal-Mart bags containing the green brown vegetable matter inside the bedroom, however she walked over to the dresser or chest of some sort, remove the marijuana…

{¶27} "* * *

{¶28} "…place it in a plastic bag and handed it to the, to C.I.…

{¶29} "Yes, when, when this was handed to the C.I. you can hear over the digital, ask how much do you want for this and she said nothing, nothing for this and he asked again, nothing, and she says, yeah, don't worry about it, just catch me tomorrow and then they exited and go back in to the living room area. Um, he says goodbye, apologized again, thanks her, says he was looking forward to it. She reiterates its really good stuff and then she says catch [him] tomorrow."

{¶30} Tr. 19-26.

{¶31} We begin by noting Appellant twice raised a specific objection to Agent Zambounis' testimony based on violation of her constitutional right to confrontation. Tr. at 11 and 12. Thereafter, the trial court noted for the record her continuing objection. Tr. at 13.

{¶32} The trial court admitted evidence regarding the CI's revelation of his past history of making drug buys from Appellant. Tr. at 13-14. We find the trial court erred in admitting this evidence for the reasons set forth in *U.S. v. Powers* (2007), 500 F.3d. 500.

{¶33} Likewise, we find the trial court erred in admitting testimony about what the CI observed while inside the Red Head residence; in particular, the gallon bags of what the CI believed was marijuana observed upon entering the residence and again in the bedroom. We also find inadmissible the testimony Appellant removed marijuana from the bedroom dresser, placed it in a plastic bag and handed it to the CI as such information was related to the agent by the CI after the exchange and apparently not discernable from merely listening to the wire transmitter.

{¶34} However, we find admission of what Agent Zambounis heard the CI and Appellant say over the wire transmitter while they were inside the Pizza Hut, during the telephone call from 330-674-5078, and inside the Red Head residence is admissible because Appellant was able to cross-examine Agent Zambounis as to what she heard firsthand. When coupled with the pre-buy CI search protocol and post-exchange CI search protocol, we find any errors in admission of the CI's past drug dealings with Appellant and observations the CI made while inside the residence to be harmless error

in this bench trial. What we do find prejudicial was the erroneous admission of the CI's identification of Appellant made to Agent Zambounis after leaving the Red Head residence. Agent Zambounis testified the voice she heard over the wire transmitter during the conversation between the CI and the suspect at the Red Head residence she "**imagined"** was the same voice as heard during the telephone call and other recordings. Tr. at 23. While we acknowledge there was other circumstantial evidence it was Appellant based upon Agent Zambounis' observation of her at the Pizza Hut, we cannot conclude admission of the CI's post-exchange identification was harmless beyond a reasonable doubt.

{¶35} Accordingly, we find Appellant was denied her constitutional right to confrontation. This portion of Appellant's first assignment of error is sustained.

{¶36} We now turn to the issue of whether Appellant was denied her constitutional right to confront witnesses against her as a result of the trial court's admission of the lab report and plastic baggy containing marijuana.

{¶37} Recently, the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009), 557 U.S. __, answered the question whether affidavits reporting the results of forensic analysis of materials seized by police were "testimonial", rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment. Id. The nation's Highest Court, answering the question in the affirmative, found the affidavit was "incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact'." Id. (Citations omitted). The *Melendez-Diaz* Court rejected the State of Massachusetts' argument the affidavits were admissible without confrontation because such qualify as traditional official or

business records. Id. The High Court continued, even if the affidavits did qualify as traditional or business records, the authors of such would be subject to confrontation nonetheless. Id. The Court added, although the affidavits were generated for law enforcement officials and may be kept in the regular course of operations, such were calculated for use primarily in a courtroom.

{¶38} However, this does not mean the State of Ohio can never introduce a lab report into evidence without subpoenaing the author of the report. The *Melendez-Diaz* Court, in response to the dissent's concern the majority ruling might invalidate burden-shifting statutes adopted by a number of States, noted:

{¶39} "[T]he dissent believes that those state statutes 'requiring the defendant to give early notice of his intent to confront the analyst,' are 'burden-shifting statutes [that] may be invalidated by the Court's reasoning.' * * * That is not so. In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. See, *e.g.,* * * * Ohio Rev.Code Ann. § 2925.51(C)[1] (West 2006). Contrary to the dissent's perception, these statutes shift no burden whatever. The defendant *always* has the burden of raising his Confrontation Clause

[1] R.C. 2925.51(C) provides:

"(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."

objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections. See *Wainwright v. Sykes,* 433 U.S. 72, 86-87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. See Fed. Rules Crim. Proc. 12.1(a), (e), 16(b)(1)(C); * * *. There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial. See *Hinojos-Mendoza v. People,* 169 P.3d 662, 670 (Colo.2007) (discussing and approving Colorado's notice-and-demand provision). Today's decision will not disrupt criminal prosecutions in the many large States whose practice is already in accord with the Confrontation Clause." Id. at 2541. (Emphasis in original. Footnote added).

{¶40} In the instant action, the parties dispute whether the State provided Appellant with the lab report. Our review of the evidence does not reveal a clear answer either way. Because we reverse and remand on the issue of Appellant's right to confront the confidential informant, we find both parties will have an opportunity on remand to present record evidence of compliance with R.C. 2925.51.

{¶41} The judgment of the Holmes County Municipal Court is reversed and the matter remanded for further proceedings consistent with our opinion and the law.

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
SANDRA L. MOONEY	:	
Defendant-Appellant	:	Case No. 09CA002

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Holmes County Municipal Court is reversed and the matter remanded to that court for further proceedings consistent with our opinion and the law. Costs assessed to Appellee.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY